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IN THE SUPREME COURT OF FLORIDA
CASE NO.

WALTER GALE STEINHORST,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

FILED
SID J. WHITE
JAN 18 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Petitioner, WALTER GALE STEINHORST, by his undersigned counsel, pursuant to Rules 9.030(a)(3) and 9.100, Florida Rules of Appellate Procedure, petitions this Court to issue its writ of habeas corpus.

Petitioner alleges that he was sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the statutory and case law of the State of Florida -- for the reason that Petitioner was accorded ineffective assistance of counsel at the appellate level, on his direct appeal to this Court from his conviction and sentence of death.

In support of such petition, in accordance with Rule 9.100(e), Florida Rules of Apellate Procedure, Petitioner states as follows:

I.

JURISDICTION

This is an original action under Rule 9.100(a), Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Rule 9.030(a)(3) thereof, and Article V, § 3(b)(9) of the Florida Constitution.

As described more fully below, Petitioner was denied the effective assistance of appellate counsel in proceedings before this Court at the time of his direct appeal. Counsel failed to raise or adequately address issues which, if raised and properly argued, would have required (1) the reversal of Petitioner's conviction and death sentence, and (2) a new trial and sentencing hearing.

Since the ineffective assistance of counsel allegations stem from acts or omissions before this Court, this Court has jurisdiction to hear Petitioner's habeas corpus petition. Arango v. State, 437 So. 2d 1099 (Fla. 1983); Buford v. Wainwright, 428 So. 2d 1389 (Fla. 1983), cert. denied, 104 S. Ct. 372 (1983); Knight v. State, 394 So. 2d 997, 999 (Fla. 1981).

If the Court finds that Petitioner's appellate counsel was ineffective, it can and should thereafter consider, on the merits, the appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy, where the appellate right has been thwarted due to the omissions or ineffectiveness of appellate counsel, is a new review of the issues raised by the Petitioner. State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Futch v. State, 420 So. 2d 905 (Fla. 3d DCA 1982); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974).

The proper means of securing such a belated appeal is a petition for a writ of habeas corpus, filed in the appellate court empowered to hear the direct appeal. See Baggett, supra, 229 So. 2d at 244; cf. Ross, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968).

Accordingly, the habeas corpus jurisdiction of this Court is properly invoked to review "all matters which should

have been argued in the direct appeal," Ross v. State, supra, 287 So. 2d at 374-75, where such matters were originally overlooked or otherwise not adequately and effectively pursued by appellate counsel. See id. at 374; Kennedy v. State, 338 So. 2d 261, 262 (Fla. 4th DCA 1976); Davis, supra, 276 So. 2d at 849.

II.

FACTS UPON WHICH PETITIONER RELIES

Procedural History

Petitioner Steinhorst was found guilty after a jury trial of four counts of murder in the first degree, by the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County, on May 3, 1978.* R. 84-87. The court, after a split jury recommendation, imposed a sentence of life imprisonment on one count and sentences of death on the three remaining counts.** R. 122-27.

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* Petitioner was charged with violating Fla. Stat. § 782.04(1)(a) in two separate indictments. The first indictment, in three counts with respect to Douglas Hood, Sheila McAdams, and Sandra McAdams, alleged the alternative grounds of premeditated design and felony-murder; the second, in one count, was with respect to Harold Sims on the single ground of premeditated design. R. 1-3. The two indictments were consolidated for trial pursuant to Fla. R. Crim. P. 3.151. R. 21, 22-26. The defense motion for severance from the co-defendants named in the indictments was also granted. R. 22. References to the Record (R. ___) are references to the Record filed in Petitioner's direct appeal, Case No. 55,087.

While not in the record before this Court in connection with Petitioner's prior appeal, the following facts are beyond dispute. Petitioner was the first co-defendant to be tried. Subsequently, co-defendants David Goodwin and Charles Hughes were tried. Goodwin is currently serving a life sentence. Hughes, tried 3 years after Petitioner, entered into a plea bargain following a hung jury under which he was sentenced to a maximum term of 15 years.

** The trial court's sentence was imposed, and the findings and conclusions were entered on August 8, 1978, after the conclusion of the trial co-defendant Goodwin.

In accordance with the statutory scheme, a direct appeal was taken to this Court, which affirmed the judgment of conviction, and the sentences of death, in Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). A motion for rehearing was made, and denied. Id. No further appeals have been taken or are pending on behalf of the Petitioner.*

Facts of the Crime Set Forth in the Trial Record and this Court.

At trial, the State introduced evidence to the effect that Petitioner was present at Sandy Creek in Bay County on January 23, 1977, due to his involvement in a marijuana smuggling scheme arranged by, and with the assistance of, the FBI.** Steinhorst, supra, at 334; Tr. 591-92, 659-62, 673-75, 694-96.*** The witnesses who testified concerning Petitioner's role in the smuggling plan were all co-conspirators in the marijuana operation, and uniformly testified under cloaks of immunity granted by the State.

The evidence on which Petitioner was convicted consists almost exclusively of the following testimony. Petitioner was standing guard on a back road some distance from the place where the marijuana unloading operations were taking place. Steinhorst, supra, at 334. Apparently a pickup truck approached the area where Petitioner was on guard. An exchange of gunshots took place, and the driver of the pickup truck, Sims, who was armed with a shotgun, was killed. Id.

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* Despite having agreed to do so, Petitioner's former counsel failed to file a petition for certiorari to the United States Supreme Court.

** It should be noted that Petitioner was acquitted by the jury of the federal drug smuggling charges. U.S. v. Steinhorst, U.S.D.C. N. Fla. Docket No. 77-731-01.

*** References to the Transcript (Tr. _____) are references to the transcript of Petitioner's trial State v. Steinhorst, Case No. 77-708, and 77-709 in the Circuit Court, Fourteenth Judicial Circuit in and for Bay County.

There was testimony from one co-conspirator, Vines, who testified under a complete grant of immunity, that Petitioner was in the presence of the other victims. Tr. 640-42. Another co-conspirator, Woods, also testifying under a grant of immunity, identified Sims' pickup truck as being in the vicinity of Petitioner. Tr. 809. The State's witnesses also identified at least two other co-defendants, Hughes and Goodwin, besides Vines, Woods and Petitioner as being in the vicinity of the victims. Tr. 642, 644, 809, 936.

The bodies of Sims and the three passengers were eventually discovered in August, 1977, six months after the marijuana smuggling operation in Taylor County, over 100 miles from the site of the marijuana smuggling. The State did not adduce any direct evidence as to when or where the victims were killed, or whether Petitioner was actually involved in the murders, or even present at the scene of them.

Facts With Respect to the Nature of the Trial Afforded Petitioner

Petitioner was indicted on November 30, 1977. Approximately three months thereafter, the court granted the State's motion for a continuance and tolling of the time for a speedy trial. R. 15-18. Petitioner entered a plea of not guilty on all four counts contained in the two indictments. R. 19-20.

The voir dire of the venire commenced on April 24, 1978. A jury was finally selected and empaneled after three days of questioning, during which the defense counsel's Witherspoon* motion was made and denied. Tr 193-95; 224-25. The jury selection process at Petitioner's trial shows that of the 97 prospective jurors interviewed, all had some knowledge

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* Witherspoon v. Illinois, 391 U.S. 510 (1968).

of the incident based on pretrial publicity. Of them, 62 had heard or seen reports on radio, television or newspaper; 12 stated they knew a lot about the case; 20 had formed an opinion as to Petitioner's individual guilt; 3 knew one or more of the witnesses; and 3 knew the victims or their families. All of the 12 jurors finally selected indicated they had heard or seen reports on radio, television or newspaper.*

At the outset of the trial, the court, upon the motion of the defense counsel, ordered the sequestration of the witnesses. Tr. 40. Despite the instruction, the court's order was violated by 13 of the State's witnesses.

During the trial proceedings, defense counsel asked Lloyd Woods, a state witness, who was a co-conspirator and who, since his arrest, had been in the custody of the State, the following question:

> Q: "Have you overheard any of the other testimony given during this trial." Tr. 824

The witness responded that he had:

> A: "Yes, sir [while] sitting out here in the hall and over at the State Attorney's office." Tr. 824 (emphasis supplied).

A few moments thereafter, defense counsel moved to strike Woods' testimony, as the witness had clearly violated the sequestation order. Tr. 826. Upon further examination by the trial court, the witness Woods admitted that he and at least three other State witnesses overheard the prior testimony of three other State witnesses, while either sitting in the State Attorney's office or being seated by the State in hearing distance of the courtroom:

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* A summary of the prospective jurors' responses to questioning concerning their exposure to pretrial publicity is contained in the appendix as Exhibit A. The summary includes only the responses of jurors identified by name in the record; other, unidentified jurors were also questioned and each prospective juror indicated some knowledge of the incident through pretrial publicity.

THE COURT: Where were you when you heard the testimony?

THE WITNESS: I was sitting in the State Attorney's office and sitting out here in the hallway.

THE COURT: You were sitting in the State Attorney's office? Were you being interrogated? I don't quite understand, sitting in another room and overheard testimony.

THE WITNESS: There was three witnesses, myself, Chris Goodwin and Steve Long were sitting in the office waiting to be called over here and they [the State Attorney's office] had it on the radio in the library and we could overhear parts of it.

THE COURT: And this was . . . You heard it over the radio?

THE WITNESS: Yes, sir.

THE COURT: When you were sitting in the hall here, you said that you could hear the witnesses?

THE WITNESS: Very plainly, yes, sir.

* * *

THE COURT: But you remained in that same position so you could hear the witnesses?

THE WITNESS: They [the State Attorney's] told me that is where they wanted me when they brought me over from the State Attorney's office.

THE COURT: What witnesses did you hear?

THE WITNESS: I heard Bill Epperson some this morning. I heard John Mitchell. I heard Bill yesterday, Billy Epperson, yesterday; part of Bobby [Joe] Vines.

* * *

When the States Attorney, the lady, brought me over from the State Attorney's office she walked me into the end of the hallway and said "sit right here on the bench and wait to go in." There was about four or five more witnesses out there. There was some witnesses out there, now. . .

Tr. 827-29 (emphasis supplied). The witness Woods further admitted to overhearing prior testimony of Bobby Joe Vines to the effect that Vines saw the Petitioner with David Goodwin and the victims, and stated unequivocally that his testimony was influenced by the testimony of those witnesses who preceded him. Tr. 831, 834. The court again denied defense counsel's

motion to have the witness' testimony stricken from the record and then further and summarily denied counsel's motion for a mistrial. Tr. 835.

Sensing that the violation of the rule went far beyond this one witness, the court questioned the remaining ten witnesses.* Indeed, the court's suspicions were well-founded -- the four witnesses being held in custody by the State apparently heard the radio broadcast of the trial in their respective prison cells or at various other times while still in the physical custody of the State, and those not in custody also responded affirmatively to having overheard prior testimony. Tr. 836-39.

Evidently frustrated by the fact that gross violations of the sequestration order had occurred, the trial court then explained the meaning of the rule and the court's expectation of compliance therewith. However, the damage -- clearly prejudicial to Petitioner -- had already been done. The State's key witness, Bobby Joe Vines, the organizer of the drug smuggling operation, testifying under a complete grant of immunity, had already testified. Virtually every other witness involved in the drug smuggling had, by that point, heard all or a portion of the Vines testimony with respect to the very events they were to be examined about.

Despite the clear violation of the rule and its prejudice to Petitioner, the trial court apparently felt that a violation of the sequestration rule was only a matter impinging

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* The trial transcript does not provide positive identification of the witnesses questioned by the court. Based upon a newsreel of the proceedings broadcast on Channel 7 on April 28, 1978, the witnesses may tentatively be identified as Steve Lukefaur, Thomas Lukefaur, Florence Sawyer, Faye Sims, Jacqueline Schmidt, Denna Murphy, and Lloyd Woods. See Affidavit of Cliff Davis appearing in the Appendix as Exhibit B.

upon the credibility of a witness and "is a matter the jury can consider." Tr. 841. The record, however, shows that the jury was not advised of that, nor instructed to consider the effects of the violation on each witness' credibility.

And most importantly, the court did not conduct any inquiry into the effect of the violation on the testimony of the other state witnesses, the State's need for the testimony from the affected witnesses, or the State's involvement, participation or knowledge of the circumstances involving the violation. Tr. 841.

At trial, the State called as its witness, David Capo. Tr. 1054. After refusing to state his name, the State granted the witness full immunity in the presence of the jury, Tr. 1055, a procedure to which trial counsel objected. Tr. 1055-56. The witness then testified concerning a conversation that took place several days after the aborted drug operation in which the witness played a major role. Despite admitting difficulty in recalling the conversation, Tr. 1063, 1066, the witness stated that the Petitioner allegedly admitted to "taking care" of the victims. Tr. 1065-66. This testimony represents the only incriminating evidence in nearly a thousand pages of trial testimony. As was his right, Petitioner sought to cross-examine the witness concerning the factual background of the conversation he related on direct examination, viz, his central role in the drug operation, in order to test the credibility of the witness.*

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* Defense counsel made the following proffer after the trial court ruled on the issue of the scope of the cross-examination.

> Mr. Davis: [W]e feel the evidence would show that this man was charged, that his charges were dropped and right here in front of the jury he was given immunity, which bears on his credibility to a major extent. And not to be able to go into all of that would be to limit his testimony

Footnote Continued

Defense counsel attempted to bring to light the motive or bias which may have influenced the witness' testimony by questioning him concerning his involvement in the drug operation.* The State did not object to this line of questioning. The trial court limited the scope of the cross-examination only when the witness' attorney who had previously been permitted to simply "advise" his client, raised an objection based on the materiality and relevance of the inquiry. Tr. 1057-58. Counsel quite properly objected to this anomalous and unjustified procedure, Tr. 1074, and moved for a mistrial "on the ground that we are unable to attack the credibility of this witness." Tr. 1075.

Notwithstanding the right of counsel to put before the jury issues relating to the credibility of an adverse witness, and over the objection of counsel, the trial court precluded any question concerning the witness' pivotal role and participation in the drug smuggling operation. Tr. 1071, 1075-76.

III.

NATURE OF RELIEF SOUGHT

Petitioner seeks an order of this Court, in light of the indisputable constitutional and statutory violations set forth herein, as in Manning v. State, 378 So. 2d 274 (Fla. 1980); Dumas v. State, 350 So. 2d 464 (Fla. 1977); Witherspoon

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* Footnote Continued From Previous Page

or limit the cross to such an extent that we couldn't even attack his credibility.

Tr. 1072-73.

* Prior to trial, the grand jury that issued the indictment against the Petitioner granted immunity on state drug charges against several of the witness' co-conspirators. On the eve of the trial, third degree murder charges against the witness were dropped by the State.

v. Illinois, 391 U.S. 510 (1968); Davis v. Alaska, 415 U.S. 308 (1974) vacating the judgment and remanding the case for a new trial in a changed venue. Alternatively, Petitioner seeks an order of this Court, as in Gardner v. Florida, 430 U.S. 349 (1977):

(1) reversing the sentence of death now imposed upon him; and

(2) remanding this case to the trial court for a new jury trial as to sentence.

Alternatively, Petitioner seeks an order of this Court, as in Ross v. State, supra:

(1) granting Petitioner belated appellate review from the death sentence imposed by the trial court, and

(2) permitting Petitioner full briefing of the issues presented herein.

IV.

BASES FOR THE WRIT

Constitutional and Statutory Rights Denied To Petitioner Steinhorst

The failure of Petitioner's appellate counsel to raise and effectively argue the necessary and critical issues on his direct appeal to this Court denied Petitioner his rights to a full and meaningful direct appeal, and the effective assistance of appellate counsel -- guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and under Articles One and Five of the Florida Constitution and under Florida statutory law. See Proffitt v. Florida, supra, 428 U.S. at 253; State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Art. V., § 3(b)(1), Fla. Const.; § 921.141, Fla. Stat. (1977).

To be effective, counsel must be "an active advocate," and must "support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744 (1967). "The advocate's duty is to argue any point which may reasonably

be argued . . . ." Wright v. State, 269 So. 2d 17, 18 (Fla. 2d DCA 1972). Thus, if appellate counsel fails to raise issues on direct appeal, the appellant is entitled to renewed appellate review if there existed "an arguable chance of success with respect to these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978); accord High v. Rhay, 519 F.2d 109, 112 (9th Cir. 1975); Hooks v. Roberts, 480 F.2d 1196, 1197 (5th Cir. 1973), cert. denied, 414 U.S. 1163 (1974).

As noted above in the Jurisdictional Statement, Florida law requires that an appellant who is deprived of effective assistance by appellate counsel be granted belated appellate review. See, e.g., Ross v. State, supra, 287 So. 2d at 375. The failure of former counsel for Petitioner to present the arguments presented herein, with respect to errors at the trial stage which require a reversal of Petitioner's conviction and death sentences, denied him effective assistance of counsel, and requires that the writ of habeas corpus issue.

In Knight v. State, 394 So. 2d 997 (Fla. 1981), this Court set forth a four-part test with respect to a claim of ineffective assistance of appellate counsel. First, a petitioner must specify the "omission or overt act upon which the claim of ineffective assistance of counsel is based". Second, he must show that "this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." This Court recognized, however, that "in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Third, Knight provides that the petitioner must demonstrate that "this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of

the court proceedings." Id. at 1001.*

The fourth part of the Knight test which places a burden of rebuttal on the State need not be addressed at this time.

As will be demonstrated below, Petitioner herein has satisfied the three parts of the Knight test imposed upon him, and accordingly has succeeded in establishing prima facie that he was denied the effective assistance of appellate counsel as guaranteed by the United States Constitution and the Constitution and laws of the State of Florida.

Specific Errors and Omissions Complained Of

Petitioner Steinhorst was denied effective assistance of counsel at the appellate level with respect to the following specific acts and omissions:

1. Failure to Argue that Pervasive and Prejudicial Publicity Denied Defendant his Due Process Right to a Fair Trial

On numerous occasions it has been stated that right to counsel guarantees the right to effective counsel. See, e.g., Washington v. Strickland, supra; Herring v. Estelle, 491 F.2d

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* The deficiences of appellate counsel in this case were so substantial that the likelihood that they affected the outcome of Petitioner's appeal before this Court cannot be doubted. As this Court knows, in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc), cert. granted, 103 S.Ct. 2451 (1983), the en banc United States Court of Appeals for the portion of the old Fifth Circuit now making up the Eleventh Circuit rejected the "outcome determinative" test of "prejudice" and held instead that a petitioner alleging ineffective assistance of counsel must only "show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." Id. at 1262. He "need not show that this disadvantage affected the outcome of the entire case". King v. Strickland, 714 F.2d 1481, 1485 (11th Cir. 1983). While this Court declined to adopt the Washington standard of prejudice in Armstrong v. State, 429 So. 2d 287, 290 (Fla. 1983), we would respectfully suggest that, at least where a man's life is at stake, Washington's prejudice standard is more appropriate.

However, since Petitioner has clearly met the higher standard of Knight and Armstrong, it may not be necessary for this Court to reach that question in this case.

125, 127 (5th Cir. 1974); Mackenna v. Ellis, 280 F.2d 592,599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961). It is the duty of counsel, moreover, "to argue any point which may reasonably be argued ..." Wright v. State, supra, 267 So. 2d at 18. Yet, appellate counsel failed to raise as error an issue which goes to the heart of our system of law -- the right to a fair trial untainted by prejudice, bias and preconceived opinions resulting from a barrage of pre-trial publicity.

Fundamental to the criminal justice system is the unfettered right of the accused to an impartial trial. Indeed, when adverse pretrial publicity becomes so pervasive and extensive as to make it impossible to find a jury which is free of prejudice, bias and preconceived opinions, the trial must be removed to a more sterile locale.* As this Court has properly observed, "when a defendant's life is at stake, it is not requiring too much that the accused be tried in an atmosphere undisturbed by . . . a wave of public passion." Manning v. State, 378 So. 2d 274, 278 (Fla. 1980).**

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* There was of course the statutory procedure for making a motion before the trial judge for a change of venue, one of the legal predicates usually needed to preserve the issue on appeal. See F.S.A. § 3.240 (1973). Unfortunately, Petitioner's prior counsel -- who handled both the trial and the appeal -- did not raise the matter of pretrial publicity at the trial either. This issue is nevertheless properly before the Court inasmuch as the failure of trial counsel to move for a change of venue -- and the fact that the trial was conducted in an area in which it was impossible for Petitioner to obtain a fair trial -- constituted fundamental error. Murphy v. Florida, 421 U.S. 794 (1975); Ray v. State, 403 So. 2d 956 (Fla. 1980); Singer v. State, 109 So. 2d 7 (Fla. 1959).

** This is particularly true where, as is the case here, the State could not adduce any evidence as to where the victims were killed, or placing Petitioner at the scene of the victims' death. The sole evidence on which Petitioner was convicted consisted of one State witness, Vines, testifying under a complete grant of immunity, identifying Petitioner with the victims, alive, at one point during the evening of January 23, 1977; and another State witness, Woods, also testifying under a grant of complete immunity, identifying the Petitioner as being in the vicinity of the truck in

Footnote Continued

Appellate counsel's failure to call to this Court's attention the extent to which a fair and impartial trial was impossible in Panama City -- indeed, his failure to raise the publicity issue at all -- amply illustrates Petitioner's contention that he was denied the effective assistance of appellate counsel. The effect of such neglect was to deprive Petitioner of the ability to demonstrate to this Court that his presumed innocence was lost even before the trial commenced.

That fact that the pretrial publicity pervaded Panama City is best demonstrated by the jury selection process. The record revealed that all 97 possible jurors were aware of the incident because they had been exposed to pretrial publicity.* Over 60% of the potential jurors had seen or heard reports about the incident in the news media and 20 individuals admitted that they had formed an opinion as to Petitioner's guilt.** In addition, twelve prospective jurors said they knew

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** Footnote Continued From Previous Page

which the victims were riding that night.

The only other evidence linking the Petitioner with the deaths of the victims comes from testimony from a third State witness, Capo, also testifying under immunity, concerning alleged incriminating statements made by defendant at a later time. The credibility of this testimony is clouded by the erroneous limitations placed upon Petitioner's counsel's cross-examination at trial. See, Point 4, infra.

* See, Exhibit A.

** This fact alone evidences the extent to which media coverage impinged upon Petitioner's right to an unbiased fact finding process. Moreover, in light of the extent of pretrial publicity and the extrajudicial knowledge of venire of the Sandy Creek incident, it is likely that even more of the veniremen harbored preconceived notions as to guilt. As this Court has stated, pretrial knowledge "cannot be erased from the mind as chalk is erased from a blackboard. . . . It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially." Singer v. State, 109 So. 2d 7,24 (1959). See also Murphy v. Florida, 421 U.S. 794, 800 (1975) ("the juror's assurances that he is equal to this task [of rendering an impartial verdict] cannot be dispositive of the accused's rights.").

a great deal about the case, while another thirteen people felt they knew at least a little.

Clearly the pretrial publicity pervaded Panama City and Bay County. That this occurred is not surprising when one considers that Panama City has a population of only 33,346 and the Panama City News Herald, which published no less than 48 inflammatory pretrial articles* about the incident and the Petitioner, has a circulation of 28,264 from Monday through Saturday. Furthermore the News Herald's Sunday circulation extends to almost the entire population of Panama City as 32,000 people read the Sunday edition.

Equally prejudicial were the radio and T.V. news-spots devoted to the "Sandy Creek" killings and Petitioner's upcoming trial. By February 1, one Tallahassee television station alone (TV6) had run at least 45 to 60 news and perhaps as many as 90-120 stories concerning the drug smuggling and the sink hole murder. Indeed, Anchorman Frank Hranicky testified during the federal drug trial that during each story, a graphic design was displayed which used the word "MURDER."** Suffice it to say that the Sandy Creek killings and Petitioner's upcoming trial were the news items of the day.

The events leading to the Petitioner's trial were the subject of intensive and pervasive media coverage that was highly prejudicial. References to "gangland-style executions" were rampant throughout the articles. Numerous articles included the statement -- unattributed to any source -- that the victims had been "tied and gagged" although, as noted

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* See, Exhibit D containing the 48 pre-trial articles published by the Panama City News Herald. See also Exhibit C, a chart summarizing how these articles clearly convicted Petitioner even before the trial began.

** See, testimony of Mr. Hranicky contained in Exhibit E of the Appendix.

below, there was no phyical evidence introduced to support this speculation -- indeed, the physical evidence contradicted that possibility.* Indicative of the widespread notoriety and interest in the Sandy Creek incident is the fact that the trial itself was later covered by live radio broadcasts and numerous T.V. news-spots.

More harmful than the sheer weight of the pretrial publicity was the fact that the State and other governmental offices failed to abstain from active participation in this barrage of media coverage. The State's attorney, the FDCLE, and the FBI were all constantly quoted in the newspapers and television as to the Sandy Creek incident. For example, in the weeks preceding Petitioner's trial, it was reported

> Jones says he will allege in the trial that Steinhorst shot Sims, then turned the gun on the other three victims who were in Sims' pickup truck.

Panama City News Herald 4/12/78.

On the first morning of Walter's trial (on which morning the prospective jurors would have been most influenced by publicity), the Panama City News Herald published a lengthy description of Sandy Creek, and quoted extensively from the prosecutor:

> Jones says he will allege that Steinhorst, while acting as an armed guard posted up the road from the loading site, shot Sims first. The prosecutor will also claim that Steinhorst with the help of Goldwin and Hughes loaded the other three into a van. They were later tied, gagged and shot in the back of the head with a revolver.

The pervasive nature of the pretrial publicity and the contributing role played by the prosecutor's office were highly

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* Attached hereto as Exhibit C is a chart summarizing the information contained in the pretrial articles, and the prejudicial statements therein, demonstrating how this publicity clearly convicted Petitioner even before the trial began.

dramatized during the hearing on a motion for a change of venue made by certain of the defendants in the federal drug trial. (Walter's trial counsel joined in that motion, and thus had access to the materials and testimony submitted in connection therewith. Thus, it is all the more inexcusable that he failed to make a similar motion in connection with Petitioner's trial for murder.) At the hearing, TV 6 Assistant News Director and Anchorman Frank Hranicky testified as to the 45-60 news items (each appearing twice daily for a total of 90-120 broadcasts) concerning Sandy Creek which had been broadcast as of February 1, 1978, each of which displaying a graphic with the word "murder" which filled one-third of the television screen. Exhibit E at 16, 20. TV 6 is broadcast into 54,000 homes in North Florida (including Bay County) -- during the six o'clock news, and 36,000 homes during the eleven o'clock news. Id. at 25-26.

Donald Modesitt, an Assistant United States Attorney, testified as to the numerous "leaks" from the Florida State Attorney's office which contributed to the pretrial publicity. Modesitt stated he had filed a motion in state court to hold Leo Jones in contempt for having leaked information concerning the deposition testimony of certain of the Sandy Creek co-conspirators in violation of a court order. Exhibit E at 154-158. Modesitt noted:

> I have been fighting Mr. Jones to keep him from releasing information to the press so that we could prevent what we are doing right here today, avoding a motion for change of venue, and I filed those motions [to keep information from being disclosed] to try to keep the press not from printing what is newsworthy, but to keep from printing testimony which any juror who heard it would become so tainted that they could not sit and give these defendants a fair trial. ... Mr. Jones did release some of that information and I objected to it and requested he be held in contempt.

Exhibit M at 155 (emphasis supplied). Modesitt himself was forced to concede that he had made statements to the press. For example, in response to press inquiries as to why the depositions were being kept confidential, Modesitt effectively eliminated the very protection he was seeking to assert by stating "If we ask one question [to a prosepective juror], he may stand up and say 'yes, I heard that guy over there was charged with killing four people and two of them were children' . . . Then the whole panel of jurors is tainted." Exhibit E at 159-60. This statement was published in an article which appeared on February 1 in the Tallahassee Democrat. Id.

Patrick Cook, a practicing psychologist on the Faculty of Florida State University testified to the phenomenon of "paired learning", which is the process by which an individual will learn to associate two words or objects together if seen or heard either at the same time or close in time. Based upon his knowledge of the extent of the pretrial publicity, Cook testified that the average person would have come to associate the word "sinkhole" with the word "murder" and the words "Sandy Creek" with he word "marijuana." Exhibit E at 105-107. Asked whether a fair jury could be selected from the venire, Cook stated "I would have serious questions about it. I don't think so." Id. at 134-35.

Set against the backdrop of applicable law, it is clear beyond doubt that Petitioner was placed on trial in an atmosphere contaminated by extensive and prejudicial media publicity which portrayed Petitioner in such a light that his guilt was preordained. One can only speculate why appellate counsel ignored the obvious.

In Murphy v. Florida, 421 U.S. 794, 798-79 (1975), the United States Supreme Court made clear that a claim of jury prejudice attributable to pretrial publicity may be presumed when the "totality of the circumstances" or the "influence of

the news media" establish that a fair trial was rendered impossible. That is, actual juror prejudice need not be shown when defendant can demonstrate evidence of pervasive community prejudice in the form of highly inflamatory and extensive media coverage. See also Sheppard v. Maxwell, 384 U.S. 333, 352 (1966); Estes v. Texas, 381 U.S. 532, 542-43 (1965); Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966) ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.")

In several cases, all reported before Petitioner's initial appeal before this Court, the Florida courts adopted this test. E.g., Jackson v. State, 359 So. 2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Kelley v. State, 212 So. 2d 27 (Fla. 2d DCA 1968). The test, as stated by this Court, requires that a "determination must be made as to whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom." Manning v. State, supra, 378 So. 2d, at 276.

Petitioner's appellate counsel should also have directed this Court to Mayola v. State of Alabama, 623 F.2d 992 (5th Cir. 1980) which was decided between the time of filing Petitioner's appellate brief and the date of decision, and should have been brought to the attention of the court by counsel. In Mayola the court stated that "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury

drawn from that community, '[jury] prejudice is presumed and there is no further duty to establish bias'" Id. at 997. Pretrial publicity in Panama City was so pervasive that the standard established in Mayola was clearly met and Petitioner had no further duty to establish bias.

While exhaustive comparison with prior decisions is, in and of itself, not dispositive of the merits of Petitioner's case, such a comparison should have suggested to the appellate counsel the standard to be employed and the likelihood of success on appeal.

Indeed, this Court, in Manning v. State, 378 So. 2d 274 (Fla. 1980), a case involving facts strikingly similar to those in this case, performed exactly this task, finding that the defendant was entitled to a new trial in a changed venue. While Manning was reported after counsel filed his appellate brief on behalf of petitioner, Manning was reported a full fifteen months before this Court announced its decision in Petitioner's direct appeal.

Moreover, Manning did not make new law, but simply applied the well-established standard, using as a backdrop prior opinions all decided well in advance of the appeal. Thus, appellate counsel need not have been a clairvoyant to have successfully argued this issue on appeal.* See Parker v. North Carolina, 397 U.S. 790, 797-98 (1970); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977); Meeks v. State, 382 So. 2d 673 (Fla. 1980), aff'd on later appeal, 418 So. 2d 987 (Fla. 1982), cert. denied, 103 S. Ct. 799 (1983).

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* Moreover, to the extent counsel failed to raise the issue in his initial brief, following Manning counsel should have sought leave to file a supplemental brief in light of that decision. Fla. R. App. P. 9.210(g) (1983).

In Manning v. State, 370 So. 2d 274, 276 (Fla. 1980), this Court held that where defendant's motion for change of venue was "amply supported by evidence which established that the community was so pervasively exposed to the circumstances of this incident that the defendant could not secure a fair and impartial trial," it was an abuse of the trial court's discretion to deny the motion. Petitioner is entitled to a new trial, in a location other than Bay County, for the simple reason that this case is factually indistinguishable from Manning.

The Manning opinion isolated the several circumstances or facts in the case which mandated remanding the case for a new trial: (1) extensive knowledge by the prospective jury of the alleged crimes through news media accounts and community discussion; (2) the identity of the victims evoked sympathy and strong emotions among the members of the community; and (3) the accused was from outside the community.

In Petitioner's case, the record reveals that without exception all of the prospective jurors were aware of the crime and the accused through extensive media coverage, that the youth and gender of the victims* who resided in the local community exaggerated the problems involved in securing a fair trial in Bay County, and that the accused was from outside the community.** In addition, the media's presentation of the accused's biography and lifestyle presented the community with

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* It should not go without notice before this Court that the prosecutor later used this presumed community bias effectively by repeated references to age of the victims punctuated by frequent sexual innunendo. Tr. 1185, 1214, 1234-35, 1281-82.

** The prosecutor, again, made effective use of community bias by continuous and repeated reference to the fact that the petitioner was from New York, a community, the prosecutor noted, "where life is cheap." E.g., Tr. 1064, 1235-37.

an inflammatory and jaundiced picture of the accused, which precluded an objective fact finding process and a fair imposition of the death sentence.*

Of particular significance here, as it was in Manning, is the fact that the incident occurred in a small community where the local newspaper, The Panama City News Herald, devoted substantial copy to the incident. Nearly 50 articles appeared in the newspaper prior to the Petitioner's trial which reported, as if proven, the fact that Hood and the McAdams' sisters were killed when they "stumbled" onto the Sandy Creek site. Television coverage was just as massive. As noted above, by February 1, 1978 alone one TV station had run 40 to 60 and perhaps as many as 90-120 news stories on the Sandy Creek drug smuggling and sink hole murder incident -- each accompanied by a graphic display which used the word "MURDER."**

Indeed, this Court in Manning highlighted massive pretrial publicity in a predominantly small rural community as particularly critical and probative of the ability of a defendant to receive, and of the capacity of the State to guarantee, a fair trial. After noting the factors discussed above, the Court stated:

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* These facts alone serve to distinguish this case from Dobbert v. Florida, 432 U.S. 282 (1977). Unlike Dobbert, where the petitioner's argument rested "almost entirely upon the quantum of publicity which the events received," id. at 303 (emphasis added), petitioner claims that it was both the quantity and the quality of the highly inflammatory pretrial publicity which denied him a fair trial. See Murphy v. Florida, 421 U.S. 794, 800 n. 4 (1975) ("We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory").

** See Exhibit E containing the testimony of anchorperson Frank Hranicky concerning the news stories run on TV.

> The facts in this case are clearly distinguishable from the factual circumstances existing in McCaskill v. State, (344 So. 2d 1276 (Fla. 1977)], Hoy v. State, [353 So. 2d 826 (Fla. 1977)], Thomas v. State, [372 So. 2d 997 (Fla. 4th DCA 1979)] Kelly v. State [212 So. 2d 27 (Fla.2d DCA 1968)], Murphy v. State [421 U.S. 794 (1975)], and Dobbert v. Florida [328 So. 2d 433 (Fla. 1976), aff'd, 432 U.S. 282 (1977)]. These were different facts under different circumstances, not the least of which was the fact that this incident occurred in a rural community where it is apparent that the incident had received substantially more attention than if the same incident has occurred in a metropolitan area.

Manning v. State, 378 So. 2d at 276.

Moreover, as in Manning, the media coverage of the incident, as noted supra, was replete with information supplied by the prosecutor and other officials of the State.

In Manning, this Court devoted a full third of its opinion to the importance and prejudicial nature of the State's extrajudicial communications with the media. It noted, with reference to the Supreme Court's decision in Nebraska Press Assoc. v. Stewart, 427 U.S. 539 (1976), that "the capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage." Manning v. State, 378 So. 2d at 278.

As to the prejudicial effect of such publicity, this Court in Manning quoted its previous opinion in Singer v. State, 109 So. 2d 7, 17 (Fla. 1959):

> "[I]f those who sit on the jury have read the press version of [matters relating to the evidence] it is most difficult, if not impossible, for the human mind not to fill in from its extrajudicial knowledge that which is not offered at the trial or to determine the veracity of a witness by comparing the newspaper version of the facts with the testimony given at the trial." Id. at 277.

The pervasive and adverse pretrial communication of the State and other governmental officials with the local press, coupled with the distorted picture of his character

presented by the media, entitle Petitioner to a new trial in a community untainted by the effects of such pretrial publicity. The fact that trial counsel, who also represented Petitioner on appeal, failed to move for a change of venue does not deprive Petitioner of the right to remand for a new trial in light of the cases which lead to the inescapable conclusion that a verdict rendered by a biased and prejudiced jury predisposed toward guilt constitutes fundamental error.*

The courts of this state have consistently held that a fundamental error committed at trial may be raised on appeal notwithstanding trial counsel's failure to preserve the issue. E.g. Ray v. State, 403 So. 2d 956 (Fla. 1981); Morgan v. State, 392 So. 2d 1315 (Fla. 1981); Custer v. State, 34 So. 2d 100 (Fla. 1947). A fundamental error is one which goes to the foundation of the case or an error that amounts to a denial of due process. Ray v. State, 403 So. 2d 956, 960 (Fla. 1981); Castor v. State, 365 So. 2d 701 (Fla. 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978). Petitioner submits that the error herein asserted meets this Court's definition of "fundamental error."

A trial contaminated by extensive pretrial publicity represents an impermissible violation of a defendant's due process rights under the Sixth and Fourteenth Amendments and the Florida Constitution. E.g., Manning v. State, 378 So. 2d 274 (Fla. 1980); Murphy v. Florida, 421 U.S. 794 (1975); Estes v. Texas, 381 U.S. 532 (1965); Singer v. State, 109 So. 2d 7 (Fla. 1959).

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* This is not a case where an appellate counsel took over from a different trial counsel, and then made any conscious decisions not to raise any points -- for lack of preservation or for any other reason. Here we have a case where the same counsel represented the Petitioner on trial and on appeal, and was as ineffective at one as he was at the other.

Indeed, it is difficult to conceive of an issue that more fundamentally goes to the foundation of a case. As this Court has cogently noted, a finding that the verdict was rendered by an impassioned and biased jury compels the conclusion that the case must be remanded for a new trial:

> Although the evidence against the defendant in the present case is quite strong, it is possible that another jury uninfluenced by the passion existing in Columbia County at the time of this trial might have reached a different verdict. Because this record reflects a strong community sentiment, intensified by pervasive pretrial publicity which may have improperly influenced this jury's verdict and the recommendation of death, we determine it necessary to remand this case for a new trial in a location other than Columbia County.

Manning v. State, supra, 378 So. 2d at 278.*

The fact that counsel was as ineffective at the trial stage as he was on the appeal should not operate to deprive Petitioner of a new trial. As a result of counsel's failure to request a change of venue from an atmosphere permeated by pervasive, misleading and adverse pretrial publicity -- some of which came from the mouths of State officials -- Petitioner was tried to a serious extent on false information received by the jury outside the courtroom, information Petitioner did not have the opportunity to explain or deny, and which denied him a fair trial by an impartial jury in contravention of the sixth and fourteenth amendments to the United States Constitution. (Fla. Const. cites.) Therefore, Petitioner respectfully requests that

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* Those cases where the courts have noted that a motion for a change of venue will not be entertained on appeal when not raised or argued before the trial court, e.g., Stone v. State, 378 So. 2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977), are not inconsistent with the position asserted herein. In each of these cases the court went on to consider the merits of the argument and found that the defendant was not entitled to a change of venue under the specific facts of the case or simply did not consider the issue in terms of fundamental error vel non.

this Court grant him a new trial in a venue other than Bay County.

2. Failure to Argue Witherspoon Issues

In its landmark decision of Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court confronted the issue of the constitutionality of excluding jurors from capital cases based upon their briefs concerning the death penalty. In Witherspoon, petitioner was convicted of murder and sentenced to death. At the time of his conviction and sentence, an Illinois statute provided that the state could remove any juror for cause who stated that he had "conscientious scruples" against the death penalty or that he was "opposed" to it. Under the authority of this statute, the prosecution eliminated nearly half of the venire of prospective jurors. The jurors who found petitioner guilty and sentenced him to death were selected from the remaining venire members.

The Supreme Court reversed Petitioner's death sentence. Stating that a jury in a capital case must "express the conscience of the community on the ultimate question of life or death," the Court held that a jury comprised exclusively of those who are not opposed to the death penalty cannot properly speak for the community. Id. at 519 (emphasis supplied).

> Culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling minority.

Id. at 520.

The Court concluded that by excluding all venire members who had merely expressed conscientious objections or religious qualms about the imposition of capital punishment, the State of Illinois had created a jury so "uncommonly willing to condemn a man to die" that a death sentence rendered by it could not constitutionally stand. Id. at 520-22. To execute

the death sentence issued by such a jury, stated the Court, would be to deprive petitioner of his life without due process. Id. at 523.

The Witherspoon Court did acknowledge the right of a state to exclude for cause venire members on certain narrowly drawn grounds. A state could, the Court indicated, exclude those venire members who: (1) indicate that they would "automatically" vote against the imposition of capital punishment regardless of the evidence presented; or (2) make it "unmistakably clear" that their attitude toward the death penalty would "prevent" them from making an impartial decision as to the defendant's guilt. Id. at 522-23 n.21.

In the years following Witherspoon, there have been several decisions by the Supreme Court and the lower courts which have clarified various aspects of the Witherspoon decision. These decisions are discussed below. As the discussion of these decisions will indicate, there were at least three discrete Witherspoon related arguments available to counsel at the time of the appeal. These were: (1) the exclusion of jurors in contravention of the standards set forth in Witherspoon itself; (2) the conviction proneness of the jury; and (3) the unrepresentative nature of the jury on the issue of guilt.

Appellate counsel failed to make either of the first two arguments in spite of the fact that each one was amply supported by the established case law and the record in Petitioner's trial. Moreover, the argument which he did make, i.e., the unrepresentativeness of the jury, was patently inadequate. He failed to cite or discuss any of the relevant case law, and merely requested that this Court reconsider its opinion in Riley v. State, 366 So. 2d 19 (Fla. 1978), cert. denied, 103 S. Ct. 317 (1982), without articulating any reasons other than to mis-cite Spinkellink v. Wainwright, 518 F.2d 582 (5th Cir. 1978).

Despite the existence of a sizable body of case law on the Witherspoon issues, counsel failed to cite numerous cases supporting Petitioner's position or to apply well-established principles to the facts of Petitioner's trial. And in his most glaring error, counsel failed to even discuss the holdings in Witherspoon, and instead conceded, incorrectly, that the selection of jurors was in accordance with the standards forwarded in Witherspoon. Brief at 9.

Appellate counsel's cursory one-half page discussion of the Witherspoon related issues reveals the patently inadequate nature of his representation of his client. Substantial and amply supported issues of law existed which demanded a much more extensive examination than what was provided by counsel. Counsel's perfunctory discussion of these important constitutional issues reveals a serious lack of preparation and/or misunderstanding of the applicable law on the counsel's part; his presentation of the Witherspoon issues was seriously inadequate and fell far short of the constitutionally prescribed standard of reasonably effective counsel to which petitioner was entitled. Specific instances of counsel's inadequate representation are discussed below.

A. Improper Exclusion of Jurors

Following Witherspoon there were several decisions -- none of which were discussed by Petitioner's appellate counsel -- which reaffirmed and amplified its holdings. In Boulden v. Holman, 394 U.S. 478 (1969), the Supreme Court held it would be unconstitutional to exclude prospective jurors who merely state that they have "fixed opinions against" or do not "believe in" capital punishment. One of such jurors, the Court held, "might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of the trial judge and to consider fairly the imposition of the death sentence in a particular case." Id. at 484. The Court

accordingly remanded the case back for a determination of whether the venire members who had been excluded had in fact demonstrated an inability or refusal to vote for the death penalty regardless of the circumstances. Similarly, in Maxwell v. Bishop, 398 U.S. 262 (1970) (per curiam), the Court held that it appeared that the exclusion of venire members who stated that they "think" they have reservations which would prevent them from returning a death sentence was unconstitutional. Again, the Court remanded the case for further, more specific findings as to the members' actual beliefs.

In Davis v. Georgia, 429 U.S. 122 (1976) (per curiam), the Court held that the exclusion of even one venire member on grounds at variance with Witherspoon was sufficient to invalidate a death sentence. The Davis Court adopted a per se rule whereby the improper exclusion of just one venire member was sufficient to render a death sentence invalid and unconstitutional.

Finally, in Adams v. Texas, 448 U.S. 38 (1980), the Court further clarified the Witherspoon decision. Under an applicable Texas statute, a prospective juror was required to be disqualified if he did not state under oath that the fact that a mandatory penalty of death or life imprisonment would result if a defendant were found guilty would not "affect" his deliberation of any issue of fact. Based on its review of the record, the Court concluded that prospective jurors had been excluded merely because they had stated that the possibility of the death penalty would "affect" their deliberations, and who apparently had meant only that it would invest their deliberations with greater seriousness or involve them emotionally. Other possible jurors had been excluded because they were unable to state positively whether or not their deliberations would in any way be "affected." The Court held

that the exclusion of jurors on these bases was impermissible and, consequently, that Texas had administered its juror exclusion statute in an unconstitutional manner. An inability to deny that one would be affected by the prospect of the death penalty, the Court indicated, was not the same thing as the unequivocal statements of irrevocable opposition required by Witherspoon in order to properly exclude a venire member.

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

Id. at 50 (emphasis supplied).

Moreover, the Court held that it is unconstitutional to exclude prospective jurors who state that they will impartially hear the facts and obey their oaths as jurors "yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt." Id. Such assessments and judgments, said the Court, are inherent in a jury system; to exclude those prospective jurors who honestly state that the prospect of the death penalty will color or influence their judgment in some way is to deprive a defendant of the kind of jury to which he is constitutionally entitled. Id.

The lower courts have demonstrated their strict adherence to the holding of Witherspoon and its progeny. In Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), aff'd, 626 F.2d 396 (1980), frequently cited as a leading case in the area, the court held that only the most "extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances" is a proper cause to exclude a prospective juror.

In light of the Supreme Court's decision in Adams v. Texas, supra, the Fifth Circuit met en banc to reconsider its opinion in Burns v. Estelle. See 626 F.2d 396 (1980). In this decision, the Fifth Circuit affirmed its prior decision, holding that the exclusion of a venire member who had stated three times in succession that she did not believe in the imposition of the death penalty, and who had also affirmed that her beliefs might affect her deliberations of the facts, was improper. Conceding that the case for an exclusion was stronger in Burns than it was in Adams v. Texas, the Court nonetheless held that the excluded venire member's responses at the voir dire fell well short of the unequivocal avowals required under Witherspoon and subsequent decisions.

In Granviel v. Estelle, 655 F.2d 673, 677-78 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982), the court reversed defendant's death sentence, holding that the responses of an excluded venire member were equivocal and indicated only a generalized objection to the death penalty. The excluded venire member responded merely that "I don't think I could" when asked if he could vote for the infliction of the death penalty. The court held that his responses to the questioning at the voir dire were ambiguous and did not clearly indicate that he would automatically vote against the death penalty or that his objections to it would prevent him from making an impartial decision as to guilt. Other cases which have strictly adhered to the holdings of Witherspoon and its progeny include: Alderman v. Austin, 663 F.2d 558, 563 (5th Cir. 1981); Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970), cert. denied, 401 U.S. 911 (1971); Darden v. Wainwright, 513 F. Supp. 947 (M.D. Fla. 1981).

The following two excerpts from Petitioner's trial transcript plainly indicate the violation of Witherspoon and the subsequent decisions discussed above:

1. Prospective Juror Kolmetz:

MR. JONES: I mean, would it have a bearing, would or might you say to yourself, "well, if I vote first degree murder, the judge might sentence Walter Steinhorst to the electric chair and I think he killed those people but my vote might send him to the electric chair and therefore I'm not going to vote that way." Could that happen, do you think?

BERT B. KOLMETZ: Whether I could or whether or not I couldn't?

MR. JONES: Yes, sir, may that happen to you?

BERT B. KOLMETZ: Well I would probably have to face that decision.

MR. JONES: So, you are saying that it could be, that your decision as to whether or not Mr. Steinhorst committed murder could weigh on the fact that you thought he might go to the electric chair?

BERT B. KOLMETZ: Yes, sir, it might, it might.

MR. JONES: Would the Court like to ask questions of the juror?

THE COURT: What I have to determine is . . . There are two phases. I understand your belief about capital punishment but . . . and there is no criticism of that at all, there are people with the same thoughts and beliefs that you have.

BERT B. KOLMETZ: Yes, sir.

THE COURT: We come down first though of determining whether or not a person is guilty and the thing that bothers me is that when someone has a belief or opposed to capital punishment and it comes down to the time of rendering a verdict which based on the evidence and everything else then you find yourself in a position whereas you render a verdict of guilty, this man might result in the death penalty, not positively but a good chance that it might.

Would that affect you in any way in determining the outcome of the case?

BERT B. KOLMETZ: My emotions might get involved.

THE COURT: You have some doubt as to whether or not you could really render a verdict based on the evidence because you are afraid that your feelings about capital punishment might enter into it; is that correct?

BERT B. KOLMETZ: That would be as close as we could come to it.

THE COURT: You may step down.

MR. DAVIS: I would like to note a continuing objection for the record for the systematic exclusion of people opposed to the death penalty.

Tr. 537-39.

2. Prospective Juror Berryhill:

MR. JONES: . . . We're both entitled in this country to have opinions and certainly one as serious as the death penalty, a right that everybody is entitled to. So, I merely asked you, do you believe in the death penalty?

EUNICE BERRYHILL: If I seed it.

MR. JONES: If you saw the crime?

EUNICE BERRYHILL: Yes, sir. If I really seed it, well, then I could, you know . . . I might have a different feeling but hearsay, I don't go for hearsay.

MR. JONES: At the conclusion of this case, on behalf of the people of the State of Florida, I will ask of this jury to recommend to Judge Adkins that Walter Steinhorst be put to death. Now, do you have a belief that you could not vote for such request as I would make?

EUNICE BERRYHILL: I really don't understand it but I don't believe I could vote for him to be killed.

MR. JONES: Would you vote not guilty so that he would not be killed?

EUNICE BERRYHILL: If I really didn't know I wouldn't know whether to or not.

MR. JONES: I mean if you are in there and all of the jurors agreed that Walter Steinhorst participated, murdered and kidnapped, if you believe he was guilty of a crime and he might be put to death with it, would you vote not guilty to make sure that he would not be put to death . . . and certainly it is nothing to be embarrassed about, Mrs. Berryhill; each one of us is entitled to . . .

EUNICE BERRYHILL: To their opinion.

MR. JONES: Right. In other words, would your feeling be "I know he is guilty but he might be put to death and therefore I'm not going to vote guilty because they might kill him" and I will ask that he be killed.

EUNICE BERRYHILL: Well, no, I don't think I would vote for him to be killed.

MR. JONES: But could you vote that he was guilty if you believed he was guilty knowing that he might be killed or would you say "I'm going to vote no"?

EUNICE BERRYHILL: I think I'll say no.

MR. JONES: I think that is fair and honest, Mrs. Berryhill, and I don't mean to keep at you but we had to get that answer one way or the other.

I believe that Mrs. Berryhill's honest conviction is that she would vote no in order to see that he was not killed and I think in Campbell case and the Witherspoon case that is grounds for challenge for cause. She has said that she would vote no on whether he was guilty of the crime in order to see that he was not killed.

MR. DAVIS: I believe Mr. Jones' understanding of the law is the same as mine but I'm really not sure the jurors answer . . . but I won't oppose the challenge for cause.

THE COURT: You may step down, Mrs. Berryhill.

MR. JONES: Thank you, Mrs. Berryhill. We appreciate your honest and fairness with us.

EUNICE BERRYHILL: I don't know, if they was my children . . .

MR. JONES: Thank you.

Tr. 193-95.

The two excluded venire members did not unambiguously state either that they were irrevocably opposed to the death penalty or that they would automatically vote against it. Both members' responses were equivocal and each evinced great uncertainty as to what their actual beliefs were.

Mr. Kolmetz conceded merely that his attitude might affect his deliberations in some way and that his "emotions might get involved." Tr. 539 (emphasis supplied). This is an insufficient ground for exclusion. The Supreme Court in Adams v. Texas, supra, explicitly held that the exclusion of a venire member on this basis is impermissible. Id. at 50. The fact that one has indicated that his deliberations may in some way be colored by his views on the death penalty does not provide a sufficient basis to exclude a venire member, the Court held, if he has not clearly indicated his inability or unwillingness to obey his oath as a juror. Id. In sum, it is clear that Mr. Kolmetz was unconstitutionally excluded from the panel.*

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* The fact that Mr. Kolmetz was excluded from the pool of alternate jurors is irrelevant to the determination of whether this was an improper exclusion. In Davis v. Georgia, 429 U.S. 122 (1976), the Court held that the improper exclusion of even one venire member was sufficient to invalidate a death sentence. No distinction was made between these members who were to be regular jurors and those who were to be alternates. This view was confirmed in Hance v. Zant, 696 F.2d 940, 956 (11th Cir. 1983), where the court held that the improper exclusion of one member of the venire, even one who is excluded only from the pool of alternate jurors, is sufficient to invalidate a death sentence.

The exclusion of Mrs. Berryhill was similarly improper. Mrs. Berryhill displayed the same sort of uncertainty that Mr. Kolmetz did. Significantly, she said that if she were sure of guilt -- if she "seed it" -- she could support the death penalty. She responded several times that she did not "think" that she could vote for a defendant "to be killed," but taken as a whole her comments reflect a concern that the jury be certain as to guilt. Like Mr. Kolmetz, she did not unambiguously indicate that she would automatically vote against the death penalty or that her attitudes toward capital punishment would prevent her from making an impartial decision as to guilt. When pressed by the prosecutor, she wavered and said "I think I'll say no," but in words far short of certainty, and with continuing ambiguity (partly as a result of the prosecutor's question) as to whether she was referring to saying "I'd say not guilty" or "I'd say don't kill him." And she retreated again, suggesting that she might vote for death if the victims were her children.

Her responses fell far short of the unequivocal avowals of irrevocable opposition required by the established case law. Her generalized concerns as to the death penalty similarly do not provide sufficient grounds for her exclusion See, e.g., Granviel v. Estelle, supra, at 677-78. Indeed, her previously noted recognition that she could vote for capital punishment if she saw the crime plainly demonstrates that her opposition to the death penalty was not "automatic" or irrevocable.

In Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980) (discussed above), the court held that the exclusion of a venire member who had stated three times that she did not believe in the imposition of the death penalty, and who had also asserted that her beliefs might affect her deliberations in the case, was improper. Id. at 397-98. As strong as her

expressions of opposition to the death penalty were, said the court, they did not warrant her exclusion because she had not unequivocally indicated that she would "automatically" vote against the death penalty, nor had she made it "unmistakably clear" that her beliefs would prevent her from making an impartial decision as to guilt. Id.

The argument for an improper exclusion is even stronger in this case. Mrs. Berryhill did not clearly indicate her opposition to the death penalty was so inflexible that it would prevent her from ever voting for it. In fact, she indicated that she felt capital punishment may be appropriate in certain circumstances (e.g., "If I seed it"; "I don't know, if they was my children..." Tr. 193, 195.) All that can reasonably be inferred from Mrs. Berryhill's ambiguous responses is that she was genuinely uncertain about what effect her beliefs would have if she was seated as a juror. As such, her responses clearly fell well short of the unambiguous avowals of irrevocable opposition required by Witherspoon and its progeny. Accordingly, she also was improperly excluded.*

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* Although trial counsel, who also represented Petitioner on the appeal, failed to object to the improper exclusion of Mrs. Berryhill, Petitioner contends that this issue is now properly before the Court inasmuch as the failure of trial counsel to object to her exclusion -- and the fact that as a result Petitioner was tried by an unconstitutionally composed jury -- constituted fundamental error. See discussion Point No. 1, supra, at 13.

The improper exclusion of a venire member from the jury in a capital case denies a criminal defendant of his life without due process of law, and any death verdict issued cannot stand. Witherspoon, supra; Davis v. Georgia, supra. Therefore the failure to object to such an exclusion constituted "fundamental error" and Petitioner may make such an objection for the first time on appeal. Cf. Goodwin v. Balkcom, 684 F.2d 794, 814-16 (11th Cir. 1982) (in federal habeas proceeding, failure of counsel to object at trial to exclusion of jurors in contravention of Witherspoon was considered by court as a factor in determining ineffective assistance of counsel issue).

Although the case law was well established at the time of the appeal and was clearly favorable to Petitioner, counsel completely neglected to raise the issue of the improper exclusion of the two venire members. The record plainly indicates that both members were improperly excluded; moreover, it is clearly established that a showing that either one of them was improperly excluded would have resulted in a reversal of petitioner's sentence. Nonetheless, counsel made absolutely no mention of this argument in his appellate brief, nor did he file any supplemental material in which he raised the issue. Counsel's complete failure even to raise this amply supported claim on appeal reveals his inadequate preparation and/or serious misunderstanding of the applicable law and plainly demonstrates the extent to which Petitioner was deprived of the effective assistance of counsel. As a result, Petitioner's right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments was seriously denigrated.

Counsel's failure to adequately present Petitioner's Witherspoon arguments is particularly significant in light of the bifurcated structure of Florida capital trials and the advisory nature of the jury on the issue of sentencing. See Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark.), modified, 637 F.2d 525 (8th Cir. 1980),* where the court indicated that where, as under Florida's system, the jury which determines guilt does not make the ultimate sentencing determination, it would clearly be improper to exclude for cause a venire member solely upon the basis of his adamant opposition to the death penalty. Id. at 1375 n.2. Hence, counsel had a particularly

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* Grigsby was decided after counsel's brief to this Court, but almost two years prior to this Court's decision on Petitioner's appeal and thus, could have been brought to this Court's attention as supplementary authority.

attractive argument available to him on the conviction-proneness issue i.e., that under Florida's bifurcated trial structure where the jury merely advises the sentence, those who are opposed to the death penalty (but who can impartially determine guilt) should not have been excluded from the jury which tried petitioner.*

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* The trial transcript indicates that at least one member of Petitioner's venire was excluded on the basis of his adamant opposition to the death penalty, notwithstanding the fact that he had indicated that he would be able to impartially hear the case.

> MR. JONES: Mr. Forrest, in this case, on behalf of the State of Florida, I intend to ask the jury for a recommendation that Mr. Steinhorst be put to death and he could be put to death in this case for his crime. Do you believe in the death penalty?
>
> BOBBY C. FORREST: No, sir, Mr. Jones, I do not.
>
> MR. JONES: Under no circumstances would you vote for the death penalty?
>
> BOBBY C. FORREST: No, sir.
>
> MR. JONES: Mr. Forrest, actually in Florida we have what we call a bifurcated trial. We have one trial to determine the guilt or innocence of a man, of Mr. Steinhorst, which we'll ask this jury to do. If found guilty then he may be put to death whether you vote for the death penalty or not. Would that tend to influence your verdict on whether or not he was guilty?
>
> BOBBY C. FORREST: No, sir, it wouldn't. I wouldn't think so, no, sir.
>
> MR. JONES: In other words, you could still vote that he was guilty knowing that he might still get the electric chair because you voted that he was guilty?
>
> BOBBY C. FORREST: Yes.
>
> MR. JONES: You could still vote that he was guilty of first degree murder?
>
> BOBBY C. FORREST: I could vote that he was guilty of a charge but I couldn't vote . . .
>
> MR. JONES: In other words, you could vote that he was guilty of a charge but you would say, "I want to vote no on a recommendation of whether he live or die"?
>
> BOBBY C. FORREST: That's right.
>
> MR. JONES: Thank you, sir.
>
> Tr. 224-25.

Counsel's failure to adequately present Petitioner's Witherspoon arguments is particularly damaging in light of the fact that the Witherspoon Court left open the issue of whether a "Witherspoon-qualified" jury, although biased in favor of death, was also impermissibly biased in favor of conviction.

Though the Witherspoon Court was unwilling to accept the conviction-proneness claim on the basis of the record before it, stating that the evidence cited on appeal (which consisted of incomplete and unpublished versions of three studies) was "too tentative and fragmentary" to justify such a conclusion, 391 U.S. at 517; nevertheless, the Court regarded the question as an open one and suggested that future studies might result in a different ruling. In this regard, the Court stated:

> A defendant convicted by such a [Witherspoon-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence --given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.

391 U.S. at 520 n.18 (emphasis in original).

Subsequent to the Witherspoon Court's invitation to further develop the conviction-proneness studies, a substantial body of research on the issue has emerged: two of the three studies before the Witherspoon Court have been completed and published,* a variety of new empirical studies

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* H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment, (1968) (University of Chicago Center for Studies in Criminal Justice); Goldberg, Toward Expansion of Witherspoon: Scruples, Jury Bias, and Use of Psychological

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have been performed,* and extensive expert testimony concerning these studies has been presented.** Furthermore, two federal

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* Footnote Continued From Previous Page

Data to Raise Presumptions in the Law, 5 Harv. C.R.-C.L. L. Rev. 53 (1970). The third study was never published. W. Wilson, Belief in Capital Punishment and Jury Performance (unpub. 1957).

* See Boehm, Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias, 1968 Wis. L.Rev. 734; Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases make the Jury More Likely to Convict? Some California Evidence, 3 Woodrow Wilson J.L. 11 (1980); Bronson, The Exclusion of Scrupled Jurors in Capital Cases: The California Evidence on Conviction-Proneness and Representativeness (unpub. discussion paper discussed in Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); Bronson, On the Conviction-Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); Buckhout, Baker & Speigel, Jury Attitudes and the Death Penalty, 3 Social Action & Law 80 (1977); Colussi, Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt, 15 Creighton L. Rev. 595-617 (1981-82); Crosson, An Investigation into Certain Personality Variables Among Capital Trial Jurors, (unpub. doctoral dissertation), reported in Proc. 76th Ann. Meeting Am. Psychological Ass'n. (1968); Cucinotta, Witherspoon, 7 Duquesne L. Rev. 414 (1969); Ellsworth, et al., The Effect of Capital Punishment Attitudes on Juror Perceptions of Witness Credibility, (1979, prepub draft); Ellsworth, et. al., Juror Attitudes and Conviction-Proness: The Relationship Between Attitudes Towards the Death Penalty and Predisposition to Convict (1979, prepub. draft); Ellsworth & Fitzgerald, Due Process vs. Crime Control: The Impact of Death Qualification on Jury Attitudes (1979, prepub. draft); F.J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (unpublished manuscript, Morehouse College, undated); Girsh, The Witherspoon Question: the social science and the evidence, NLADA Briefs, Sept. 1978; Hamilton, Individual Differences in Ascriptions of Responsibility, Guilt and Appropriate Punishment, 1975; Haney, Juries and the Death Penalty: Readdressing the Witherspoon Question, 26 Crime & Delinquency 512 (1980); Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971); Mitchell & Byrne, The Defendant's Dilemma: Effects of Juror's Attitudes and Authoritarionism on Judicial Decisions, 25 J. Person & Soc. Psych. 123 (1973); Osser and Bernstein, Death Oriented Jury Shall Live, 1 Univ. of San Fernando Valley Rev. 253 (1968); Rokeach & McLellan, Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data, 8 Duq. U.L. Rev. 125 (1969-1970); Thayer, Attitudes and Personality Differences between Conventional Jurors Who Could Return a Death Verdict and Those Who Could Not, Proc. 78th Ann. Meeting Am. Psychological Ass'n. 445 (1970); Comment,

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courts have accepted the conviction-proneness argument, and, in those cases, have required the state trial courts to consider the relevant evidence. Grigsby v. Mabry, supra 483 F. Supp. at 1377.

Grigsby plainly confirms the validity of the conviction-proneness argument and the insufficiency of a state's interest in maintaining conviction-prone juries.* Though Grigsby and some of the research studies were completed after Petitioner's appellate papers were filed in this case,** it cannot be said that appellate counsel lacked the ability to construct this constitutional claim -- the conviction-proneness argument has been available since the Witherspoon decision in 1968, and was most certainty available to appellate counsel in this case. Nonetheless, despite the steady growth of empirical data, appellate counsel completely failed to make the

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Grigsby v. Mabry: A New Look at Death-Qualified Juries, 18 Am. Crim. L. Rev. 145 (1980); White, Death Qualified Juries: The "Prosecution Proneness" Argument Reexamined, 41 U. Pitt. L. Rev. 353 (1980); White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Jurors, 58 Cornell L. Rev. 1176, 1178 n.12, 1185-86 (1973) (summarizing study by Louis Harris & Assoc., Study No. 2016 (1971)); Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1-98 (Nov. 1982).

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Many of the unpublished studies referred to above, including those by Professor Ellsworth and her colleagues, will soon be published in a special edition of Law & Human Behavior dedicated to the question of death qualification; these studies have been collected for publication in the near future by Plenum Publishing Co., N.Y., N.Y., and will be filed as a separate appendix with this Court as soon as possible.

* E.g., Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ala.), modified, 637 F.2d 525 (8th Cir. 1980); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

** Significantly, only five of the numerous studies cited in footnote 2, supra, were prepared subsequent to the filing of the appellate briefs in this case.

argument. Counsel's failure in this regard reveals a fundamental misunderstanding of the significant legal issues in the death penalty area; clearly, an effective appellate counsel in a death penalty case would have properly presented the conviction-proneness issue, supported by the latest data, to the Court, as the undersigned is doing now.

The only Witherspoon-related argument which counsel made on appeal was that the jury which was selected for Petitioner's trial was not a representative cross-section of the community. Brief at 9. That argument consisted of a mere half page and contained no reasoning as to why a prior decision of this Court should be overturned.

In Riley v. State, 366 So. 2d 19 (Fla. 1978), cert. denied, 103 S.Ct. 317 (1982), this Court denied appellant's contention that he was entitled to have persons who were unalterably opposed to the death penalty on the jury which determined his guilt or innocence because they represented a definable cross section of the community and that a second jury qualified pursuant to the Witherspoon standards should be impaneled for the sentencing phase. This Court found "no compulsion in law or logic to so structure capital case trials." Id. at 21. Counsel urged this Court to reconsider its opinion in Riley v. State because, he said, the denial of the representativeness argument in Spinkellink v. Wainwright, 578 F.2d 582, 592-93 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) was predicated on the failure of trial counsel to timely object.

Counsel did not discuss any other reasons for this Court to reconsider its decision in Riley v. State. He did not undertake to discuss any of the existing case law on the representativeness argument, nor did he seek to indicate how these precedents might apply to the special circumstances of Florida's bifurcated trial structure. He merely cited

Spinkellink v. Wainwright, an unfavorable precedent, and stated -- incorrectly -- that this decision was predicated on the failure of counsel to object. In fact, Spinkellink v. Wainwright* was decided on the merits and the court specifically declined to address the troublesome issue of the failure of trial counsel to make timely objections. Although he cited the unfavorable Spinkellink v. Wainwright decision, counsel completely failed to discuss any of the favorable precedents which if properly presented to this Court might have persuaded the Court to reexamine Riley.

Although the Witherspoon Court declined to so hold in the case before it, it did suggest that in the future a death-qualified jury might be shown to be unrepresentative on the issue of guilt. Id. at 518, 520 n.18. The Court did not, however, indicate how such unrepresentativeness could be demonstrated. Subsequent to Witherspoon, the Supreme Court rendered two decisions which defined the constitutional right to a trial by a representative cross-section of the community.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that the systematic exclusion of women from Louisiana's jury selection process violated defendant's Sixth Amendment

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* The Spinkellink court predicated its opinion on its view that Florida has made a "reasoned determination" that its interest in the just and evenhanded application of its death penalty statute was too fundamental to risk a "defendant-prone" jury. Id. at 597. This rationale is suspect on at least two grounds: (1) the court appears to employ a rationality standard in its deference to Florida's determination that there is a risk of a defendant-prone jury, yet as noted below, the Supreme Court has held, in Taylor v. Louisiana and Duren v. Missouri, both infra, that "significant" interests must be clearly forwarded by a state to justify its exclusion of a group from the jury -- suggesting that a court should carefully examine the validity of a state's proffered rationales, and not merely defer to any justification a state may forward; and (2) the court's statement that a jury which includes those who are adamantly opposed to the death penalty is "defendant prone" is incorrect; only if there was an exclusion of those who favor the death penalty would that be so.

right to trial by a jury selected from a representative cross-section of the community. The Court held that the exclusion of a distinctive group of persons from the jury selection process could not be justified merely on the grounds that is was "rational." A state must demonstrate "weightier reasons" for its exclusion of a distinctive group from a criminal defendant's jury. Id. at 534.

Similarly, in Duren v. Missouri, 439 U.S. 357 (1979), the Court reaffirmed its holding in Taylor that women may not be systematically excluded from jury service. The Duren Court set forth a tripartite test to be employed in determining whether there was a prima facie case of a violation of the fair cross-section requirement. To demonstrate a prima facie case of a violation one would have to show: (1) that a distinctive group has been excluded from jury service; (2) that the representation of such a group on venires is not in reasonable relation to the number of such persons in the community; and (3) that the underrepresentation resulted from the systematic exclusion of the group in the jury selection process. Id. at 364. If one makes out a prima facie case, then the state bears the burden of "justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." Id. at 368 (emphasis added).

The Duren tripartite test is the presently operative legal standard in the jury representativeness area. Accordingly, in order to show that the exclusion of those venire members who are unalterably opposed to the death penalty (but who indicate that they could impartially determine guilt), violated the cross-section requirement, the first question is were such persons a distinctive group within the community? In this regard, the Witherspoon court stated that a jury in a capital case must "express the conscience of the community on the ultimate question of life or death." Id. at 519 (emphasis

added). While the Court indicated that it might be proper to exclude those persons who were adamantly opposed to the death penalty from the determination of sentencing, it suggested that a jury which resulted from such exclusions might be shown in the future to be unrepresentative on the issue of guilt. Id. at 520 n. 18.

Moreover, the Witherspoon Court plainly indicated that there are qualitative differences between that group of persons who by their lack of opposition to the death penalty were qualified to determine sentencing in a capital case and those whose opposition disqualified them. This distinction is the essence of the Court's statement that the latter group might properly be excluded from sentencing determinations. Accordingly, under the rationales of Taylor and Duren, it appears that this latter group constitutes a distinctive group which cannot be systematically excluded from criminal juries -- at least in states such as Florida where juries only determine guilt and make a recommendation as to sentence -- unless significant countervailing state interests are put forward.*

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* With respect to the other aspects of the Duren tripartite test, it is plain that since all those who are unalterably opposed to the death penalty are excluded on the basis of that opposition: 1) this group of persons is underrepresented on venires; and 2) that their exclusion is "systematic." We note in this regard not only were such jurors removed for cause, see discussion of jurors Kolmetz and Berryhill, supra, the State used its peremptory challenges to remove all the others.

However, such use of peremptory challenges by the prosecution to wholly exclude identifiable segments of the community has recently been held to be constitutionally impermissible. See Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass. 1979) (proscribing "the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular defined groupings in the community"); People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978) ("use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community" under the California Constitution). See also McCray v. Abrams,

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The burden is on a state to demonstrate such significant interests. In the context of Florida's bifurcated trial structure, where the jury's determination of the sentence is merely advisory, it is difficult to see how Florida could persuasively forward such countervailing interests. Florida's legitimate interest in applying fairly and evenhandedly its death penalty statute would not be undermined by the inclusion of those persons who are opposed to capital punishment yet are fully capable of impartially determining guilt. Since it is the trial judge who makes the ultimate decision on sentencing, the inclusion of persons who are opposed to the death penalty on a defendant's jury, would not interfere with Florida's valid interest in the application of its death penalty statute; and the inclusion of such persons would enhance the ability of such a jury to "express the conscience of the community" in accordance with the dictates of Witherspoon.

In view of a petitioner's constitutional right to a jury which is a representative cross-examination of the community, Florida has the substantial burden of demonstrating how the inclusion of those persons who are unalterably opposed to the death penalty and yet are fully capable of impartially determining guilt is "incompatible" with its legitimate interests. Since such persons indicate that they can impartially try the case, there is no interference with Florida's valid interest in having those accused of murder fully and fairly tried. The argument that such jurors would be inclined, because of their beliefs, not to be impartial is

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No. 83 C 4406, slip op. (E.D.N.Y. December 19, 1983) (equal protection clause prohibits prosecutor's exercise of peremptory challenges to exclude prospective jurors solely on the basis of race) (See Exhibit F).

foreclosed by the clear statement of the Witherspoon court that unless one unambiguously indicates that he is unable to impartially try a murder case, it simply cannot be assumed that he would act that way.

In sum, Florida's valid interest in a fair and impartial jury trial ends once it is shown that those who are selected for the jury will be impartial in determining guilt (notwithstanding their unalterable opposition to imposition of the death penalty). To require more than such impartiality from jurors would substantially infringe on a defendant's constitutional right to a representative jury, without in any way furthering a state's valid interests.

With respect to sentencing, Florida's valid interest in the proper and even-handed application of its death penalty statute is adequately served by the fact that it is the trial judge who ultimately determines sentence. The role of the jury is merely advisory and need not -- unlike the verdict in the guilty phase -- be unanimous; thus, the inclusion of those who are opposed to the death penalty (but will be impartial as to guilt) would have the benefit of increasing the representativeness of the jury without impinging on Florida's interest in having its death penalty statute applied in proper circumstances.

In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the Fifth Circuit rejected a representativeness claim, holding that even if it was assumed that the exclusion of those persons who are adamantly opposed to the death penalty constituted a distinctive class, Florida had demonstrated the "weightier reasons" required by the Taylor Court in order to justify their exclusion. Id. at 597. As indicated above, this conclusion is erroneous in view of the fact that Florida employs a bifurcated trial structure in which guilt and sentence are determined in separate phases and where the jury merely recommends sentence.

This view was expressed in Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark 1980), wherein the Court stated that if the jury which makes the determination of guilt does not also make the sentencing determination, it "would obviously be improper to excuse a juror for cause (in the guilt-determination trial) solely upon the basis of his irrevocable opposition to the death penalty." Id. at 1375 n.2. For, if jurors do not -- as in Florida -- make the ultimate sentencing determination, the court said, their unalterable opposition to the death penalty would not be likely to interfere in any way with their assessment of the defendant's guilt or innocence. Id. at 1378. Another equally important aspect of the Grigsby decision is the court's statement that a state's efficiency interest in using the same jury to determine both guilt and sentence could not provide the necessary "weightier reasons" to justify the denial of a defendant's right to a fair cross-section when his life is at stake. Id. at 1385 n.16.

Counsel made no mention of the above arguments in support of his contention that this Court should reconsider its decision in Riley v. State. He also failed to argue the implications of the Supreme Court's post-Witherspoon decisions in Taylor and Duren and to apply them in the particular context of Florida's bifurcated trial structure.

Counsel's failure to make any arguments or to cite any favorable precedent on the issues of the improper exclusions of venire members in contravention of Witherspoon and the conviction-proneness of death qualified jurors, combined with his patently inadequate presentation on the issue of jury representativeness, plainly demonstrate his ineffectiveness as counsel for Petitioner. As a result of counsel's manifest lack of preparation and/or misunderstanding of the applicable law, Petitioner was deprived of his constitutional right to

effective appellate counsel, resulting in the serious denigration of his right to a fair and impartial jury trial under the Sixth and Fourteenth Amendments. The only appropriate remedy is to reverse Petitioner's convictions and remand the case for a new trial and sentencing determination.

3. Failure to Adequately and Properly Argue that Admission of Testimony of Witnesses Who Violated the Sequestration Order was Reversible Error.

Sequestration of witnesses is ordered by a trial court to assure that a defendant receives a fair trial. The rule is intended to deprive a later witness of the opportunity of shaping his testimony to correspond with that of an earlier witness -- to restrain a witness from "tailoring" his testimony and to "[aid] in detecting testimony that is less than candid." Geders v. United States, 425 U.S. 80, 87 (1976).

Violation of the rule requires the court to conduct an inquiry into possible taint of witness testimony and the participation of counsel in the violation. Dumas v. State, 350 So. 2d 464 (Fla. 1977). During such inquiry, the party seeking to admit the testimony has the burden of showing that he or she did not know of the violation, or participate directly or indirectly in it, and that the witnesses were not influenced by what they heard. Even if it is revealed that the order of exclusion was knowingly disobeyed and that the proposed testimony is important, the appropriate sanction is disqualification. 6 Wigmore, Evidence § 1842 at 477-78 (Chadbourn rev. 1976).

In Petitioner's case, despite the court's order that the witnesses be sequestered, the State's witnesses were placed in positions from which they could hear the prior testimony of other State witnesses -- some of whom were accomplices in the drug smuggling operation. These witnesses were allowed to testify without judicial inquiry into the violation's effect on

the witnesses, the State's involvement in, participation in, or knowledge of the circumstances, and without even a jury instruction regarding the effects of the violation on each witness' credibility. Clearly this error allowed the court and the jury to consider testimony which was shaped not by the witness' own recollection of the events, but by the testimony of others.

The trial court erred in failing to grant a mistrial for violation of the rule of sequestration.* Counsel's appellate presentation on the issue, however, was patently inadequate and fell far below the standard of reasonably effective counsel; issues were inaccurately identified, and critical case law was ignored.

The gross violations of the rule of sequestration that occurred at trial, as well as the total absence of any remedial action by the trial court, were reversible errors entitling defendant to a new trial. Yet appellate counsel failed to provide this Court with a thoroughly documented argument, and thus, defendant did not receive the benefit of a full and meaningful appeal.

There were no less than four material deficiencies or omissions in appellate counsel's presentation on this one matter alone:

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* Trial counsel did move for a mistrial and to strike the testimony in question thus properly preserving this issue for appeal. Tr. 835. Moreover, this Court in Thomas v. State, 419 So. 2d 634 (Fla. 1982), held that counsel is not required to pursue a fruitless course of argument in order to preserve an issue for appeal -- as long as the objection and grounds therefor are known to the court the appellate court may consider the issue even if the ruling of the trial court does not constitute fundamental error. Id. at 635-36. Here, defense counsel twice moved to strike the testimony of witness Woods and later moved for a mistrial. Notwithstanding Woods' clear admission that his testimony was tainted and despite the number of witnesses who plainly violated the rule, counsel's motions were denied. Thus, not only was the nature of counsel's objection clear to the trial court, but it is plain that any further inquiry or objection by counsel would have been fruitless.

-- counsel's discussion of existing case law, which was superficial and perfunctory at best, reveals a total misunderstanding of the law, the result of which was the absence of any attempt to particularize the significance of violations of the rule by state witnesses;*

-- counsel failed to include as error the abuse of discretion in permitting the witness to testify. When the State permitted the violation to occur, there was evidence of taint and the testimony of the violating witnesses was merely cumulative.

-- counsel failed to note that the violation of the rule mandated a full judicial inquiry before determining what is the appropriate remedy;**

-- counsel failed to object in his appellate brief to the fact that the trial court placed the burden on the defense when it was State witnesses who had violated this rule.

Petitioner recognizes the standard adopted by this Court to demonstrate ineffective assistance of counsel, and does not base his claim for relief on mere errors in judgment or writing style. On the contrary, Petitioner notes that counsel's errors marked a serious and substantial departure from the standard of effective assistance of counsel guaranteed by the Sixth Amendment. See Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Knight v. State, supra.

Although prior counsel's appellate brief referred this Court to the case of Dumas v. State, 350 So. 2d 464 (Fla. 1977), wherein this Court held that a defense witness who has violated the rule of sequestration may not be excluded without

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* In this context, counsel failed to cite even a single case wherein a state witness violated the rule. See, e.g., Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977); Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978), cert. denied, 372 So. 2d 472 (Fla. 1979); Rollins v. State, 256 So. 2d 541 (Fla. 4th DCA 1972); Young v. State, 99 So. 2d 304 (Fla. 3d DCA 1957).

** It is not surprising therefore that counsel neglected to cite or discuss the following cases, all of which stand for the proposition that the court must exercise its discretion only after a thorough inquiry into all the facts: Spencer v. State, 133 So. 2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962); Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977); Young v. State, 99 So. 2d 304 (Fla. 1957).

inquiry into whether the violation occurred with the knowledge or by the connivance of the defendant or defense counsel, counsel failed to argue to the Court to what, at a minimum, is the obvious corollary of Dumas, to wit: that a state witness who has violated the rule may not be permitted to testify without full judicial inquiry into whether the rule violation occurred with the knowledge or by connivance of the State. Here, the State's knowledge of the violation was likely, given the fact, as this Court noted, that a number of state witnesses acknowledged having heard previous state witnesses' testimony by radio in the State attorney's office, in the jail, or while sitting in the hall outside the courtroom. 412 So. 2d at 336.

This Court in Dumas held that the permitted sanction of disqualification of a witness who has violated the rule must be balanced against the attendant prejudice to the defendant's constitutional rights were the witness to be disqualified. The Court explicitly referred to and approved the District Court of Appeals' holding in Atkinson v. State, 317 So. 2d 807 (Fla. 4th DCA 1975), cert. denied, 330 So. 2d 21 (Fla. 1976), wherein the Court held that an inquiry and finding of connivance or consent of the defendant or defense counsel must serve as the legal predicate to disqualification of a defense witness, and underscored the constitutional dimension uniquely applicable to the possible disqualification of a defense witness. See also Geders v. United States, 425 U.S. 80, 86 (1976) (court must balance the importance of the rule against the defendant's Sixth Amendment rights); Braswell v. Wainwright, 463 F.2d 1148, 1154 (5th Cir. 1972) (where the State's procedural rule of sequestration conflicts with the defendant's Sixth Amendment rights, the State rule must yield); Nash v. State, 363 So. 2d 147, 147 n.1 (Fla. 3d DCA 1978) (penalty for violation of a sequestration order is unique because of the defendant's constitutional rights under the Sixth and Fourteenth Amendments).

Dumas resolved the inherent tension between the disqualification of a witness as a means to safeguard the integrity of the trial process and the defendant's right under the Sixth Amendment to present witnesses on his behalf by requiring an inquiry into whether the violation occurred with the connivance or knowledge of the defendant or defense counsel. See also Nash v. State, 363 So. 2d 147 (Fla. 3d DCA 1978) (conviction reversed where a defense witness was disqualified without the necessary court inquiry). Forming the underpinning of Dumas, of course, is the conclusion that should the court find that the violation did indeed occur with the connivance or knowledge of the defendant of defense counsel who seeks to admit the testimony of such witness, the witness would not be permitted to testify -- notwithstanding the attendant prejudice to the defendant.

A fortiori, that is the result when the issue is whether a state witness will be permitted to testify, and the State has permitted the violation to occur. If witnesses are disqualified even against a balancing Sixth Amendment interest, they clearly should be disqualified when there is no such interest to balance it against -- and indeed, when the Sixth Amendment interest now is on the side of disqualification. When a defense witness has violated the rule of sequestration the defendant's constitutional rights are protected by the need to find connivance or consent to the violation before a witness will be disqualified. When it is state witnesses who have violated the sequestration rule, however, the underlying legal rationale for insisting upon a finding of connivance, i.e., the defendant's constitutional right to present witnesses on his behalf -- shifts: the defendant's right to a fair trial free from tainted or influenced testimony becomes paramount, and the State has a heavy burden of demonstrating (1) lack of participation in the violation and (2) show no likelihood of

taint and the necessity of the evidence sought to be adduced before the State's witnesses may testify.

This is not to suggest, of course, that a state witness should always be disqualified regardless of the circumstances of the violation; an inquiry and a finding that the State had no part in the violation -- which is not the case here -- before the State witness is permitted to testify would effectively safeguard against such a result.

Here of course it was not only State witnesses who violated the rule, but the State actually participated in the violation.* Whether the State's participation was deliberate, reckless or just the result of negligence is irrelevant. The witnesses were in the State's control. The State provided the radio and permitted the witnesses to listen to the trial. Indeed, it appears that much of the listening took place in the prosecutor's office. The State also seated the witnesses where it was obvious that they could hear the testimony of other State witnesses.

When it is the State witness who has violated the rule, that witness should not be permitted to testify absent a finding by the court that the State had no part whatsoever -- direct or indirect -- in the violation. Even when the trial

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* In Point I, supra, Petitioner argues that the State's willful and unwarranted participation in the media coverage of the Sandy Creek incident had the clear effect of denying Petitioner his right to a fair trial. Similarly, in this section Petitioner contends that the State's direct involvement in the violation of the rule of sequestration denied Petitioner his due process rights. In addition, Petitioner respectfully disagrees with this Court's decision that the State's inflammatory and prejudicial behavior and comments at trial did not similarly adversely affect Petitioner's right to a fair trial such that the prosecutorial misconduct warranted granting a new trial in this case. 412 So. 2d at 339. Petitioner respectfully requests that this Court reconsider the issue of prosecutorial misconduct in light of the cumulative effect of the State's misconduct that pervaded the entire pretrial and trial process.

court determines that the State had no role in the violation, or perhaps only a negligent role, the inquiry does not end. The trial court must also determine the likelihood of taint to the proffered witness' testimony as the result of what he has heard in violation of the rule, and the necessity of the evidence to be adduced from the witness to the State's case. If there is the possibility of taint, and the evidence is not necessary because it is cumulative or peripheral, then the witness should not be permitted to testify or a mistrial should be granted. To do otherwise clearly compromises the defendant's constitutional rights to a fair trial.

Moreover, it is clear that in this case that each of the factors weighed in favor of declaring a mistrial. First, the State was clearly involved in the violation. Second, the possibility of tainted testimony was great. Indeed, the one witness interrogated on the subject admitted his testimony was influenced by what he had heard. Third, the testimony of the additional co-conspirator witnesses was clearly cumulative to Vines' testimony and increasingly cumulative as each additional one testified. When added to the fact that these witnesses were co-conspirators testifying under immunity granted by the State, the prejudice to the defendant became overwhelming.

At stake is not only the prejudice to the innocent defendant attendant to possible witness taint, but a serious and unnecessary compromise of the defendant's Sixth Amendment right to fair trial. See Young v. State, 99 So. 2d 304, 305 (Fla. 3d DCA 1957) ("upon an invocation of the rule by a defendant in a criminal proceeding, the prosecuting witnesses should be required to give their testimony without the aid of their fellows.").

It is clear that appellate counsel failed utterly to understand and to argue the significance of Dumas. Further, appellate counsel failed to argue that while the exclusion of a

witness lies within the trial court's discretion, where certain circumstances militating in favor of exclusion are known to the trial court, an inquiry of such witnesses is required for the court properly to exercise its discretion and permit a witness to testify. Indeed, counsel did not refer to a single case defining the limits on a trial judge's discretion in deciding whether to admit the testimony of a witness who has violated the rule of sequestration.*

The trial record clearly indicates that several witnesses -- who, being in state custody, were subject to state control -- violated the sequestration rule and instruction of the court and overheard the testimony of at least three state witnesses. The voir dire examination of these witnesses elicited facts sufficient to mandate granting counsel's motion for a mistrial, or alternatively, the striking of the testimony of witness Woods and the exclusion of those witnesses who had violated the rule and had not yet testified. Without exception, every witness who violated the rule did so either in the presence of the State -- and through means (a radio) provided by the State -- or after being seated by the State in hearing distance of the courtroom.

The record also discloses that the trial judge conducted only a very limited inquiry of only one of the eleven witnesses who violated the rule, Steinhorst v. State, 412 So. 2d at 336, an inquiry that did nothing to dispel the suggestion that the violation occurred with the knowledge or consent of the State. Moreover, the ensuing colloquy involving the

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* Among the cases counsel should have cited and discussed in this context are Richardson v. State, 246 So. 2d 771 (Fla. 1971); Spencer v. State, 133 So. 2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962) and cert. denied sub nom., Spencer v. Wainwright, 372 U.S. 904 (1963); Thomas v. State, 372 So. 2d 997 (Fla. 4th DCA 1979); Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977).

prosecution, defense counsel and the witness elicited strong testimony indicating that the witness' testimony had been influenced by the testimony of the three witnesses whom he admitted overhearing.* It cannot be determined whether the witnesses who had not yet testified were influenced by what they heard, for the simple reason that the court's inquiry of those witnesses came to an abrupt halt when it was discovered how and when the rule was violated; the voir dire of these witnesses did not include a single question, addressed either to the witnesses or the State, concerning why the witnesses were permitted to violate the rule, or whether their testimony would in any way be affected by the violation.

The issue, properly presented in light of the facts available to the trial court, was not, as framed by appellate counsel, whether the defense counsel waived the opportunity for further examination of the other witnesses, Steinhorst v. State, 412 So. 2d at 336, but whether the trial court erred in permitting the witnesses to testify and in failing to declare a mistrial.

The law clearly states that the trial judge may exercise the right to exclude a witness who has violated the rule. The leading United States Supreme Court decision, far from restricting the use of this sanction, states in no uncertain terms that "the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." Holder v. United States, 150 U.S. at 92 (1893). See also Geders v. United States, 425 U.S. 80 (1976); United States v. Suarez, 487 F.2d 236, 238 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974); United States v. Moriarty,

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* Mr. Davis [defense counsel]: Mr. Woods, could your testimony have been influenced by what you have heard? Witness Woods: I'm sure it could have, yes, sir. Tr. 834.

497 F.2d 486 (5th Cir. 1974); Braswell v. Wainwright, 463 F.2d 1148, 1156 (5th Cir. 1972). As Dean Wigmore has noted, "[i]f the order of exclusion is knowingly disobeyed, the court unquestionably has the power to refuse to admit the disobedient person to testify; and it ought to exercise this power, in its discretion, whenever there appears any reason that the proposed testimony was important, [and] that the witness had heard the other testimony..." 6 Wigmore, Evidence §1842, at 477 (Chadbourn rev. 1976).

While the decision whether to exercise this power to disqualify a witness who has violated the rule of sequestration is said to be within the discretion of the court, Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), cert. denied, 369 U.S. 880 (1962) and cert. denied sub nom., Spencer v. Wainwright, 372 U.S. 904 (1963); McVeigh v. State, 73 So. 2d 694 (Fla.), appeal dismissed, 348 U.S. 885 (1954); Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977); Rollins v. State, 256 So. 2d 541 (Fla. 4th DCA 1972), the trial court's discretion concerning the decision "is not unlimited." Young v. State, 99 So. 2d 304, 305 (Fla. 3d DCA 1957) (emphasis added). It is apparent that the exercise of discretion must include, at the very least, an adequate inquiry into the possible taint of witness testimony, and the participation of counsel in events leading to violation of the rule, Dumas v. State, supra--an inquiry the trial judge neglected to conduct in Petitioner's case.

The requirement of judicial inquiry is commonly used to set the limits on judicial discretion. Thus, this Court in Richardson v. State stated that the trial "court's discretion can be exercised only after the court has made an adequate inquiry into all of the surrounding circumstances...," 246 So. 2d 771, 775 (Fla. 1971) (emphasis added) (quoting Ramirez v. State, 241 So. 2d 744, 548 (Fla. 4th DCA 1970)). Similarly, in Ali v. State, 352 So. 2d 546, 548 (Fla. 3d DCA 1977), the court

stated that when the rules of criminal procedure are violated by the State:

> "the duty devolves upon the trial court to make adequate inquiry into whether the [State's] violation of the rule was inadvertent or willful; whether the violation was trivial or substantial; and what effect, if any, it had upon the [defendant's case]. The trial court may then exercise its discretion in entering such order as it deems just."

(emphasis added).

In fact, precisely this method of bridling a court's discretion has been employed in connection with the sequestration of witnesses, albeit in slightly different settings. In County of Dade v. Callahan, 259 So. 2d 504, 507 (Fla. 3d DCA 1971), cert. denied, 265 So. 2d 50 (Fla. 1972), the court held that it was reversible error and an arbitrary exercise of the court's discretion to refuse a requested sequestration order of witnesses, without attempting to determine or inquire as to which witnesses the rule should apply simply because such request was said by the trial court "to be 'at the discretion of the court'." Similarly, a hearing or inquiry was held to be the proper manner for the trial court to determine whether a witness may remain in the courtroom, even though the rule of exclusion and sequestration of witnesses had been invoked, notwithstanding custom giving discretion to judges to so decide. Thomas v. State, 372 So. 2d 997 (Fla. 4th DCA 1979). After citing to Richardson, supra, the court in Thomas went so far as to state that the exercise of discretion without a prior inquiry would "emasculate the rule of exclusion and sequestration of witnesses and subject the trial courts to attack alleging collusion among witnesses." Id. at 999.

In those cases where the rule of sequestration has been violated by the State's witnesses, none of which were cited in Petitioner's appellate counsel's brief before this

Court, the courts have uniformly reached a definitive and well-supported determination only after a full inquiry into all of the circumstances of the violation. E.g., Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978) (state witness permitted to testify after the trial judge determined that nothing the witness discussed or heard related to anything testified to in court), cert. denied, 372 So. 2d 472 (Fla. 1979); Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977) (state witness permitted to testify when he was simply to read a transcript of his own previous testimony); Rollins v. State, 256 So. 2d 541 (Fla. 4th DCA 1972) (two state witnesses permitted to testify when they were first examined upon voir dire, following which the court made a determination that the violation was unintentional and did not affect the ability of the identifying witnesses to make an in-court identification of the defendant). Compare Showers v. State, 364 So. 2d 848, 850 (Fla. 2d DCA 1978) (third party whom defense counsel originally declared would not be called as a witness and who sat in courtroom after the rule was invoked was not permitted to subsequently testify and a detailed inquiry was not necessary to so decide since to admit the testimony would "have the practical effect of abrogating the purpose of the rule...").

As noted, the trial court failed to conduct an adequate inquiry into the circumstances of the violation. As a result, it abused its discretion in permitting the State witnesses who had violated the sequestration order to testify. Invitation by the court offered to defense counsel to conduct an inquiry of each witness on cross-examination simply cannot be considered as a substitute for the required judicial inquiry and an appropriate remedy.

Moreover, this invitation was clearly addressed to the wrong party given the State's burden to show (a) that the State did not know of, or participate directly or indirectly in the

violation (b) that the witnesses were not influenced by what they heard and (c) that their testimony was necessary to the State's case.

Defense counsel requested that the trial court inquire as to the other witnesses. Tr. 830. The trial court accepted counsel's request, and was informed by the witnesses that a substantial violation of the rule had occurred while the witnesses were under the authority or custody of the State. Again, at this point the burden should have shifted to the State to show the absence of its participation in the violations, the absence of taint or influence, and the need for the evidence.

Not only did Petitioner's prior counsel, in his discussion of this point, ignore the critical issue of the need for an adequate inquiry; he also neglected to raise before this Court the erroneous allocation of the burden by the trial court, in limited inquiry it did conduct, once the wholesale violation of the sequestration rule was made apparent. Not only does Dumas and prior case law place the burden upon the State to dispel any complicity in the violation and the absence of taint; the logical underpinnings of tne rule itself prescribe the same result.

Thus, in Woodruff v. State, 360 So. 2d 49, 50 (Fla. 1st DCA 1978) defense counsel "thoughtlessly conducted a group interview of prospective defense witnesses after the trial court had instructed all concerned that the rule of sequestration of witnesses would be invoked." The prosecutor moved to exclude the testimony of the defense witnesses involved in the conference. At that point, the court properly placed the burden on the party seeking to have the testimony admitted to show why disqualification would be an inappropriate sanction under the circumstances. As the district court noted, "defense counsel was given an opportunity to object [to the

exclusion of the defense witnesses], to attempt a showing that their testimony was critical to the defense, or to show that, for other reasons, justice did not require exclusion of the testimony. Defense counsel neither objected nor offered such a showing, and the court excluded the testimony of certain witnesses. Further inquiry by the court would have been appropriate, had [defense] counsel [who wanted to have such testimony admitted] requested and assisted that inquiry. See Dumas v. State." Id. at 50 (emphasis added).

So, too, in Rowe v. State, 162 So.22 (Fla. 1935), cited with approval in Young v. State, 99 So. 2d 304 (Fla. 3d DCA 1957), the Court held that "if the violation of the order of the court by the witness is participated in by the party calling the witness or by the attorney representing such party, testimony of the witness who has violated the rule will be excluded." It necessarily follows that it is a condition precedent to the admission of testimony from a witness who has violated the rule that the party wishing to admit the witness' testimony refute any suggestion that it participated in the violation.

In Richardson v. State, 246 So. 2d 771, 774-5 (Fla. 1971), this Court held that a violation of the Rules of Criminal Procedure by the State would require an appellate court to reverse a conviction unless the trial court made an inquiry into all the circumstances surrounding the breach, with the State having the burden of showing the absence of prejudice to the defendant. The reasoning in Richardson, moreover, has been explicitly applied and deemed relevant to resolving issues concerning sequestration procedures. Thomas v. State, 372 So. 2d 997, 998-9 (Fla. 4th DCA 1979). In Thomas, another case to which Petitioner's former counsel did not refer, a detective state witness was permitted, in violation of the rule, to remain in the courtroom after the rule had been invoked. The

Thomas court strongly suggested that had the testimony of the detective prejudiced the defendant, the case would have been remanded for a new trial on that ground alone. Id. at 999. Precedent and logic compel that in the absence of judicial inquiry and finding by the trial court concerning the effect of the violation of the sequestration rule, a defendant is entitled to a new trial.

In light of counsel's utter failure to address this issue, it is not surprising that counsel neglected to demonstrate that placing the burden of proving connivance with, or consent to, the wrongdoing upon the party who played no role in the violation leads to a clearly anomalous result. If the court is presented with sufficient evidence of the State's participation in or knowledge of the violation, as was done here, no logical reason could be advanced for shouldering the defense with the burden of proving such involvement or demonstrating the presence of taint. Rather, the incentive to rebut a showing of connivance or taint lies with the prosecution. Likewise, the facts relevant to the circumstances surrounding the violation are much more readily accessible to the prosecution-- especially since several of the witnesses who violated the rule were under the physical or constructive custody of the State. Similarly, it is logical to place the burden of showing the necessity of the witness' testimony on the party proffering the witness.

Furthermore, imposing this burden upon the party moving for the exclusion of the witnesses undermines the very purpose of the rule of sequestration. The rule is intended to deprive a later witness of the opportunity of shaping his testimony to correspond with that of an earlier witness. See Geders v. United States, 425 U.S. 80 (1976); Holder v. United States, 150 U.S. 91 (1893); Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977). If, after an admitted violation of the rule, the

burden is placed upon opposing counsel to demonstrate through cross-examination that the testimony already, or to be, tendered to the jury will be tainted, the rule itself is bereft of any efficacy. Not only is it unusually difficult to show taint, but the witnesses will be better able to handle the cross-examination as a result of the wrongful conduct. To require defense counsel to prove taint would entirely nullify the purpose of the rule.*

Finally, the deficiency specified herein certainly was error affecting the outcome of the case, and not mere harmless error. See Knight v. State, supra at 1001. The witnesses who admitted to having violated the rule stated that they overheard the testimony of Bobbie Joe Vines, the only witness, who up to that point in the trial, had stated that the victims were, at one point in time, in the custody of the Petitioner. Inasmuch as the State failed to produce any evidence placing the Petitioner in proximity of the victims when they were fatally shot, the case against the Petitioner was circumstantial; at best it relied to a great extent upon the credibililty of Vines, the very person who solicited Petitioner's assistance in the government-sponsored drug operation. To permit the other witnesses to testify may very well have had the effect of reinforcing Vines' testimony. These witnesses were permitted to testify without any showing that their version of the events was the result of their own recollections and independent memories and not based upon the testimony of witnesses who preceeded them at trial.

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* It should be noted that one eminent authority would state the rule even more broadly. See 6 Wigmore, Evidence §1842, at 478-79 (Chadbourn rev. 1970) ("[O]f two innocent parties, the contingency of suffering [disqualification] should clearly be for him whose witness has been in fault; and this is particularly so where it was also that party's duty, at whatever inconvenience, to secure the obedience of his own witnesses to a plain and simple order of court.").

The rule of sequestration was invoked to prevent exactly what transpired at this trial. Surely, Petitioner was entitled to be adjudged upon, and the jury permitted to receive, independent testimony of witnesses unaided and unrefreshed by the previous testimony of a co-conspirator and fellow witness. The potential for prejudice is at once recognized by the very invocation of the rule and its wholesale and gross violation at this trial. The only appropriate remedy, and the relief granted in Dumas, is to reverse Petitioner's conviction and remand this case for a new trial.

4. Failure to Properly Argue that the Restricted Cross-Examination Deprived Petitioner of His Sixth Amendment Right of Confrontation.

Counsel assigned as error the trial court's improper restriction of Petitioner's cross-examination of an immunized key State witness, David Capo. Br. 23-27. The testimony of this witness was critical to the State's case against the Petitioner as the State was unable to adduce any evidence as to Petitioner's direct involvement in the killings. Capo was the only witness who testified that the Petitioner allegdly admitted to "taking care" of the victims. Tr. 1065-66.

Appellate counsel's presentation of this fundamental and egregious error utterly confused and obscured the nature and extent of the error at trial. Indeed, counsel presented for the first time on appeal a theory -- that the witness and the State's other key witness, Vines, wanted to pin the murders on Petitioner to protect Goodwin -- without any foundation in the record below. 412 So. 2d at 338.* It is not surprising,

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* Petitioner does not agree with this Court's prior conclusion as to this point. Certainly Petitioner was entitled to develop his case through cross-examination of this hostile witness. The conspiracy to place blame theory also goes to the credibility of Capo's testimony on direct as well as establishing a viable defense theory.

Footnote Continued

therefore, that counsel neglected the critical issues concerning the trial court's improper restriction on Petitioner's Sixth Amendment right to confrontation, to wit:

> -- foreclosing a line of questioning on cross- examination of an adverse witness concerning possible motives or biases in testifying represents an impermissible and unconstitu- tional infringement of an accused's Sixth Amendment rights; Davis v. Alaska, 415 U.S. 308 (1974);
>
> -- permitting a witness' attorney to overcome the State's waiver of an objection constitutes a denial of the accused's rights of due process of law.

The failure of appellate counsel to accurately frame the issue before this Court denied Petitioner a proper review of the error which occurred at trial. Thus, not only did counsel cloud the fundamental error which transpired by asserting on appeal an additional objective of his thwarted cross-examination, but counsel failed to explain adequately the basis for the objection made at trial -- the effect that the witness' participation in the drug operation and the very real spectre of state criminal charges may have had on the veracity and credibility of his testimony.

Thus, it is not surprising in light of counsel's presentation, that this Court suggested that the line of questioning proposed by trial counsel was designed to merely

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* Footnote Continued From Previous Page

Indeed, this Court in Coxwell v. State 361 So. 2d 148, 151 n.9 (1978) stated:

> without regard to the plausibility of either contention, it is clear that alternative methods of proof or theories of defense are exclusively within the province of defense counsel through direct or cross-examination. (Emphasis supplied.)

See also Alford v. United States, 282 U.S. 686, at 692 (1931) to the effect that a proffer is not necessary during cross-examination.

impugn the witness' character. Rather, as counsel should have argued, in light of Davis v. Alaska, supra and Alford v. United States, 282 U.S. 687 (1931), the jury, as the sole judge of credibility, was entitled to be apprised of any motives or biases that may have underlied the witness' testimony.

Despite the fact that the right of cross-examination derives from the federal constitution, appellate counsel did not cite a single decision of the Fifth Circuit that defines the standard and scope applicable to the cross-examination in the circumstances here. In fact, counsel failed to refer this Court to the leading United States Supreme Court opinions, which if considered, clearly demonstrate that the restriction placed on the cross-examination of the witness was surely reversible error entitling Petitioner to a new trial in this case. Davis v. Alaska, supra.

Petitioner further asserts that the failure of appellate counsel to file a reply brief in the first appeal before this Court, see Fla. R. App. P. 9.210(a)(1983), constitutes ineffective assistance of appellate counsel. Petitioner takes this opportunity to address but a few of the errors contained in the State's brief for the purpose of demonstrating the extent of counsel's inadequate and ineffective assistance. Had counsel reviewed the State's brief and responded to the numerous unsupported factual and legal arguments contained therein, this Court would have benefitted from a more precise articulation of the nature of the error at trial. First, it was not the State which objected to the cross-examination, as the State's brief contended, State's Br. at 35, but the witness' own attorney. Indeed, the State did not speak even once during the colloquy among the defense counsel, the attorney, and the court. Tr. 1069-76.

Second, it is clear that neither appellate counsel nor this Court in Coxwell v. State, 361 So. 2d 148 (Fla. 1978),

ever suggested that cross-examination had no bounds. State's Brief at 36. Rather, the proper issue, and one which should have been presented to this Court, is whether the limitation in this case was consistent with Petitioner's Sixth Amendment rights as interpreted by the courts. See Davis v. Alaska, 415 U.S. 308 (1974); United States v. Crumley, 565 F.2d 945 (5th Cir. 1978); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977); Coxwell v. State, supra, 301 So. 2d at 152.

Third, the State misconstrued the intent of the limitation that the Coxwell Court placed on its holding. 361 So. 2d at 152. As authority for the proposition that in an exceedingly rare case a discretionary curtailment of an inquiry may be harmless error if no prejudice is shown, the Court cited to Tischler v. Apple, 30 Fla. 132, 11 So. 273 (1892), a civil case involving a simple contract claim, where the Sixth Amendment plays no role at all. In contrast, the Court juxtaposed the constitutional rights of a "criminal defendant in a capital case." 361 So. 2d at 152. See also Coco v. State, 62 So. 2d 892, 894-95 (Fla. 1953). In such a case, the Court held that "an abuse of discretion by the trial judge in curtailing th[e] inquiry may easily constitute reversible error." 362 So. 2d at 152 (emphasis added). See also Davis v. Alaska, 415 U.S. 308, 318 (1974) (emphasis added) ("a denial of cross-examination without waiver would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."); Smith v. Illinois, 390 U.S. 129, 131 (1968); United States v. Morris, 485 F.2d 1385, 1387 (5th Cir. 1973). Compare United States v. Mayer, 556 F.2d 245, 252 (5th Cir. 1977) (where there has not been a complete denial of access to a proper area of cross-examination, reversal is required unless the error was "harmless beyond a reasonable doubt"); Chapman v. California, 368 U.S. 18 (1966); Nowlin v. State, 346 So. 2d 1020, 1024 (Fla. 1971); Salter v. State, 382 So. 2d 892, 893 (Fla. 4th DCA 1980).

Fourth, the State raises to constitutional magnitude the statement in Petitioner's appellate brief that cross-examination was the only viable means available to impugn the witness' integrity. State's Br. at 35-36. Yet, the State cited to no case which suggests that the right of cross-examination as secured by the Sixth Amendment is merely a tactical tool of last resort. Indeed, quite the contrary is true as this Court has properly noted. Coco v. State, 62 So. 892, 895 (Fla. 1953).

The State also noted the nature of the objection raised at trial by the witness' attorney, but failed to mention or refer this Court to a footnote in Coxwell itself, 361 So. 2d at 152 n.11, wherein this Court stated: "[T]rial judges should be inclined to afford greater latitude on cross-examination when the object is to impeach a key prosecution witness[,]" citing to Gordon v. United States, 344 U.S. 414 (1953); Vickery v. State, 50 Fla. 144, 38 So. 907 (1905). The Court also cited with approval Kirkland v. State, 185 So. 2d 5, (Fla. 2d DCA 1966) which held that "[f]or the purpose of discrediting a witness, a wide range of cross-examination is permitted, as a matter of right, in regard to his motives, interest, or animus, as connected with the cause or with the parties thereto, ..." The failure of appellate counsel to respond to these specious arguments put forth by the State is made even more egregious by his failure to discuss the following cases with respect to a defendant's fundamental right of confrontation.

In Pointer v. Texas, 380 U.S. 400, 403 (1965), the Supreme Court held that the Sixth Amendment right of confrontation "is a fundamental right essential to a fair trial and is made obligatory on the States by the Fourteenth Amendment." The Court described the "right of confrontation as '[o]ne of the fundamental guarantees of life and liberty,' and 'a right long deemed so essential for due protection of life

and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all States composing the Union." Id. at 404 (quoting Kirby v. United States, 174 U.S. 47, 55, 56 (1899)). See also Douglas v. Alabama, 380 U.S. 415 (1965); 5 Wigmore, Evidence §§ 1365, 1397 (Chadbourn rev. 1974).

Likewise, this State has recognized the critical importance of the right of confrontation. The Florida State Constitution, in its Declaration of Rights, Art. I, § 16, lists as one of the rights of an accused, "the right...to confront at trial adverse witnesses." Indeed, more than a decade before Pointer v. Texas, supra, this Court described the "inalienable" right of confrontation as an "absolute right, as distinguished from a privilege, which must always be accorded a person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree." Coco v. State, 62 So. 2d 892, 894-95 (Fla. 1953) (emphasis added).

Although the scope and extent of cross-examination rests within the sound discretion of the trial court, Glasser v. United States. 315 U.S. 60, 83 (1942), this discretion must give due regard to the Sixth Amendment right of confrontation. United States v. Crumley, 565 F.2d 945, 949 (5th Cir. 1978); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977). Thus, it is absolutely clear that an improper restriction upon the defendant's right to cross-examine witnesses testifying against him is violative of the Sixth Amendment warranting a new trial. Davis v. Alaska, 415 U.S. 308 (1974). See also Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("absence of proper confrontation at trials calls into question the ultimate 'integrity of the fact-finding process.'") (quoting Berger v. California, 393 U.S. 314, 315 (1969)).

In Davis v. Alaska, supra, the Supreme Court reversed a state criminal conviction for improperly limiting the scope of cross-examination. In Davis, the defense sought to discredit a key witness in order to "afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony." Id. at 316. The fact which the Petitioner sought to elicit was the witness' possible concern that he might be a suspect in the investigation. Cross-examination at trial, however, was limited by a protective order prohibiting any reference to the key witness' juvenile record. The Court reversed and held that, as balanced against the State's policy of protecting juvenile offenders, the right of confrontation was paramount. After stating that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," id. at 316, the Court held:

> On these facts it seems clear that to make [an] inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it,' Brookhart v. Janis, 384 U.S, 1, 3 [(1966)]." Smith v. Illinois, 390 U.S. 129, 131 (1968).

Id. at 318.

Similarly, in Alford v. United States, 282 U.S. 687 (1931), the Court held that a defendant in a criminal trial may not be denied the right to show on cross-examination grounds from which the jury might infer that a witness' testimony was untrue or biased. In Alford, the defendant sought "the opportunity to place the witness in his proper setting, [i.e., under custody of the federal authorities,] and put the weight of his testimony and his credibility to a test, without which

the jury cannot fairly appraise them." Id. at 692. The Court stated:

> The purpose [in asking "where do you live?,"] obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution.

Id. at 693.

In several Fifth Circuit opinions the court has consistently held that "cross examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope." United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974) (quoting McConnell v. United States, 393 F.2d 404, 406 (5th Cir. 1968), cert. denied, 434 U.S. 903 (1977); United States v. Williams, 592 F.2d 1277, 1281 (5th Cir. 1979). See also United States v. Centreras, 602 F.2d 1237, 1242 (5th Cir.) ("the scope of the direct examinatin may be exceeded on cross-examination in an effort to test the truthfulness of the witness."), cert. denied, 444 U.S. 971 (1979). More specifically, the Fifth Circuit has stated that a trial judge may not deny an accused the right to expose a witness' motivation and biases in testifying. Thus, in United States v. Crumley, 565 F.2d 945 (5th Cir. 1978), the court held that an inquiry concerning stolen property found on the witness' property to determine whether the witness may have been motivated by fear of additional criminal charges was a proper line of questioning on cross-examination.

> Certainly the fear of additional [criminal] charges and prosecution might motivate a witness to testify favorably on behalf of the government. Even a witness then serving a ten year confinement. Because the district court did not allow the defense sufficient inquiry into [the witness'] motivation in testifying for the prosecution we find the full exercise of the accused's

> Sixth Amendment right to confrontation was frustrated and the trial judge abused his discretion.

Id. at 950.

Although prejudice need not be shown where an accused's Sixth Amendment rights have been abridged, United States v. Dickens, 417 F.2d 958 (8th Cir. 1969) (cited with approval in United States v. Mayer, 556 F.2d 245 (5th Cir. 1977)), it is abundantly clear that Petitioner suffered unduly by the restriction imposed upon the cross-examination in this case. Capo's testimony was critical in the State's case against the Petitioner.

Indeed, there is no need to second guess the effect the witness' testimony had on the jury -- Capo was the single witness who placed a possible incriminating statements in the mouth of the Petitioner.* Given the importance of this witness' testimony, it is clear that any question concerning the issue of cross-examination should have been resolved in the Petitioner's favor. See United States v. Summers, 598 F.2d 450, 460 (5th Cir. 1979) (where the witness the accused seeks to examine is a key government witness, "the importance of full cross-examination to disclose possible bias is necessarily increased."); United States v. Barrentine, 591 F.2d 1069, 1081 (5th Cir.), cert. denied, 444 U.S. 990 (1979).

This is not a case where the court denied counsel the right to an extended cross-examination or otherwise prohibited an inquiry that was merely repetitious. Rather, counsel was not permitted to ask any questions relating to the witness' involvement in the drug operation, the very event concerning which the witness was facing federal charges and possible

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* This fact was specifically referred to and repeatedly emphasized by the State. Tr. 1186, 1189, 1194, 1207, 1211, 1214, 1218, 1223, 1224, 1231, 1234, 1235, 1236.

criminal indictment by the State, Thus, counsel was not simply restricted on the scope of cross-examination but was entirely forbidden to ask any questions concerning the very issue which could best serve to test the credibility of the witness. The nature of the restriction thus served to deprive the Petitioner the right to cross-examine a key state witness.

As the court in United States v. Elliott, stated, the "discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." 571 F.2d 880, 908 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1978) (quoting United States v. Bass, 490 F.2d 846, 858 n.12 (5th Cir. 1974)). In Elliott, the court held, inter alia, that the Sixth Amendment is violated when the jury, through a restriction on cross-examination, is not exposed to facts sufficient for it to draw inferences relating to the reliability of the witness.

Here, the jury was entitled to know of the witness' possible exposure to state charges due to his involvement in the drug operation. The jury should have been permitted to judge the demeanor of the witness concerning his participation in the "Sandy Creek" incident. Dutton v. Evans, 400 U.S. 74, 88 (1970). The jury should have been made aware of any possibility that the witness' testimony was designed to shift suspicion away from himself and to the Petitioner. Davis v. Alaska, supra, 415 U.S. at 318 ("counsel [should have been able] to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. . . .").

The ability to test the witness' credibility hinged upon the ability of the defense to question the witness concerning his participation in the drug operation, the outstanding federal charges against him, and the possibility

that state charges would be brought. As in Cromley, supra, the witness had every reason to conform his testimony to the State's case against the Petitioner. Petitioner should have been able to lay the foundation for making these points known to the jury by questioning the witness as to his key role and participation in the Sandy Creek affair.

Petitioner respectfully submits the manner in which the witness was granted immunity, as well as the testimony of the witness' co-conspirators in the drug operation were not sufficient to apprise the jury of the witness' possible motives or biases in testifying. As to the issue of immunity, the Fifth Circuit has stated that the accused must be afforded a sufficient opportunity to cross-examine a witness to enable the accused to make a record from which he could argue why that particular witness might have been biased. United States v. Elliott, supra; United States v. Summers, 598 F.2d 450, 461 (5th Cir. 1979).

Here, the jury was not informed that the grant of immunity was for activity relating to the events that led to charges being brought against the Petitioner. The jury was denied the opportunity to judge for itself whether the witness' participation in the events may have influenced the content of his testimony.

The information which defense counsel sought to elicit was not merely cumulative of the prior testimony of other witnesses. First, the jury was entitled to view the demeanor of the witness upon cross-examination. Moreover, in an Eighth Circuit opinion cited with approval in United States v. Mayer, 556 F.2d 245, 249 (5th Cir. 1977), the court held that when the evidence linking the accused to the offense is scant and the relationship between the cross-examined witness and the other witnesses is close and substantial, a court may not limit the cross-examination on the ground that similar testimony has

already been tendered. United States v. Dickens, 417 F.2d 958, 962-63 (8th Cir. 1969). As the Dickens court explained: "a successful attack on the credibility or veracity of either accomplice could reasonably be expected to detract from the testimony of both." Id. at 963. Here, all the witnesses who testified knew each other. Counsel should have been permitted to cross-examine this witness fully concerning his participation in the Sandy Creek affair. This is especially true given the fact that he was the only witness who was granted immunity by virtue of his testimony given in this trial.

It is elementary that an objection, unless timely made, is deemed waived. Fla. Stat. Ann., Evidence Code, § 90.104(a)(1979); 1 Wigmore, Evidence, § 18, at 790, 835-40 (Tillers rev. 1983). Here, defense counsel commenced a line of inquiry which directly related to the witness' credibility. Even assuming a basis for objection, a point the Petitioner vigorously denies, the State did not voice its objection, nor the grounds therefore, if any. Thus, the State's objection to the line of cross-examination was waived and the objection of witness' counsel should not have been granted. It is inconceivable that an attorney not representing the State may nevertheless serve as the State's surrogate or proxy. And yet, even though trial counsel clearly objected to this macabre procedure, Tr. 1057-58, appellate counsel failed to raise the issue before this Court. The active participation of the witness' attorney, as well as his raising an objection to a permissible line of inquiry which was erroneously sustained by the trial court, denied Petitioner his guaranteed rights of due process and the right to confront his accusers. This is reversible error and Petitioner's conviction should be reversed and the case remanded for a new trial as the only viable way of curing this unconstitutional error.

5. Failure to Effectively Argue that Consideration by the Trial Judge of Evidence Outside the Record at Sentencing Denied Petitioner His Due Process Rights and Rendered Unconstitutional the Imposition of the Death Sentence.

The Petitioner was denied effective assistance of counsel when his then counsel failed to raise and argue that the sentencing judge's findings were based on evidence outside the trial and sentencing record and that such reliance was a per se violation of Petitioner's due process rights requiring vacation of the sentence and remand for a new sentencing hearing.

At the time of Petitioner's appeal, it was well settled that a defendant is "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977). Accordingly, since the only possible source for one of the sentencing judge's most crucial findings was the evidence presented at Goodwin's trial, over which the same judge presided, this error would have required vacation of the sentence. Counsel's failure to argue this issue denied Petitioner effective assistance of counsel.

Many cases, from the United States Supreme Court to Florida decisions, were available to Petitioner's then appellate counsel which clearly established that (1) sentencing proceedings must satisfy due process requirements, (2) reliance by the sentencing authority on evidence external to the trial and sentencing proceedings violates the due process requirements, and (3) such error is reversible without further proof or argument.*

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* The following cases, cited herein, were available to, but not cited by, Petitioner's appellate counsel prior to this Court's decision in Steinhorst v. State, 412 So. 2d 332

Footnote Continued

The sentencing judge's consideration of evidence presented at the trial of Petitioner's co-defendant violated Petitioner's due process rights for the following reasons: (1) Petitioner was denied the opportunity to rebut the evidence or confront the witnesses on the very factors which placed him on death row, (2) the balancing of mitigating and aggravating circumstances was tainted by consideration of evidence outside the record since such evidence constitutes an impermissible non-statutory aggravating circumstance; and (3) meaningful appellate review and uniformity in capital-sentencing procedures were thwarted by the judge's failure to disclose all the considerations which motivated imposition of the death penalty.

The United States Supreme Court, in underscoring the vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion, has consistently reaffirmed that the sentencing process must satisfy the requirements of the Due Process Clause. Gregg v. Georgia, 428 U.S. 153 (1976); Gardner v. Florida, 430 U.S. 349, 358 (1977); Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967).

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* Footnote Continued From Previous Page

(Fla. 1982): Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967); U.S. v. Gonzalez, 661 F.2d 488 (5th Cir. 1981); Katz v. King, 627 F.2d 568 (1st Cir. 1980); U.S. v. Huff, 512 F.2d 66 (5th Cir. 1975); Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980); Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), rev'd on other grounds, 628 F.2d 400 (5th Cir. 1980); Porter v. State, 400 So. 2d 5 (Fla. 1981); Elledge v. State, 346 So. 2d 998 (Fla. 1977). Moreover, appellate counsel's failure to compare the Steinhorst and Goodwin trial transcripts, especially in view of the near identity of the trial court's written findings in both cases and his role in the two trials, is further evidence of appellate counsel's ineffectiveness. See discussion of transcripts, infra.

In Gardner v. Florida, supra, the Supreme Court reversed a sentence of death and remanded for a new sentencing hearing because the sentence was based, in part, on a confidential portion of the presentence investigation report that had not been disclosed to the defendant. The Court reasoned that reliance on such information deprived the petitioner of the right "to challenge the accuracy or materiality of any such information." 430 U.S. at 356. Petitioner's right to confront witnesses and evidence used against him were thus infringed upon.*

Moreover, since "the determination of the court shall be supported by specific written findings of fact based upon the [statutory] circumstances . . . and upon the records of the trial and the sentencing proceedings," Fla. Stat. Ann. § 921.141(3) (Supp.1983) (emphasis added), the finding of an aggravating circumstance based upon evidence external to such records is clearly improper.

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* See U.S. v. Gonzalez, 661 F.2d 488, 495 (5th Cir. 1981) ("The requirements of due process and fundamental fairness require that the defendant be given an opportunity to rebut the factual assumptions relied on by the judge."); Katz v. King, 627 F.2d 568, 576 (1st Cir. 1980)("the sentencing procedure must comport with the requirements of due process."); U.S. v. Huff, 512 F.2d 66, 71 (5th Cir. 1975) (sentence vacated and remanded because defendant denied due process where government submitted ex parte memorandum on sentencing recommendation which went beyond the record without giving defendant opportunity to rebut); Raulerson v. Wainwright, 508 F. Supp. 381, 384 (M.D. Fla. 1980) ("Petitioner must be given the opportunity to rebut and deny any portion of the report. . . . Both the 'appearance and reality of due process' must exist in a sentencing proceeding."); Evans v. Britton, 472 F. Supp. 707, 719 (S.D. Ala. 1979) ("Gardner v. Florida . . . has established the rule that the sentencing process, just like the trial itself, must comport with the fundamental principles of due process.") rev'd on other grounds, 628 F.2d 400 (5th Cir. 1980).; Porter v. State, 400 So. 2d 5 (Fla. 1981)(sentence of death vacated where trial judge relied, in part, on deposition containing facts not proved at trial); Funchess v. State, 367 So. 2d 1007 (Fla. 1979)(remanded for new sentencing hearing where trial judge relied, in part, on confidential portions of presentencing investigation report not disclosed to defendant).

Consideration of aggravating circumstances outside the record taints the weighing process, and, if there were any mitigating circumstances, requires vacation of the sentence and remand. Elledge v. State, 346 So. 2d 998 (Fla. 1977).

Here, the sentencing judge specifically found the mitigating circumstance that the petitioner had no significant prior criminal activity. R. 124. Given the existence of this mitigating circumstance, the court's consideration of an aggravating factor outside the record -- or worse yet confusing the record in Petitioner's case with the record in a co-defendant's case -- seriously distorted the balancing process. It is impossible to tell whether the decision of the trial court would have been the same in the absence of this impermissible factor, and, thus, the Petitioner's death sentence must be reversed and remanded.

We note that, if the aggravating factor not supported by the record in Petitioner's case is removed (heinous, atrocious and cruel), then only one aggravating factor (in the course of the commission of a felony) and one mitigating factor (no significant history of prior criminal activity) remain. As in Menetez v. State, 419 So. 2d 312, 315 (Fla. 1982), this is unlikely to be sufficient to sustain the imposition of a death sentence. This is particularly true where as is the case here, the jury was instructed on the alternative theories of premeditated design and felony murder, and there is no way of knowing on which theory they convicted Petitioner. Indeed in the absence of a finding of actual killing by Petitioner or an intention on his part that death result, a death penalty would actually be unconstitutional and improper. See Enmund v. Florida, 458 U.S. 782 (1982), on remand, 8 Fla. L. Wkly. 417 (Fla. Oct. 20, 1983) (imposing life sentence), mandamus denied, 52 U.S.L.W. 3511 (U.S. January 9, 1984).

By requiring that these written findings be "based . . . upon the records of the trial and the sentencing proceedings," the statute facilitates meaningful and independent appellate review and, in the final analysis, assures that the death penalty will not be imposed in violation of Petitioner's due process rights. See Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. 242 (1976).

The Supreme Court in Gardner v. Florida, 430 U.S. 349 (1977) made clear the constitutional importance of written findings. At issue in Gardner was the legitimacy of a "capital-sentencing procedure which permits a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." Id. at 358.

There the Court noted the dual purpose of full disclosure of all the evidence upon which the trial judge relied in sentencing a defendant to death. First, because it permits "debate between adversaries," it is an effective means of bridling the otherwise unconstitutional discretion of the trial court. Second, full disclosure of the considerations which motivated imposition of the death sentence permits meaningful appellate review and uniformity in capital-sentencing procedures. As the Court explained, "[w]ithout full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." Id., at 361 (footnote omitted).

Indeed, such disclosure is required in order to assure continued compliance with the Supreme Court's ruling in Proffit. "Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, supra, 428 U.S. at 250-253, it is important that

the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." Gardner v. Florida, supra, at 361.

A review of the trial court's sentencing procedure, however, indicates that the defendant's due process rights in this regard were seriously and fundamentally compromised. Although appellate counsel raised this point on appeal, it was buried amidst numerous quotations from the trial record and counsel's presentation omitted a critical fact that argues eloquently for the merits of this issue -- the trial court's consideration of evidence from Goodwin's trial. Defendant should not suffer the consequences of counsel's inadequate presentation.

The entire thrust of former counsel's argument was that the findings were not supported by sufficient evidence. (App. Br. at 33, 36, 37, 38, 39 and 41.) Former counsel never addressed the due process issue involved in the obvious reliance on factors outside the record in Petitioner's case, and in its opinion in Steinhorst v. State, 412 So. 2d 332, 340 (Fla. 1982), this Court never addressed that issue either.

There can be no good reason why the point was never raised. Clearly it would appear that Petitioner's former counsel simply failed to review carefully the Steinhorst trial transcript, and the Goodwin trial transcript over which the same judge presided.

The findings of the trial judge that "the capital felony was especially heinous, atrocious and cruel" not only are without support in the record of Petitioner's trial but there is every reason to believe that the court relied on evidence adduced at the trial of Petitioner's codefendant, David Goodwin. The Court's written findings supporting imposition of the death penalty in Petitioner's case read, in pertinent part, as follows:

> 3) The capital felony was especially heinous, atrocious, and cruel. Florida Statutes, Section 921.141(5)(h). The three victims, bound and gagged were confined in a small van with the body of their companion, Harold Sims. They were not blindfolded. While under armed guard, they underwent the experience of seeing the firearms which would be the instruments of execution, hearing the sobs of each other, seeing the dead body of Sims, and feeling the hope of survival vanish. The first victim suffered the least and the last suffered the most. These were execution-type slayings, requiring cold, brutal, and heartless calculation to murder by firing a shot into the skull of a defenseless human being. Although the evidence does not show whether Charlie Hughes or the defendant actually pulled the trigger, the evidence does show that only these two were with the victims at the time of the murder. Defendant was armed and was in the rear of the van with the victims when it was driven to the place of execution by Hughes. Hughes has never been apprehended.

State v. Steinhorst, Case No. 77-708CF, Findings and Sentence at 2-3. The underscored portion of this finding had absolutely no support in the trial record.* No witness testified seeing the defendant leave the beach road in the van. No one testified as to what the victims were able to see or what they felt. The evidence did not show that the defendant was with the victims at the time of the murder. No one testified to having seen the defendant in the rear of the van. No one testified that the van was driven from the road.

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* The only evidence indicating that the three victims were tied and gagged appeared in the hearsay testimony of Ray Fredricks. And, that testimony indicated, contrary to the trial court's finding, that the victims were blindfolded as well. Witness Fredricks stated: "[Defendant ordered Goodwin] to hold the gun on the three people while Steinhorst tied, gagged, and blindfolded the three people." Tr. 1163 (emphasis added). But Fredricks was not an eyewitness to the incident, but was simply relating what he said David Goodwin told him. The sentencing report, the only other statutorily permissible basis for determining sentencing other than the trial record, stated, again in relevant part, "The three people were kept in the gray van and tied up. Steinhorst told him [Bobbie Joe Vines] that Charlie Hughes was going to help him with the body and the other three people. Steinhorst told him that the three people would be allowed to live and would be tied to trees." R.98 (emphasis added).

Moreover, Bobbie Joe Vines testified that when he moved Sims' pick-up truck, Sims' body was still inside that truck, and not the van (Tr. at 685); finally, the only mention in hundreds of pages of testimony indicating the emotion of the victims was that of Vines, who testified that "one of the girls was crying [when he approached the vehicle] and the one on by the right [sic] was crying and the boy had his arm around the girl, you know, calming her down." Tr. 639, 1112. Obviously, at that point the victims were not tied or gagged. There was some general testimony about rope, and David Goodwin trying to obtain rope; but much rope was being used that tragic night to secure the various small boats hauling the marijuana.

Dr. Ketchum, the medical examiner, gave no testimony regarding ropes being recovered on or with the bodies of the victims. It is illogical to believe that whoever carried the victims' bodies to the sinkhole and attached wires and cement blocks to them also stopped to remove ropes and gags.

It was the testimony introduced at Goodwin's trial which provided support for the improper Steinhorst findings. A comparison of the court's findings in the two cases reveals that, despite the different testimony given and facts adduced, the two findings are virtually identical on the relevant points. In the Goodwin trial, the court found in relevant part:

> Three - The capital felony was especially heinous, atrocious and cruel. The three victims, bound and gagged, were confined in a small van with the body of their companion, Harold Sims. They were not blindfolded. While under armed guard, they underwent the experience of seeing the firearms which would be the instruments of execution, hearing the sobs of each other, seeing the dead body of their friend Sims, and feeling the hope of survival vanish. The victims, known to the defendant [Goodwin], were prepared for execution by the defendant in a cold, brutal and heartless manner. Assuming that either co-defendant Steinhorst, or co-defendant Hughes was the triggerman, the execution-type slaughter could not have been accomplished without the assistance of defendant, Goodwin. The success of the marijuana operation depended upon the slaughter of the victims and the disposal of the bodies.

Goodwin Tr. at 1807-08 (emphasis added). Cf. Steinhorst Findings, quoted supra.

The trial transcript of the Goodwin trial further provides the evidentiary basis upon which the identical findings at the two trials were based. The prosecutor had to show that the victims were confined and that Goodwin aided in that confinement in order to make his case. The record reveals no less than thirteen instances where evidence regarding the procurement of rope was introduced. Goodwin Tr. at 898-99, 900-01, 921, 922, 970, 971, 989, 1069, 1200-01, 1204, 1271, 1272-73, 1274-75. Contrary to the findings at both trials, there was direct testimony that only one of the girls was crying and that she was quickly comforted by Hood who put his arm around her. Steinhorst Tr. at 639, 1111, 1112; Goodwin Tr. at 746. None of those present at the van that night testified to hearing any other sobs or crying and Goodwin himself testified that he never heard anyone cry or beg. Goodwin Tr. at 1276, 1285, 1294, 1299. Finally, unlike the testimony on point at Petitioner's trial, all of the witnesses at Goodwin's trial testified that the victims were bound and gagged and none of the witnesses testified that the victims were blindfolded, Goodwin Tr. at 739, 1152, 1207, 1294, 1299, and Goodwin affirmatively testified that they were not blindfolded, id. at 1313.

The astonishing similarities between the trial judge's findings in the two cases, in the face of the discrepencies in the testimony, is more than mere coincidence. It is clear evidence that his findings in the Steinhorst case were tainted by his recollection of the testimony in the Goodwin case.* It

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* The Steinhorst Findings were issued on August 8, 1978 while the Goodwin testimony concluded on May 26, 1978.

cannot be said that this taint was harmless error because the Steinhorst findings were not supported by the Steinhorst record.* As this Court stated in Elledge v. State, 346 So. 2d at 1003:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial . . . .

Moreover, it appears that the trial court was highly influenced by this particular aggravating factor. Despite finding that there was a mitigating factor, Petitioner's lack of any significant criminal history, it said "the court further finds that there are no mitigating circumstances which outweigh the aggravating circumstances. These were pitiless crimes which were unnecessarily torturous to the victims," State v. Steinhorst, Findings and Sentence at 3 (emphasis added).

The findings supporting the imposition of the death sentence are unsupported by the Steinhorst record. Clearly, such reliance as is demonstrated above is in violation of Fla. Stat. Ann. §921.141(3)(Supp. 1983) and denied Petitioner the opportunity to rebut such testimony as mandated by Gardner v. Florida, supra. Counsel's failure to raise these issues on appeal denied Petitioner effective assistance of counsel and

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* On appeal, this Court did not reach the due process issue, but merely stated that the judge's findings were supported by the record and, in particular, that "[t]he finding of heinousness based on infliction of mental anguish is ... proper." Steinhorst v. State, supra, at 340. Since it is clear that the trial court's findings were based, at least in substantial part, on evidence outside the record, this Court's prior conclusion as to the propriety of the finding of heinousness should not now bar the Court from remanding the case for a new sentencing hearing. The Court may not simply conclude that despite consideration of impermissible evidence, the sentence of death was properly imposed. To do so would violate the prescribed procedures for constitutional imposition of the death penalty.

requires vacation of the sentence of death and a remand for a new sentencing hearing.

CONCLUSION

Obviously, this Court cannot search every record on appeal in every capital case for error. It is the responsibility of effective appellate counsel to present all issues of arguable merit to the appellate court. In this case, counsel failed to fulfill that responsibility. Where the points omitted or improperly and inadequately presented are of indisputable merit -- such as those set forth herein -- and where the difference is between life and death, a case cries out for judicial intervention.

What has occurred in Petitioner's cases was, we submit, fundamental error at every stage of the proceeding. First, the failure to have the trial moved from Bay County because of the adverse pre-trial publicity. Manning v. State, supra. Publicity fueled, in part, by information leaked to the press by the State Attorney in violation of a court order.

Second, prospective jurors were excluded from the jury in clear violation of the rule set forth in the Supreme Court's decision in Witherspoon. Thus, Petitioner was tried before a jury not only pre-conditioned by the adverse pretrial publicity but which was not representative of the community and had a substantial conviction prone bias.

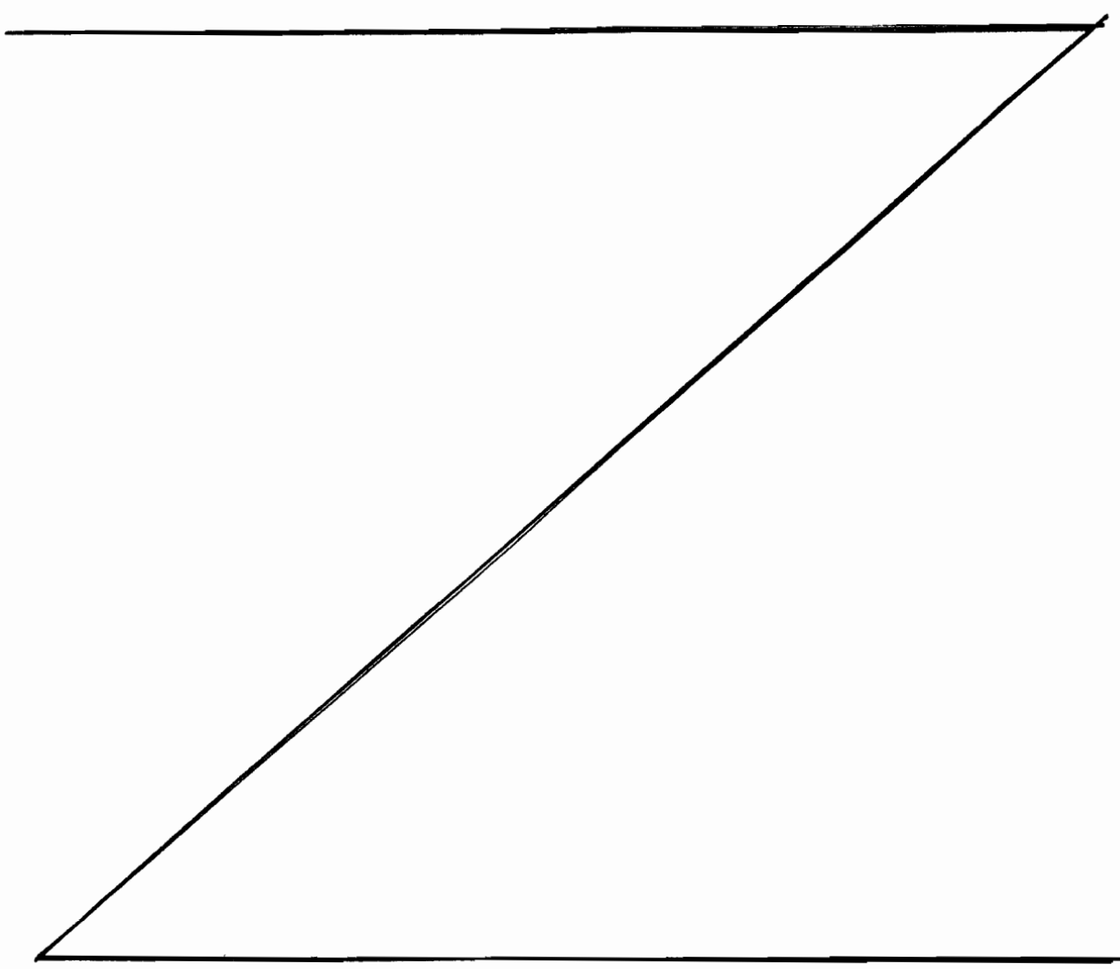
Third, no less than 13 State witnesses admittedly violated the Court's sequestration order some with the aid of the State; and yet were permitted to testify -- without even a jury instruction with respect to the fact that violation of the Court's sequestration order might effect the credibility of their testimony.

Fourth, Petitioner's cross-examination of a key immunized State witness was erroneously limited on the objection

of the witness' counsel -- not the State. Thus, defendant was denied his fundamental right of confrontation in violation of Davis v. Alaska, supra; and Alford v. United States, supra.

Fifth, the trial court in imposing the death sentence obviously not only considered the record of a co-defendant's trial but confused it with that of Petitioner's trial in that the Court's critical aggravating circumstance of henious, atrocious and cruel is not supported by the record in Petitioner's case. Thus, Petitioner's right to due process was denied him in violation of Gardner v. Florida, supra; and Elledge v. State, supra.

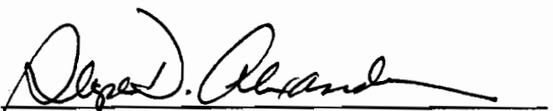
Finally, the failure of appellate counsel to properly identify and argue these errors in Petitioner's direct appeal deprived him of a meaningful direct appeal in contravention of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.



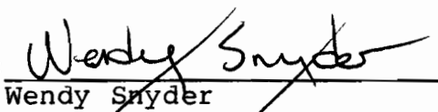
Petitioner therefore requests this Court to issue its writ of habeas corpus, and to direct that Petitioner receive a new trial; alternatively, that this Court allow full briefing of the issues presented herein, and grant Petitioner belated appellate review from his conviction and sentence.

Respectfully submitted,

Stephen D. Alexander
Wendy Snyder
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A Partnership Which Includes
Professional Corporations)
One New York Plaza
New York, New York 10004
(212) 820-8000

BY: 
Stephen D. Alexander
A Member of the Firm

Dated: January __, 1984

BY: 
Wendy Snyder
A Member of the Florida Bar

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEPHEN D. ALEXANDER, being duly sworn, deposes and says that the facts in the foregoing petition for a writ of habeas corpus are true and correct to the best of his knowledge and belief.

STEPHEN D. ALEXANDER

Sworn to before me this
17th day of January, 1984

Notary Public
JOHN PLOTNICK
Notary Public, State of New York
No. 31-01PL4730133
Qualified in New York County
Commission Expires March 30, 1984

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was personally delivered to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, this 18th day of January 1984.

Stephen D. Alexander