IN THE SUPREME COURT OF FLORIDA

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| WALTER GALE STEINHORST, Petitioner, vs. LOUIE L. WAINWRIGHT, Respondent. | : | CASE NO. 64,755 |



REPLY BRIEF OF PETITIONER
WALTER GALE STEINHORST

Comes now Petitioner Walter Gale Steinhorst by his undersigned counsel, and in reply to the Response and Renewed Motion to Dismiss filed by the State of Florida with respect to the Petition for Writ of Habeas Corpus states as follows:

Preliminary Statement

The Petition herein clearly demonstrates that Petitioner was denied the effective assistance of appellate counsel under the standards set forth in Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981) with respect to five issues:

> (i) The trial court improperly excluded, under Witherspoon, two jurors who declined to state unequivocally that they could not vote for the death penalty. In his one-half page argument, appellate counsel argued only that this court should reconsider the issue of jury representativeness, and completely omitted any reference to the particular two jurors whose exclusion was improper under the strictest interpretation of Witherspoon and its progeny, including the recent Eleventh Circuit decision in McCorquodale v. Balkcom.
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> (ii) The State was permitted to introduce, over objection, numerous witnesses who had overheard prior testimony while in the State's custody in violation of the court's sequestration order without inquiring, as required by Dumas v. State, whether their testimony would be affected, or whether the State had knowledge of the violation. Among other omissions, appellate counsel (a) failed to note trial counsel's preservation of the issue as to each of the witnesses -- not merely the one witness questioned -- a fact which led this Court to conclude, as it would not have

had to otherwise, that the issue was not before it; and (b) failed to argue any of the controlling federal authority with respect to the due process issue.

(iii) Defense counsel's cross-examination of a key immunized State witness on credibility issues was improperly restricted on the objection not by the State, but by the witness' counsel in clear violation of defendant's Sixth Amendment right to confrontation. Fatally, appellate counsel argued a ground not preserved by trial counsel and failed to argue that, under Fifth Circuit law (as to which there was no mention) defense counsel's questions were well within the permissible parameters insofar as they directly bore on the witness' credibility. Moreover, appellate counsel failed to note the impermissible objection of the witness' counsel over the State's waiver.

(iv) The trial court, which also presided over the trial of a co-defendant, imposed the death sentence on the basis of factual findings of aggravating circumstances derived not from Petitioner's trial, but from that of his co-defendant. Among other deficiencies, appellate counsel (a) failed to draw the Court's attention to the source of those findings; and (b) failed to argue, under applicable federal law, that the reference to sources other than the record violated defendant's due process rights.

(v) Against a backdrop of prejudicial publicity nearly identical to that in Manning v. State, including prosecutorial statements (indeed, press conferences) splashed constantly in newspapers and over television for months preceding the trial, no change of venue was sought or obtained, a fundamental error which appellate counsel, who was also trial counsel, failed to argue on appeal.

Beyond peradventure, Petitioner has established a "substantial deficiency and ... a prima facie showing of prejudice" under Knight, supra at 1001. Under the fourth requirement set forth in Knight, the State must establish, "beyond a reasonable doubt," that Petitioner suffered no actual prejudice as a result of the errors complained of by Petitioner. This the State has failed to do. Far from meeting its burden under Knight, the State's Response fails to show why the relief here-

in requested -- a belated effective appeal or reversal of the underlying conviction -- should not be granted.*

Facts

Petitioner refers to and incorporates by reference Point II of the Petition which sets forth the facts upon which Petitioner relies. Petition at 3-10. Because the State's characterization of the facts is irrelevant to the issues herein, Petitioner will not address the State's various deficiencies. It is sufficient to note only that with respect to the facts relied upon by Petitioner with respect to the particular issues before the Court, the State voices no disagreement.

POINT I: PETITIONER'S APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE STANDARD SET FORTH IN KNIGHT V. STATE

As detailed in the Petition, Petitioner has satisfied the three-prong test set forth in Knight v. State necessary to establish a prima facie case for the ineffectiveness of his appellate counsel. Rather than acknowledge this and attempt to rebut this showing as required by Knight by demonstrating beyond a reasonable doubt that no prejudice in fact occurred, the State's discussion of the issue of appellate ineffectiveness cites cases which are both inapposite and inapplicable.

For example, in Engle v. Issac, 456 U.S. 107 (1982) -- which the State cites as leading authority on the issue of appellate ineffectiveness -- the Court held merely that the constitutionality of jury instructions may not be challenged in

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* With respect to the State's Renewed Motion to Dismiss, Petitioner refers to and incorporates by reference his previous Response in Opposition to Respondent's Motion to Dismiss, wherein Petitioner argued that prior decisions of this Court and principles of judicial economy dictate that this Court's consideration of the merits of the instant Petition not be deferred.

a federal habeas corpus petition where no objection had been contemporaneously made on the ground, inter alia, that the "[f]ederal habeas challenges to state convictions . . . entail greater finality problems and special comity concerns," Engle, 456 U.S. at 134. No allegation of ineffective counsel was made in Engle.

Similarly, Jones v. Barnes, ____ U.S. ____, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), another case involving a federal habeas petition, has no bearing herein. Contrary to the State's assertion, the Court did not hold that "an appointed lawyer does not have to raise all conceivable constitutional claims on appeal," Response at 3, but that appellate counsel had no constitutional duty to raise every "colorable" claim suggested by his client. Jones, 77 L.Ed.2d at 995. There was no extended discussion of the unraised claims themselves (none of which were the same as the errors alleged herein). Moreover, there is a substantial difference between a dissatisfied client's view of what constitutes ineffectiveness of counsel with respect to "colorable" issues and that standard to which appellate counsel is held under Knight with respect to constitutional issues the consideration of which, as is the case here, warrant a reversal of conviction.

Other authority cited by the State is likewise unavailing. For example, the fact that some of the claims rejected in Armstrong v. State, 429 So. 2d 287 (Fla.), cert. denied, ___ U.S. ____, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983) are similar to the specific acts and omissions alleged herein is meaningless without a substantive comparison on the merits. Thus, although the petitioner in Armstrong supported his claim that his appellate counsel was ineffective by alleging the failure to appeal denial of a motion for change of venue, there is no discussion in Armstrong of the extent or inflammatory nature of the prejudicial pretrial publicity. Nor did the discriminatory method of jury selection in Armstrong involve Witherspoon issues as

herein.* The same is true of the allegations in Armstrong with respect to supplemental authority.

Lastly, the State's citation to Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984) is inapposite. Alvord noted that the failure to appeal errors which later gain judicial recognition does not constitute unconstitutional aid, 725 F.2d at 1291, but did not base its finding that appellate counsel had been effective on that ground. Rather, the Court found that there were no errors made by appellate counsel. Moreover, Petitioner does not here allege that appellate counsel failed to argue issues which later gained recognition; on the contrary, every point raised herein by Petitioner was well established as of the time of Petitioner's direct appeal.

In sum, respondent's attempt to blur the substance of petitioner's argument by citation to irrelevant cases and inapposite dicta does not even purport to meet the state's burden under Knight.

## POINT II: AS TO EACH OF THE ISSUES RAISED BY PETITIONER, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER KNIGHT V. STATE

Petitioner argues that with respect to each issue raised, this Court would have held in Petitioner's favor had appellate counsel been effective in presenting the correct argument.

### A. Prejudicial Publicity Prevented a Fair Trial

In the Petition, the extensive prejudicial pretrial publicity surrounding the events out of which arose the charges

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* In Armstrong, Petitioner asserted that his appellate counsel was ineffective in failing to argue that the absence of women and blacks on the jury which convicted him rendered Petitioner's trial unconstitutional. Armstrong, supra at 288. A far different case is presented by Petitioner herein, whose appellate counsel failed to refer to the two jurors who did not state unequivocally that they could not impose the death sentence and whose exclusion was clearly erroneous.

against Petitioner was amply demonstrated. See Petition, at 13-27 and accompanying Exhibits A, C, D and E. The State, however, deliberately misconstrues the Petition and alleges that the record of the jurors' statements on voir dire shows no bias. Such a contention ignores the rule in Murphy v. Florida, 421 U.S. 794 (1975) that "the juror's assurances that he is equal to this task [of rendering an impartial verdict] cannot be dispositive of the accused's rights . . . ." 421 U.S. at 800. While the court in Murphy ultimately found that the totality of the circumstances in that case failed to indicate inherent prejudice in the trial setting or actual prejudice from the jury selection process, the totality of the circumstances surrounding Steinhorst's trial demonstrates the presence of the invidious kind of pretrial publicity that deprived him of his fundamental rights to a fair trial. As argued below, the failure to obtain a change of venue constituted fundamental error which appellate counsel could and should have argued.

The import of the fundamental error doctrine is plain: there are certain errors which are so egregious, or so affect the foundation of the case or the merits of the cause of action, that they result in a denial of procedural due process, and can be considered on appellate review, notwithstanding the failure of trial counsel properly to preserve the record for appeal. See Ray v. State. 403 So. 2d 956, 960 (Fla. 1981). The doctrine can be applied where the interests of justice require it. Id.

Denial of the right to a fair trial is exactly the type of error which is fundamental and which, in any event, can be reviewed by this Court under its general power. "Our state and federal constitutions guarantee to criminal defendants a right to a fair trial by an impartial jury." Manning v. State, 378 So. 2d 274, 277 (Fla. 1980). The State cites State v. Smith, 240 So. 2d 807 (Fla. 1970), for the proposition that not

every constitutional issue amounted to fundamental error which could be considered on appeal without objection in the lower court, Response at 10. But in Smith this Court stated that "where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged," application of the fundamental error rule is warranted. 240 So. 2d at 810 (quoting Gibson v. State, 194 So. 2d 19 (Fla. 2d DCA 1967).*

Thus, Stone v. State, 378 So. 2d 765, 768 (Fla. 1979), cert. denied, 449 U.S. 986 (1980) wherein this Court held that trial counsel's failure to move for change of venue precluded appellate counsel from raising this issue on appeal is not dispositive. In Stone, the application of the fundamental error doctrine was not raised. Moreover, in contrast to the evidence herein, no evidence of prejudicial publicity was presented.

Contrary to the State's assertion that Petitioner bases this claim only on the quantum of publicity, it is clear that not only was the barrage of pretrial publicity emanating from the local press and radio and television massive and sustained with regard to details of the Sandy Creek smuggling incident and the sinkhole murders, it was precisely the kind of invidious and inflammatory coverage the Court warned against in Murphy. 421 U.S. at 793-94 n.4. The extensive media coverage emphasized the youth and gender of the local victims, and the fact that the accused was from New York and presented an inflammatory view of the accused's history and lifestyle. The inevitable result was that 100% of the venire were aware of both the crime and the accused.

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* The State's suggestion that the holding of harmless error in Smith -- where a defendant charged with conspiracy to commit first degree murder was convicted of conspiracy to commit assault and battery -- has any application to Petitioner's deprivation of a fair trial resulting in a sentence of death, is offensive.

In another case in which the record indicated the taint of media coverage on all the prospective jurors, this Court found that the trial judge erred in not granting a motion for change of venue and remanded for a new trial. Manning v. State, supra. The similarities between Manning and the instant case are described in the Petition at pps. 21-27.

Stewart v. State, 420 So. 2d 862 (Fla. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983), also cited by the State, actually suggests Petitioner's position in its rule that "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." 420 So. 2d at 863. In this case, the prejudicial publicity so tainted the jury that despite a total lack of evidence, a conviction resulted. In a case where the State had presented "quite strong" evidence against the accused, this Court held that "it is possible that another jury uninfluenced by the passion existing in [the place of venue] at the time of this trial might have reached a different verdict." Manning, 378 So. 2d at 278. "[W]hen a defendant's life is at stake, it is not requiring too much that the accused be tried in an atmosphere undisturbed by so huge a wave of public passion." Id. (citing Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) citing Irvin v. Dowd, 366 U.S. 717, 728 (1961)).

At issue herein is not only the trial counsel's failure to move for a venue change. In the face of the juror taint documented herein, the trial judge himself had a constitutional duty to order a venue change sua sponte. The lack of provision in the state's statutes and rules for the court to change venue on its own motion, for which proposition the State cites dicta in Stone, 378 So. 2d at 768 and North v. State, 65 So. 2d 77, 80 (Fla. 1953) (en banc), aff'd, 346 U.S. 932 (1954), is not determinative. In Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976), the Supreme Court noted in a slightly different context that "state laws restricting venue must on occasion yield to

the constitutional requirement that the State afford a fair trial." 427 U.S. at 563 n.7.

Additionally, this Court has special powers of review in appeals from sentences of death. See § 921.141(4), Fla. Stat. (Supp. 1981); Fla. R. App. P. 9.140(f); LeDuc v. State, 365 So. 2d 149, 150 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963); Henry v. Wainwright, supra, 686 F.2d at 314 (analyzing the Florida law). That special scope of review enables this Court to excuse procedural defaults. Id. As this Court held in Burnette, reversing a death sentence after an improper supplementary jury charge had not been objected at trial:

> The rules of this Court and the statutes of this State provide that in causes of this nature this Court may in its discretion, if it deems the interests of justice to so require, review anything said or done in the cause which appears in the appeal record, including instructions to the jury, whether or not exception was taken thereto at the time. While this rule and the statute have not been applied in all instances it has been closely and strictly adhered to in cases where the supreme penalty has been imposed by the judgment under review.

157 So. 2d at 67 (emphasis added; footnotes omitted).

Similarly, in LeDuc, this Court held:

> Even though LeDuc's counsel has not challenged the legal sufficiency of LeDuc's convictions and sentences on any basis, we are obligated by law and rule of this Court to ascertain whether they are proper.

365 So. 2d at 150 (footnote omitted).

The State's argument that trial counsel made a "strategic decision" not to move to change venue is unavailing. An examination of the surrounding facts shows that there was simply no conceivable reason not to have sought a change of venue with respect to Petitioner's trial, particularly given the age and gender of the victims, who were local residents of the predominantly rural area; the fact that Petitioner was not from

the area; the fact that the prosecutor was running for re-election locally and was thus likely to (and did in fact) exploit the publicity value of the case; and finally, the extensive publicity which saturated the community for months in advance of trial. Indeed, the State itself has not suggested any reason why counsel would have come to such a "stategic" decision.*

In its response, the State ignored the vast body of federal law in support of Petitioner's position. See Petition at 20-27; Parker v. North Carolina, 397 U.S. 790, 797-98 (1970); Davis v. Wainwright 547 F.2d 261 (5th Cir. 1977). Instead, the State attacks Petitioner's reliance on Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981) with an argument that is entirely misplaced. Response at 13-14. The State suggests that the court in Mayola denied relief on the grounds the publicity had been insufficiently extensive. In fact, the grounds for denying habeas in Mayola were laches (petitioner waited 11 years before seeking review of denial of his motion for a continuance) and the failure to set out statistical data such as newspaper circulation figures and lack of the transcript of the voir dire. Thus, despite the Court's finding of prejudicial publicity, the the lack of proof of the pervasiveness or saturation level of the publicity precluded granting the writ.

Here, in contradistinction to Mayola, Petitioner is not handicapped by the absence of such proof. See Petition at 13-27 and Exhibits A, C, D, and E. The evidence submitted showed inflammatory coverage by a local newspaper circulated to almost everyone in the county. The transcript of the voir dire indicated that all venire members were reached by the barrage

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* In any event, the State offers no support for the proposition that even if it were found to be a strategic decision it could not also constitute fundamental error.

of publicity emanating from the newspapers, radio and television. Such publicity was not only extensive, but inflammatory and highly prejudicial to the local community from which the jury was selected.

Measured against the essential constitutional guarantee to all criminal defendants of a fair trial, the failure of trial counsel to move for a change of venue, and the failure of the same counsel to raise this issue on appeal simply cannot preclude Petitioner's right to be tried by an impartial jury.

B. Improper Exclusion of Jurors under Witherspoon

The State's Response to Petitioner's presentation of the Witherspoon* issues ignored by appellate counsel is simply incorrect as a matter of law. First, with respect to the improper exclusion of jurors Bert Kolmetz and Eunice Berryhill, (whose exclusion drew no reference by appellate counsel), the State's leading citation, McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir. 1983) (en banc) does not provide support for the exclusions here; on the contrary, McCorquodale reinforces Petitioner's assertion that both jurors were improperly excluded.** Second, contrary to the State's assertion otherwise, the issue of the death-qualified jury having been prosecution-prone was preserved by trial counsel's "continuing objection for the record for the systematic exclusion of people opposed to the death penalty" which objection properly preserved all Witherspoon issues. Thus appellate counsel could have but did not argue this issue. Third, appellate counsel's

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

** Petitioner notes that the State seeks to impose a double standard: on one hand the State would preclude Petitioner from citing to post-appeal decisions on the ground that appellate counsel need not have been "visionary"; on the other hand, the State cites recent decisions to argue that appellate counsel was effective. Petitioner submits that where a man's life is at stake, the Court must consider all relevant legal authority in determining the validity of the conviction and sentence. See Burnette v. State, supra at 67; LeDuc v. State, supra at 150.

one-half page treatment of Witherspoon on the sole issue of representativeness is wholly ineffective under Knight standards; while the State characterizes Petitioner's argument as amounting to "more is better," Response at 21, Petitioner urges only that under Knight, appellate counsel must at least attempt to frame the issue in a competent fashion. This he failed to do.

In McCorquodale, the Eleventh Circuit affirmed the district court's denial of a Petition which raised Witherspoon issues only after an extensive review of the juror's responses, and the questions posed, which revealed, with respect to the first prong of the Witherspoon test,* that the two witnesses who were excluded were unequivocal in their statements that they would automatically vote against the death penalty irrespective of the evidence. In the instant case, jurors Kolmetz and Berryhill were excluded under the second prong of Witherspoon, i.e. that their attitudes toward the death penalty would prevent them from making an impartial decision as to Petitioner's guilt. Because Petitioner believes that McCorquodale dictates a reversal of Petitioner's conviction herein, a detailed review of the questions and responses therein is required.

Initially, the prosecutor in McCorquodale collectively asked a series of three questions to the sixty jurors comprising the jury pool. He first asked:

> Are you conscientiously opposed to capital punishment? If you're conscientiously opposed to capital punishment, if you will, please stand. If you are not conscientiously opposed to capital punishment, remain seated.

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* Under Witherspoon, the Court identified two permissible bases for the exclusion of venirepersons: (1) where the venireperson makes it unmistakenly clear that he or she would automatically vote against the imposition of capital punishment without regard to any evidence; or (2) where the venireperson makes it unmistakenly clear that his or her attitude toward the death penalty would prevent him or her from making an impartial decision as to the defendant's guilt. Witherspoon, supra, at 522, n.21.

To the nineteen jurors who stood up in response to the first question, the prosecutor then addressed two additional questions:

> The first question is this. Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?
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> The [second] question is this. Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment? If you would, would you please step forward.

McCorquodale, supra at 1496. The Eleventh Circuit held these questions were sufficient to permit the exclusion of those jurors who answered affirmatively. Id. at 1499.

After the group voir dire, the prosecutor conducted individual questioning of the remaining jurors, which resulted in two jurors -- Woodlief and Kidd -- being excused for cause. The excusal of Woodlief was based on the following exchange:

> Q: Do you really believe in capital punishment?
>
> A: No.
>
> Q: You don't?
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> A: No, I don't. It's different being faced, you know, discussing capital punishment and sending someone to the electric chair.
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> THE COURT: You didn't understand the question that was posed to you a while ago?
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> THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.
>
> THE COURT: All right, Mr. Ridley. That's grounds for excusal for cause. You may be excused.

Id. at 1500. The Eleventh Circuit found, based upon the "'totality of the circumstances,'" that Woodlief had understood the questions asked, reflected upon them, and concluded that she could not impose the death penalty. Id. (Citation omitted).

The responses of juror Woodlief are manifestly of a different character than those of juror Kolmetz in the instant case. (The responses of juror Kolmetz are set forth in full in

Petition at p.33.) In response to the questions of whether the fact that Petitioner could go to the electric chair could "weigh" on his decision as to guilt,* Kolmetz stated "Yes, sir, it might, it might." Tr. 538.** This response is far short of the unequivocal declaration required by the Eleventh Circuit in McCorquodale. The State's attempts to equate Woodlief's statement that "I don't think I could [vote for the death penalty], I really don't," with Kolmetz's statement that his death penalty views "might" weigh in his deliberations. Such equation is specious.

Moreover, the question posed to juror Kolmetz by the prosecutor, Mr. Jones, was itself impermissibly ambiguous under McCorquodale. Id. at 2496, n.4.

> "Questions that have been held inadequate for gauging the unequivocability of a juror's response are those that have inquired only as to ... whether the death penalty might 'affect' his deliberations, without making the ultimate inquiry of whether the juror's views are so strong that they would preclude him from following his oath. [citations omitted]."

Thus, the trial court's question posed to juror Kolmetz herein, to wit: whether the fact that a guilty verdict "might result" in the death penalty would "affect" Kolmetz in any way in determining the outcome of the case (to which Kolmetz responded merely that "My emotions might get involved"), Petition at 33; Tr. 539, was likewise impermissibly ambiguous under McCorquodale. The voir dire of juror Berryhill was similarly insufficient to warrant exclusion. See Petition at 34-40.

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* 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.

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

It is abundantly clear that appellate counsel's failure ever to refer to the two jurors' improper Witherspoon exclusion manifested gross ineffectiveness under Knight given that all of the decisions relied upon by McCorquodale (e.g. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd, 626 F.2d 396 (5th Cir. 1980) (en banc); cases cited in Petition at 31-40) were well established as of the time of the instant appeal. The State's Response ignores the federal authority cited by Petitioner on this issue.

With respect to Petitioner's second argument, i.e. that appellate counsel failed to argue the prosecution-prone nature of a death-qualified jury, the State's argument that the issue was not properly preserved is simply wrong. Trial counsel made a "continuing objection for the record for the systematic exclusion of people opposed to the death penalty," Tr. 539, which objection preserved all Witherspoon-related issues. As to this issue, Petitioner incorporates the discussion contained in the original Petition at pps. 40-48. With respect to the issue of representativeness -- the only issue raised by appellate counsel -- it is sufficient to note that appellate counsel devoted only one half page to his argument, failing even to attempt to fashion a comprehensive or persuasive appeal on this ground.

In sum, the State's reliance on McCorquodale, supra, is obviously misplaced; that decision, and those which precede it establish beyond any doubt that had appellate counsel argued the improper exclusion of jurors Kolmetz and Berryhill, this Court would have been constrained to reverse Petitioner's conviction (or remand for a new trial) on Witherspoon grounds alone.

C. Violation of Sequestration Order

Had appellate counsel correctly argued the requirements of Dumas v. State, 350 So. 2d 464 (Fla. 1977), this Court would have reversed that appellant's conviction on the ground

that numerous State witnesses who had violated the trial court's sequestration order while in the State's custody were improperly permitted to testify. But for the ineffectiveness of that argument, this Court could have held (a) that the State failed to meet its burden of proof that the violation had occurred without the knowledge or connivance of the State; (b) an inquiry should have been conducted to determine whether the witness' testimony was substantially affected by what they heard; and (c) the testimony of at least one witness demonstrated he had been influenced. The State's Response herein fails to rebut Petitioner's argument.

At Petitioner's trial it was discovered that several State witnesses had overheard the testimony of three other witnesses while in the State's custody, e.g., while listening to the radio in the State Attorney's Office. Petition 57-58. The trial court questioned only one witness, Lloyd Woods, as to possible influence; Woods indicated that he was "sure" his testimony could have been influenced. Id. Trial counsel requested that other witnesses be called in and that the court inquire whether they, too, had violated the order. Tr. 830. Other witnesses were brought in and questioned only as to the circumstances under which they had heard prior testimony. Trial counsel moved to exclude Woods' testimony, which motion was denied. Tr. at 835. Trial counsel then moved for a mistrial, which motion was also denied. Id.

Petitioner's main brief establishes no less than four material deficiencies or omissions in appellate counsel's presentation of this one error alone. Petition at 52-66. Most glaring was appellate counsel's failure to apprise this Court of the fact that (a) the issue as to the inadequacy of the court's inquiry was properly preserved as to all witnesses, not merely Woods; and (b) Woods clearly admitted that his testimony had been influenced in an exchange to which appellate counsel failed even to refer, let alone quote.

The ineffectiveness of appellate counsel's argument is underscored by this Court's summary of counsel's position: "appellant argues that the court, on its own motion, should have inquired into the effect of and state complicity in the violations," Steinhorst, 412 So. 2d 332, 336. Through a grossly negligent and fatal error, appellate counsel failed to apprise the Court that a request for such an inquiry had in fact been made by trial counsel. Tr. at 830.* Thus, appellate counsel's ineffectiveness in apprising the Court of the underlying request which properly preserved the issue of the necessity for an adequate Dumas hearing as to each of the witnesses -- not merely Woods -- caused this Court to reach the unnecessary conclusion that the issue was not properly before it.

More importantly, appellate counsel failed to argue that, under Dumas, the proponent of a witness who has violated a sequestration order has the burden of proving lack of knowledge of, or connivance in, the violation. See Petition at 54-58, 62-65. Thus, as appellate counsel failed to argue, the trial court should have required the State to meet that burden prior to admitting the witness' testimony irrespective of whether a motion for such inquiry was made by defense counsel. This Court has held that where a defense witness is sought to be introduced "it [is] error to exclude the witness without conducting an inquiry 'to determine whether the witness acted [in violation of a sequestration order] with the knowledge, consent, procurement or connivance of the [proponent] . . . .'" Steinhorst v. State, 412 So. 2d 332, 336 quoting Dumas. Had appellate counsel argued the obvious corollary of Dumas, i.e., that with respect to a State witness, the State

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* Petitioner acknowledges that trial counsel could and should have made a more compelling record below; however, since a request for an inquiry was made, the issue was at least preserved.

has the burden of demonstrating lack of involvement in the violation before the witness may be permitted to testify, the Court would have concluded that the trial judge erred in admitting the testimony of numerous witnesses without any questioning. A defendant's right under the Sixth Amendment to an untainted trial free of prejudice far outweighs the State's "prerogative" to present evidence of defendant's criminal conduct. See, e.g. 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); Petition at 53-57.

The State's suggestion that this Court "disagreed" ignores the plain fact that the issue was never argued by appellate counsel. Nowhere did appellate counsel cite a single case wherein a State witness was excluded. See, e.g., Ali v. State, 352 So. 2d 546 (Fla. 3d DCA 1977). Nor did appellate counsel make reference to the myriad of decisions which hold that judicial discretion may only be exercised following an appropriate inquiry. See, e.g., Richardson v. State, 248 So. 2d 771, 776 (Fla. 1971); cases cited in Petition at pps. 57-63.*

Most egregiously, nowhere in appellate counsel's brief was this Court apprised of the fact that Woods himself, the only witness to be questioned on the issue of possible influence, was permitted to testify even though he admitted to having been influenced by what he overheard. The following colloquy was never cited by appellate counsel:

> Mr. Davis: Mr. Woods, could your testimony have been influenced?
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> Woods: I'm sure I could have, yes sir.

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* Here again, the State's Response does not address the federal authority cited by Petitioner. See, e.g., Geders v. United States, 425 U.S. 80, 87 (1976); Braswell v. Wainwright, 463 F.2d 1148, 1159 (5th Cir. 1972).

Tr. 834. It was clearly error for the trial court to permit Woods to testify over trial counsel's objection. In the course of his brief, perfunctory and wholly ineffective argument with respect to the witnesses other than Woods (which argument counsel lost due to his failure to apprise the Court of the underlying request which preserved the issue), appellate counsel never argued that Woods' exclusion was improper as is evident from the record. The State's Response is conspicuously silent on this point.

It is noteworthy that the State itself concedes that "Florida law requires ... that an inquiry be conducted." Response at 23. In the instant case, no hearing was conducted as to the witnesses other than Woods in contravention of the well established rule which the State itself recognizes. Appellate counsel's ineffectiveness in arguing this point to the Court should not deprive Petitioner of his right to a new trial free from prejudice, or, alternatively, a belated effective appeal on this issue.

D. Improper Restriction of Cross-Examination

The State cites only one case, Maggard v. State, 399 So. 2d 973 (Fla.) cert. denied, 454 U.S. 1059 (1981), in its Response to Petitioner's argument that had appellate counsel effectively argued that the trial court improperly restricted defense counsel's cross-examination of a key State witness on matters relating to credibility, this Court would have reached a different conclusion on the issue. Yet Maggard is silent as to the nature of the questions posed in that case; it is impossible to determine from the opinion whether the questions as to which the State's objections were sustained bore directly on the witness' credibility as did the questions in the instant case. See Petition at 66-78.

While the State refers only to a single, non-dispositive case, the State totally ignores the vast body of Supreme Court and Fifth Circuit opinions -- none of which were

cited by appellate counsel -- which require that cross-examination of a witness in matters pertinent to credibility be given the largest possible scope. Davis v. Alaska, 415 U.S. 308 (1974) (foreclosing a line of questioning on cross-examination of an adverse witness concerning possible motives or biases in testifying represents an impermissible and unconstitutional infringement of an accused's Sixth Amendment rights); United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974); 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. Contreras, 602 F.2d 1237, 1242 (5th Cir.) ("the scope of the direct examination may be exceeded on cross-examination in an effort to test the truthfulness of the witness"), cert. denied, 444 U.S. 971 (1979); United States v. Crumley, 565 F.2d 945 (5th Cir. 1978) (a trial judge may not deny an accused the right to expose a witness' motivation and biases in testifying).

The State's own Response highlights the ineffectiveness of appellate counsel's argument on this issue. As the State notes, appellate counsel argued that his questions should have been permitted because they bore on the "only viable defense theory," a ground this Court found had not been properly preserved below, Steinhorst, supra, at 338; this Court determined that even if the argument had been raised at trial "what appellate counsel had really asked for was the use of a State witness 'as a vehicle for presenting defensive evidence.'" Response at 24, quoting Steinhorst, supra at 337. However, counsel's questions bore directly on the witness' credibility, and sought to elicit testimony directly relating to the witness' biases and motivations. See Petition at 74-77. Trial counsel properly preserved the credibility issue. Had appellate counsel effectively argued this issue citing even one of the decisions discussed above, we submit that this Court would have concluded that the restriction of defense counsel's cross-examination constituted prejudicial error.

The State also ignores the second issue raised by Petitioner which was entirely omitted by appellate counsel: defense counsel's questioning was improperly restricted not as a result of State objection, but as a result of an objection as to scope advanced by the witness' personal counsel. See Petition at 77. 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 (Tiller's rev. 1983). Even had there been a basis for objection -- and there was none -- the State did not voice any objection. Thus, the State's objection to the line of cross-examination was waived and the objection of the witness' counsel should have been overruled.

That Petitioner suffered severe prejudice from this error alone is manifest from the fact that the witness sought to be questioned was the only witness to place a possibly incriminating statement in the mouth of Petitioner. See Petition at 74. Given the importance of this witness' testimony, it is clear that any question concerning the issue of cross-examination should have been resolved in 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"). Nothing in the State's Response refutes this argument.

### E. Trial Court's Findings Based on Matters Outside the Record

In the face of Petitioner's compelling demonstration of appellate counsel's ineffective and wholly inadequate argument with respect to the issue relating to the trial court's findings in support of an aggravating circumstance, which findings were wholly unfounded by the record of Petitioner's trial and were derived from the trial of Petitioner's co-defendant over which the same judge presided, see Petition at 78-88, the

State's Response is devoid of any rebuttal. The State's Response is confined to a suggestion that Petitioner's order of issues presented (which is chronological relative to the trial and sentencing proceedings) reflects their respective significance. This response is patently insufficient to overcome Petitioner's prima facie showing of prejudice.

The instant Petition copiously and methodically illustrates that none of the trial court's factual findings in support of its determination that the underlying offense was "heinous, atrocious and cruel" could have been based on the record of Petitioner's trial proceedings. See Petition at 83-88. In point of fact, the trial judge's findings are nearly identical to those made with respect to Petitioner's co-defendant, David Goodwin. As argued in the Petition in greater detail, the sentencing judge's consideration of evidence presented at Goodwin's trial 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 "facts" 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. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977)(sentence of death reversed and remanded because sentence was based, in part, on a confidential portion of the presentence investigation report that had not been disclosed to the defendant); Elledge v. State, 346 So. 2d. 998 (Fla. 1977)(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); cases cited in Petition at 77-78.

Appellate counsel argued only that the trial court's findings were not supported by sufficient evidence and failed to address, let alone argue, the due process issue; moreover, he drew no comparison between the findings in support of Petitioner's sentence and those in Goodwin's trial. The severe prejudice to Petitioner caused by this failure is nowhere refuted in the State's Response.

## Conclusion

Petitioner has established a substantial deficiency and a prima facie showing of prejudice as required under the standards set forth in Knight v. State. Having done so, the State must come forward with rebuttal which establishes beyond a reasonable doubt that Petitioner suffered no actual prejudice as a result of the errors complained of by Petitioner. This the State has totally failed to do. Petitioner therefore requests this Court to issue its writ of habeas corpus, and to direct that Petitioner received 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,

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Dated: April 30, 1984

By: Wendy Snyder
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by hand on JIM SMITH, Attorney General of the State of Florida, The Capitol, Tallahassee, FL 32301, this 1st day of May, 1984.

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