65,354

IN THE SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee

CASE NO.

BRIEF OF APPELLANT

On Appeal From Denial of Motion to Vacate by the Circuit Court of the 17th Judicial Circuit of Florida, In and For Broward County, Florida, and On Petition for Writ of Habeas Corpus

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STATEMENT OF THE CASE

Appellant, John O'Callaghan, was convicted of first degree murder in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, on April 8, 1981. A jury verdict that the death sentence be imposed was rendered on April 9, 1981. The court sentenced appellant to death on May 12, 1981. This Court affirmed. O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). There was no petition to the United States Supreme Court for a writ of certiorari to review that judgment.

On April 30, 1984, the Governor of Florida signed a warrant for appellant's execution, which is currently scheduled for May 31, 1984, at 7:00 A.M. At the time the warrant was signed, appellant was without the benefit of counsel. For three weeks, volunteer agencies attempted to obtain representation for Mr. O'Callaghan; more than 75 lawyers in Florida, Washington, D.C., and New York were contacted. None would accept the representation. Current counsel did not receive the full record until May 18, 1984, and agreed at that time to represent Mr. O'Callaghan on an emergency basis. H. 8.[1]

A motion for relief pursuant to Fla.R.Crim.P. 3.850, together with motions for a stay of execution, for a continuance, for discovery, and for a hearing were filed in the Circuit Court for the Seventeenth Judicial Circuit on May 23, 1984. Because the

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[1] Citations to the transcript of the arguments below are designated as H. ___. Citations to the original trial are to the record on direct appeal to this Court and are designated as R. ___. Citations to pretrial depositions are designated as Dep. ___.

original trial judge was not available, the case was assigned to a new judge. H. 2. Oral argument was heard on the motion on May 24, 1984.[2] At the close of arguments, the court denied the motion for a stay, denied an evidentiary hearing, denied relief, but appointed counsel because of the difficulty of obtaining representation and the dearth of willing volunteer counsel in Florida. H. 61. This appeal followed.

On May 29, 1984, appellant filed an application for leave to file a petition for a writ of error coram nobis and filed an original habeas in this Court. The coram nobis petition is based on the May 22, 1984, affidavit of O'Callaghan's co-defendant, Tucker. In it, Tucker recants his trial testimony and affirms that it was he and not O'Callaghan who fired the only bullet to strike the victim. The original habeas raises a claim of ineffective assistance of counsel on appeal.

STATEMENT OF FACTS

Appellant was convicted of the first degree murder of Gerald Leon Vick, a reputed hit man known as "Ratface." The basic facts are set out in the 3.850 motion filed below and in this Court's opinion on direct appeal. O'Callaghan v. State, 429 So.2d at 692-94. For the Court's convenience, we set out below some of the facts that bear upon the issues now before the Court, especially that of ineffective assistance of counsel.

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[2] A supplement to the 3.850 motion, raising new claims and setting forth additional facts, was filed and accepted during oral argument. H. 3-4.

The central issues at trial concerned the relative culpability of O'Callaghan and Tucker and the cause of death. The victim's body was not found for almost a month; only the skeletonized remains were available to the medical examiner for autopsy. He found entrance and exit bullet holes in the skull, a bullet in the chest cavity, and a hole in the back of the victim's T-shirt. Based on this, he concluded that the victim died from bullet wounds to the head and chest. The medical examiner was unaware, however, of any of the events of the night of the murder. Moreover, he conducted none of the ordinary scientific tests to determine whether the hole in the T-shirt was caused by a bullet.[3] And there were no viscera to be examined to determine or exclude the possibility of another cause of death. Indeed, on cross-examination, the medical examiner was forced to admit that there was a possibility that death resulted from the beating administered in the bar by Tucker and Cox.

The defense expert pathologist testified that the victim was already dead when shot, that he died from the beating administered in the bar.[4] He based this conclusion on the victim's age, the slightness of his physique, the severity of the beating, the great loss of blood, and the fact that the victim was not

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[3] The testimony was undisputed that the shots were all fired at close range. Amongst the standard forensic tests is one that detects residue or powder burns on clothing left by shots fired at close range. This test was not conducted. Because the T-shirt was destroyed by the state, it was not available for testing by the defense.

[4] Thus, this Court's characterization in its opinion on direct appeal, that the defense expert testified that it could not be determined with certainty that the shooting was the cause of death, 429 So.2d at 694, is incomplete. Dr. Fatah testified that, in his opinion and to a reasonable medical certainty, the beating administered in the kitchen was the cause of death.

heard to breath or moan during the 30 to 45 minute ride to the shooting site. Because the T-shirt was cremated with the victim, it was not available to the defense to conduct any scientific tests to determine the cause of the hole or whether there was blood on the shirt.

It was undisputed that the victim was beaten in the bar, and that the beating was administered by Tucker and Cox. Although O'Callaghan was present during some or all of the beating, he took no part in it. Some of the witnesses testified that the kitchen was awash with blood. While some did not remember seeing blood, it is undisputed that the state forensic people took blood splatterings from the refrigerator at a height of three feet off the floor. Cox testified that, subsequent to the beating in the bar, the victim did not move, breath, moan, or gurgle. R. 752-54. Tucker's girlfriend, Cyndi LaPointe, testified that she thought she saw the victim's leg move in the van but that: "I can't swear to it. I looked back and turned back real fast." R. 783-84.

It was also undisputed that it was Tucker who had the motive. There was conflict in the testimony whether Tucker was armed when he entered the bar, whether he threatened the victim at that time, whether he or O'Callaghan took the victim into the kitchen, whether he or O'Callaghan shot the victim, and whether there were two or three shots fired.

On March 26, 1981, appellant asked the court to replace appointed counsel, Smith, with retained counsel, Seidel. The court allowed Seidel to enter an appearance, but refused to grant a continuance so that he could prepare for trial. R. 69, 86-89.

Instead, the court designated Smith and Seidel as co-counsel. Smith was present at trial but did not participate at all. Thus, when the trial began on March 31, 1981, the reality was that appellant had only one lawyer who had only four days in which to prepare.

As a result of this handicap, counsel was unable to review the extrensive pretrial discovery, including prior depositions and sworn statements, necessary to cross-examine the state's key witnesses effectively and competently on the central issues of the case. Similarly, counsel was not aware of and did not adduce critical evidence at the guilt/innocence phase when it was reasonably likely to make a difference.

Thus, LaPointe was able to testify at trial that she did not know whether Tucker was armed, that she did not see Tucker hold a gun to the victim's head nor hear him threaten to blow the victim's brains out, and that she thought she saw the victim's leg move while in the van. Had counsel read her deposition,[5] however, he would have been in a position to impeach this testimony and adduce favorable testimony corroborative of O'Callaghan's on each of these factual questions bearing on the central issues: Was Tucker or O'Callaghan the main mover and when did the victim die?

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[5] At the argument below, the court asked counsel whether Seidel had in fact failed to read the depositions or possibly decided not to use them as a tactical choice. Counsel responded that he had not yet had an opportunity to interview Seidel, but that he stood ready to adduce testimony from the defendant on that point. H. 22, 35. Upon information and belief, it can now be stated that Seidel would testify that he was not aware of the LaPointe deposition.

At her deposition, LaPointe testified that Tucker was always armed, Dep. 16, and that he was armed when he entered the bar. Dep. 22. She testified that Tucker later admitted to her that he did threaten the victim when he entered the bar. Dep. 44-45. More importantly, her deposition testimony was that she thought that the victim was already dead in the bar, Dep. 19; the leg movement she saw was in the kitchen, and she thought that might have been a muscle spasm. Dep. 20. Indeed, she testified repeatedly that she did not see him move or hear him moan at any time thereafter, either while in the van or at the shooting site. Dep. 26, 45-47.

Similarly, counsel was not aware of and did not adduce at the guilt/innocence phase the testimony of the barmaid, Leslie Knuck. In deposition, in a sworn statement to the police, and at Tucker's parole revocation hearing, she corroborated O'Callaghan's testimony that, upon entering the bar, Tucker held a gun to the victim's head and threatened to blow his brains out.

During the trial, Tucker's counsel made a motion for the appointment of a psychiatrist to examine the defendant to determine whether there were any mitigating factors regarding his mental state that should be adduced at sentencing. Counsel for O'Callaghan joined in the motion and it was granted. Nevertheless, counsel took no steps to take advantage of this opportunity to develop mitigating evidence: No psychiatrist was obtained and O'Callaghan was never examined. Had counsel read the depositions, he would have known that there was cause to do so: LaPointe testified that O'Callaghan was "a lunatic" and that Tucker said "that he was nuts." Dep. 5.

Counsel made no investigation and presented no evidence in mitigation concerning appellant's background or character. His only effort at sentencing was to belatedly introduce Knuck's testimony, after the jury had already determined that factual issue against appellant. As a result, this Court was able to observe that: "Appellant apparantly concedes that there were no mitigating circumstances." 429 So.2d at 697.

But there were; the apparant concession was counsel's, made out of ignorance, and not appellant's.[6] As part of his 3.850 motion in the trial court, appellant proffered affidavits setting out information concerning his character and background. They describe possible brain damage at birth, serious head trauma as a young child, near blindness as a child, a peculiarly harsh and alienating childhood, physical and emotional abuse in school, a family history of mental illness, and a drug problem as an adolescent. One of the affidavits is that of Dr. Dorothy Lewis, a psychiatric expert on the relationship between childhood abuse, neglect, head trauma, and mental illness and violence. She would testify that in her opinion there is a likelihood that appellant suffers from brain damage and mental illness, and that a thorough psychiatric, neurological, and psychological examination is medically warranted.

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[6] As argued in the court below: "Mr. O'Callaghan is obviously not a lawyer. That's why he needs a lawyer. He needs a lawyer to tell him what the law is, what defenses are, how one goes about putting them together. Mr. O'Callaghan cannot be expected to know what evidence is relevant in mitigation of this sentence.... The point is Mr. O'Callaghan is a lay person with no more than an eighth grade education, [he] can't be expected to know what kind of legal issue his lawyer ought to be raising." H. 39.

Finally, as part of his 3.850 motion and his coram nobis petition, appellant has included the affidavit of the co-defendant, Tucker. Tucker now admits that he fired the shot that struck the victim in the head. He also corroborates O'Callaghan's trial testimony that there were not two but three shots fired; he has sworn that O'Callaghan fired two shots that missed and then handed the gun to Tucker who inflicted the head wound.

ARGUMENT

I. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE COURT BELOW ERRED IN DENYING A STAY AND AN EVIDENTIARY HEARING ON THIS CLAIM

This case is the first to come to the Court under the newly articulated standards for deciding claims of ineffective assistance of counsel as set out by the United States Supreme Court in Strickland v. Washington, ___ U.S. ___, No. 82-1554 (May 14, 1984). The court below purported to apply the Strickland standard but denied a stay and an evidentiary hearing, reasoning that, "in light of" Strickland, "the waters will be more cautiously broken." H. 60. The court below explicitly deferred to this Court to determine whether a hearing should be had. Id.

The court below erred; in light of Strickland, appropriate caution dictates that this Court should grant a stay and exercise its measured judgment to consider appellant's ineffectiveness claim under the new standard. As we show below, the court below inadequately considered Strickland, ultimately applied the wrong standard, erred in denying a stay, and improperly denied an evidentiary hearing on this claim.

A. Appellant Is Entitled to Relief Under Strickland v. Washington, Which Replaces the Test of Knight v. State for Determining Claims of Ineffective Assistance of Counsel:

In Strickland, the Court replaced the exacting standards articulated by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981), with a new standard. In place of a showing that counsel's deficiencies were "measurably below that of competent counsel...," Knight, 394 So.2d at 1001, a defendant must show "that counsel's representation fell below an objective standard of reasonableness." Strickland, Slip op. at 17. In place of a showing of prejudice "that there is a likelihood that the deficient conduct affected the outcome of the proceedings...," Knight, 394 So.2d at 1001, a defendant need only show "that there is a reasonable probability that ... the result of the proceeding would have been different." Strickland, Slip op. at 24. As defined by the Strickland Court, this is substantially less than "a likelihood:" "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Indeed, as made clear in the briefs before the Strickland Court, the Court rejected the standard of United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1979)(en banc), urged by the Solicitor General, Slip op. at 23, and upon which this Court based Knight.

With regard to appellant's challenge to counsel's effectiveness at the guilt/innocence phase, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have a reasonable doubt respecting guilt." Strickland, Slip op. at 25. The deficiencies detailed in appellant's motion meet this standard precisely. Counsel failed

to adduce evidence and impeach testimony that went to the critical factual issue in the case: Was the victim alive when O'Callaghan allegedly[7] shot him? Counsel failed to adduce evidence that went to the central legal issue: Was Tucker the principal and O'Callaghan the aider and abettor or vice versa? The jury decided both questions adverse to O'Callaghan. But had counsel been aware of the prior statements of Cyndi LaPointe and Leslie Knuck that bore on both these questions, he could have put before the jury information sufficient to create a reasonable doubt. Appellant can show prejudice because he can show failings of counsel on critical points "sufficient to undermine confidence in the outcome." Strickland, Slip op. at 24.[8]

With regard to sentencing, "the question is whether there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 25. In Strickland, the Court found no prejudice given "aggravating factors [that] were utterly overwhelming" and the slightness of the proffered mitigation. Id. at 29-30. But, as this Court knows, the ag-

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7 We say "allegedly," despite the adverse jury determination, because of the doubt cast by Tucker's confession that he was the one who fired the shot that struck the victim.

8 In setting the standards for determining prejudice, the Strickland Court noted that, "absent challenge to the judgment on grounds of evidentiary sufficiency," a reviewing court should presume "that the ... jury acted according to law." Slip op. at 24. As set out more fully in the 3.850 motion filed below, this case presents just such a challenge to the evidentiary sufficiency of the conviction. Thus, the determination of the prejudice prong of the the Strickland standard in this case will require the Court to tread in an area not yet charted even by Strickland. This presents yet another reason why a stay should issue: so that the Court can consider the novel issues presented by this case.

gravating factors in that case were extreme. Washington committed three murders, each of which involved brutal stabbings. One involved the shooting of witnesses, the victim's sisters-in-law, including the shooting of one old woman in the eye. There was robbery, witness elimination, torture, kidnappings, and the creation of a grave risk of harm to many persons. Id. at 1, 29. The deleted mitigation only involved prior good behavior and "emotional stress." Slip op. at 29.

In Strickland, moreover, the Court noted that counsel had a strategy: He knew the trial judge was disposed toward those who accepted responsibility for their acts and he decided to take that tack at sentencing. By not presenting the kind of character evidence submitted by Washington in the later post-conviction proceedings, trial counsel was also able to keep out rebuttal evidence that would have been harmful. He was able to keep out the defendant's "rap sheet" and to argue for the mitigating circumstance of extreme emotional disturbance, which would have been undercut by the lesser psychological evidence later proferred. Id. at 30.

This case stands in stark contrast. Counsel had no discernable strategy at sentencing, at least none that can be deciphered absent the evidentiary hearing denied below. There was no harmful evidence kept out by counsel's sparse presentation. The aggravating circumstances were hardly as overwhelming as those in Strickland: the beating was administered by others; the victim was either dead or unconscious when shot;[9] there was no

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[9] As this Court has recently noted, the statutory aggravating circumstance of "especially heinous, atrocious, and cruel" does not apply in such cases. "Actions after the death of the victim

robbery or witness elimination; and there had to have been substantial doubt about cause of death. In addition, the potential mitigating evidence is much stronger: Even in the little time that current counsel has had on this case, we have been able to establish that O'Callaghan suffered a peculiarly harsh and alienating childhood, serious physical and psychological abuse as a child, a serious drug problem as a teenager, as well as having a family history of mental illness. Dr. Lewis's affidavit attests that there is likely evidence of brain damage and mental illness.[10]

Moreover, unlike Strickland, where there was no jury at the sentencing phase, O'Callaghan did have a jury sentencing trial. The jury did not make any specific findings of aggravating factors; it rendered a generalized death verdict. Thus, we cannot know how many aggravating circumstances the jury actually found. Whatever the number, the jury simply had no evidence in mitigation to weigh on the other side. Considering that the jury might have found only one or two aggravating circumstances, the

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are irrelevant to determining the aggravating circumstance. Herzog v. State, 439 So.2d 1372 (Fla. 1983). Also, when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness. Id. at 1380." Jackson v. State , ___ So.2d ___, No. 62,723, Slip op. at 8 (Fla. May 10, 1984).

10 In addition to establishing a prima facie showing that ought to entitle appellant to a stay, a continuance, and a hearing to further develop the factual basis for his claim, Dr. Lewis's affidavit is directly relevant in another way. The trial court granted the motion to appoint a psychiatrist to develop possible mitigating evidence, but counsel did not follow up on this and O'Callaghan was never seen by a doctor. At a minimum, Dr. Lewis's affidavit establishes that there is sufficient information available to indicate that such an examination is called for and that, therefore, counsel was ineffectivce for failing to follow up on the court's ruling appointing a psychiatrist.

addition of substantial mitigating evidence to the balance is "sufficient to undermine confidence in the outcome" under the circumstances of this case.[11]

The court below erred because it did not evaluate the facts alleged by appellant under the Strickland standard. It did not determine whether there was a reasonable probability that the outcome would have been different. Instead, it applied a standard of its own making, one higher even than Knight. It denied relief because there was "not anything that the Court can find that so prejudices the Defendant that it would have changed the jury verdict or any action of the Judge." H. 61. But even Knight did not require that level of certainty: that "it would have changed the jury verdict." And certainly Strickland requires less: "A reasonable probability ... sufficient to undermine confidence in the outcome." Slip op. at 24. Appellant has made that showing; the decision below should be reversed.

B. Both Strickland v. Washington and the Decisions of this Court Require That a Stay Be Granted and That There Be an Evidentiary Hearing:

In Strickland, the Court stressed that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case...." Slip op. at 20. For example, "inquiry into counsel's conversations with the defendant may be critical to a proper

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[11] It is irrelevant that the trial court found four aggravating factors. Had the jury voted for life, the trial court would have been severely constrained in its ability to override that verdict; it would have been binding "unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

assessment of counsel's investigation decisions...." Id. at 27. Competency of counsel can only be determined "in light of all the circumstances." Id. at 20.

The court below surely did not meet these dictates. The judge who heard the 3.850 motion was not the original trial judge. H. 2. Especially in a case such as this, where counsel's challenged inadequacies relate to the sufficiency of the evidence and the existence of reasonable doubt, the decision regarding probable prejudice cannot be made without a full familiarity with the evidence and the record. Yet the court below only had the case for one day when it dismissed, not enough time to review the 1200 page trial record to determine the importance of counsel's failures as they relate to the evidence that was adduced and the real issues in the case. Accordingly, a stay should have issued just so that the court could have performed the basic record review necessary to determine appellant's claims.

Moreover, in the absence of an evidentiary hearing, the court could not have known the extra-record facts necessary to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case...." Strickland, Slip op. at 20. For example, the trial court wanted to know whether counsel failed to make use of LaPointe's depostion testimony because he had failed to read it or because of some tactical choice. H. 35. But the fact is that Seidel simply failed to read the deposition, and an evidentiary hearing would establish that.[12] What the court below

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[12] At the hearing, appellant's counsel twice told the court that he was ready to go forward with evidence on this point; "it's what the client represents to us. And we're prepared to present testimony if the Court will give us a hearing." H. 35 & 22. In fact, Seidel will apparently confirm that testimony if he is

has essentially said is that appellant must first prove his case before he is entitled to an evidentiary hearing to prove his case.

The evidentiary inquiry implicitly required by Strickland dovetails with the state law requirement of a hearing. Fla.R. App.P. 9.140(g) provides that: "Unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing." This Court has especially applied this standard in cases of ineffective assistance of counsel, granting stays and remanding for an evidentiary hearing. Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). Indeed, this Court has noted that ineffectiveness claims are particularly suited for evidentiary development, suggesting "even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue." Jones v. State, ___ So.2d ___, No. 62,848 (Fla. Feb. 2, 1984).

The court below did not apply these standards. It cannot be said, especially in light of the new Strickland standard, that the record conclusively shows that appellant is not entitled to relief. Accordingly, a stay should issue and the case should be remanded to the lower court for an evidentiary hearing.

C. Under the Strickland Standard, Appellant Was Denied the Effective Assistance of Counsel on Appeal:

In addition to counsel's errors and omissions at the trial level, he failed to provide appellant with effective assistance of counsel on direct appeal. As set out in the original habeas

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called to testify.

filed in this Court, counsel failed to raise on appeal several substantial and valid constitutional issues set out more fully in the 3.850 motion filed below that present "[a] reasonable probability ... sufficient to undermine confidence in the outcome" of the appeal. For example, counsel failed to bring to this Court's attention the fact that relevant and material exculpatory evidence had been destroyed by the state. He failed to place before the Court the full panoply of the prosecutor's misconduct. He failed to raise the trial court's refusal to allow the jury to have the testimony of the expert witnesses on cause of death reread to them during deliberations, preventing the jury from reliably determining the critical factual issue in the case.

All of these omissions affected the outcome of the appeal. The Court should have had these issues, going to the fundamental fairness of the trial and the reliability of the verdict, to consider. Each of these issues was relevant to and bolstered the issues that the Court did consider such as the two specific instances of impermissible prosecutorial argument that were raised and the application of the harmless error rule. O'Callaghan v. State, 429 So.2d at 696.

Counsel also failed to raise issues that went to the reliability of the sentence, including the manner in which the jury was selected and the judge's erroneous charge. The failure to raise and preserve issues that have resulted in relief in other cases -- see Williams v. State, 445 So.2d 798, 811-12 (Miss. 1984); Grigsby v. Mabry, 569 F.Supp. 1273, 1303-04 (E.D.Ark. 1983)(appeal pending) -- is an error "sufficient to undermine confidence in the outcome."

There is no conceivable tactical reason for counsel to forfeit appellant's rights to a fundamentally fair trial and to a reliable determination of the question of life or death. Especially in a death case, counsel has a responsibilty to preserve all issues for both state and federal review. Lay defendants rely on counsel to identify, preserve, and present their legal claims. To "waive" such claims, many of which were presented to the trial court, is to provide ineffective assistance of counsel of the most fundamental kind.

Finally, even if counsel's appellate deficiencies do not suffice in and of themselves, the Court should consider their effect together with counsel's failings at the trial and sentencing levels. See Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984)(finding that cumulative effect of errors meets Knight standard). In total, appellant was denied the effective assistance of counsel and is entitled to relief.

II. THE COURT BELOW ERRED IN DENYING RELIEF ON CLAIMS GOING TO THE FUNDAMENTAL FAIRNESS AND RELIABILITY OF APPELLANT'S CONVICTION AND SENTENCE

Appellant's conviction and sentence of death were the result of a process so flawed as to violate the requirements of fundamental fairness and reliability imposed by the due process clause and the eighth and fourteenth amendments. Relevant and material evidence was destroyed or made unavailable by actions of the state. The prosecutor engaged in a pattern of inflamatory and improper argument that mislead the jury on critical factual issues. During deliberations, the court denied the jury access to

critical testimony bearing on the central factual question: cause of death. The jury was selected in a manner designed to bias it toward appellant's guilt and toward the imposition of the death sentence. And the jury was given inaccurate information concerning its role in sentencing under Florida law that depreciated the gravity of its decision and lessened its sense of responsibility, making it more likely to impose death and introducing an intolerable degree of unreliability in violation of the eighth and fourteenth amendments.

Errors that are fundamental are reviewable at any stage, including post-conviction proceedings. For example, finding a constitutional violation of double jeopardy in sentencing, the court in Flowers v. State, 351 So.2d 387 (Fla. 1st DCA 1977), recognized that although the issue had been raised on appeal, reversal on the motion to vacate was required:

> [T]he trial court's resentencing error and our own were fundamental errors which deprived Flowers of a constitutional right not be placed twice in jeopardy for the same offense.... We decline to watch helplessly in the hope that our decision here may create decisional conflict that would authorize the Supreme Court to correct our former error, or in the hope that a federal court will do so.

Id. at 390. See also O'Neal v. State, 308 So.2d 569, 570 (Fla. 2d DCA 1975) (defendant deprived of due process right to notice); Dozier v. State, 361 So.2d 727, 728 (Fla. 4th DCA 1978)("A fundamental error of constitutional dimension may be collaterally attacked"); French v. State, 161 So.2d 879, 881 (Fla. 1st DCA 1964) (denial of continuance); cf. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965) (although issue was properly a ground

for a motion to vacate, court considered it on habeas corpus because error was fundamental); Skinner v. State, 366 So.2d 486, 487 (Fla. 3d DCA 1979).

The decision below does not consider the companion principle applied when the ultimate penalty of death has been imposed: that errors must be more strictly reviewed when a life is at stake. That is, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So.2d 795, 801 (Fla. 1957) (overlook technical niceties where death penalty imposed); Burnette v. State, 157 So.2d 65, 67 (Fla. 1963) (error found fundamental "in view of the imposition of the supreme penalty"); Pait v. State, 112 So.2d 380, 385 (Fla. 1959) (improper prosecutorial argument); Grant v. State, 194 So.2d 612, 615-616 (Fla. 1967); Singer v. State, 109 So.2d 7, 30 (Fla. 1959); Harrison v. State, 149 Fla. 365, 5 So.2d 703 (1942); cf. Anderson v. State, 276 So.2d 17, 18-19 (Fla. 1973) (failure to define premeditation).

The errors raised in this case are all of that fundamental character. Judgments are given finality because we rely on the fairness of our procedures to produce just results. But when a conviction and sentence are so riddled with errors so fundamental in nature that they go to the very integrity of the basis of the conviction and sentence, then the courts should be open to hear such claims and grant relief. The trial judge's ruling ignores these settled principles and should be reversed.

III. THE DEATH PENALTY IS APPLIED IN FLORIDA IN AN ARBITRARY AND DISCRIMINATORY MANNER ON THE BASIS OF RACE, GEOGRAPHY, AND OTHER ARBITRARY FACTORS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This claim presents precisely the same question that has been previously presented to and rejected by this Court, most recently in Adams v. State, ___So.2d___, 9 F.L.W. 155 (Fla. May 2, 1984) ("This same issue has been raised and disposed of by this Court in Sullivan v. State, 441 So.2d 609 (Fla. 1983)"). For that reason, we will not burden the Court with a detailed restatement of the allegations. The allegations are included in the 3.850 motion filed in the court below. The appendix to that motion includes the scholarly, statistical studies and the research that form the basis of the claim.

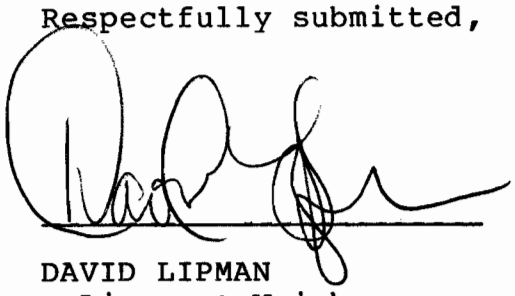
Briefly, the claim is that the death penalty has been applied in Florida in violation of both the eighth amendment and the equal protection clause of the fourteenth amendment, for it has been imposed on the basis of race and other arbitrary factors. This fact is shown by a number of independent scholarly studies, using different data bases and different methodologies, that each reach the same result: race is a determinative factor in the imposition of the death penalty in Florida, especially race of the victim and as compared with the race of the defendant. These studies meet and exceed the legal standards (2 or 3 standard deviations) for setting out a prima facie case under the equal protection clause. These allegations together with the supporting evidence, require that a hearing be held to present the evidence in an adversary context and to provide respondent

the opportunity to rebut the prima facie case. If there are questions to be raised regarding the studies, they should be raised at an evidentiary hearing where they may be explored with the experts. The allegations and evidence presented set out a prima facie case; appellant is entitled to a hearing on the question at which he may prove his claim. This Court should reconsider its prior holdings on this question.

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling below, grant a stay of appellant's impending execution, grant leave to file the petition for a writ of error coram nobis in the court below, remand for an evidentiary hearing, and grant appellant a new direct appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by hand to Richard Bartmon, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 28 day of May, 1984.

OF COUNSEL