IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	Appeal Docket No. 65,407
	)	
THE STATE OF FLORIDA,	)	Case No. 80-48-cc
	)	
Respondent-Appellee.	)	

BRIEF FOR APPELLANT

Robert G. Udell
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October 25, 1984

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STATEMENT OF THE CASE

A. Prior Proceedings

On August 11, 1980, Appellant Kenneth Darcell Quince pleaded guilty to the murder of Frances Bowdoin during a sexual assault, in violation of §782.04 Fla. Stats., and burglary of an occupied dwelling, in violation of §810.02 Fla. Stats. [1] (PTR. 5-6, 12-14).[2]

Following a sentencing hearing before the Honorable S. James Foxman without an advisory jury, on October 20, 1980, the Court adjudged Mr. Quince guilty of both offenses and imposed a sen-

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[1] Because the sexual assault was the underlying felony, Count II of the indictment, which alleged a sexual battery in violation of §794.11 Fla. Stats., was dismissed. (R.App. 29; PTR. 3-4, 18-19).

[2] The following abbreviations will be used with respect to the record:

PTR. refers to the transcript of the guilty plea entered on August 11, 1980.

R.App. refers to the Record on Appeal from the conviction and sentence in 1980.

STR. refers to the transcript of the sentencing hearing conducted on October 20, 1980.

SX. I refers to State Exhibit 1 introduced at the Sentencing hearing.

PCR. refers to the Record on Appeal from the denial of post conviction relief on April 30, 1984.

tence of death on October 21, 1980, (R.App. 30). The death sentence was affirmed on appeal. Quince v. State, 414 So.2d 185 (Fla.), reh'g denied, cert. denied, 459 U.S. 895 (1982).

Thereafter, Mr. Quince filed a Motion for Post-Conviction Relief in the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida on July 5, 1983, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (PCR. 602-19). While the motion was pending before the Circuit Court, the Governor of Florida signed a death warrant on January 31, 1984, ordering Appellant's execution on February 20, 1984. (PCR. 667-68). On February 8, 1984, the Circuit Court granted Mr. Quince's application for a stay of execution (PCR. 669) and subsequently granted his request for an evidentiary hearing on the motion for post-conviction relief. (PCR. 673). After the conclusion of this evidentiary hearing, the Circuit Court denied Mr. Quince's motion for post-conviction relief on April 30, 1984. (PCR. 707-08). On May 24, 1984, Mr. Quince filed a Notice of Appeal. (PCR. 709).

B. Statement of Facts

On the evening of December 28, 1979, Frances Bowdoin was sexually assaulted and killed, and her house was burglarized.

Mr. Quince was initially charged with the burglary and arrested on January 3, 1980. (R.App. Vol. I at 34-35). During custodial interrogation on that date, Mr. Quince made an admission concerning the death of Mrs. Bowdoin but denied sexually assaulting her. (R.App. Vol. I at 47; STR. 36-37, 42-51). Mr. Quince was then also charged with first degree murder. (STR. 46). On or about January 4, 1980, the public defender's office was appointed to represent Mr. Quince (PCR. 412-13), who was subsequently charged in a three count indictment with first degree murder, sexual battery, and burglary of an occupied dwelling, in violation of §§782.04, 794.011 and 810.02 Fla. Stats., respectively. (R.App. Vol. I at 1).

After obtaining a court order on February 4, 1980, to seize samples of Mr. Quince's blood, saliva, head hair, and pubic hair (R.App. Vol. I at 2-3), the police initiated further interrogation of Mr. Quince, outside the presence of his counsel. (STR. 51-52). At that time Mr. Quince admitted to the sexual battery of Ms. Bowdoin. (STR. 53).

On March 10, 1980, upon the motion of defense counsel, the Circuit Court appointed three psychiatric experts to examine Mr. Quince to determine both his competency to stand trial and his mental state at the time of the offense. (R.App. Vol. I at 4-

8). Each of the experts concluded that Mr. Quince was competent to stand trial and that he was sane when the crime occurred. (R.App. Vol. I at 54-56).

Subsequently, on August 11, 1980, Mr. Quince, represented by Howard Pearl, Esquire, entered pleas of guilty to the felony murder of Ms. Bowdoin and the burglary of her home. (PTR. 5-6, 12-14). Mr. Quince's right to an advisory sentence recommendation by a jury was waived (PTR. 6-9), the Circuit Court ordered a presentence investigation of Mr. Quince, and the matter was continued for sentencing. (PTR. 17).

On September 29, 1980, defense counsel moved for the appointment of two experts, Dr. Ann McMillan, a psychologist, and Dr. Fernando Stern, a psychiatrist, to examine Mr. Quince to determine whether the mitigating circumstance of substantial impairment existed. (R.App. Vol. I at 15-17). The Circuit Court granted the motion. (R.App. Vol. I at 13-14).

The sentencing hearing was conducted on October 20, 1980 before Judge Foxman. Again, Mr. Pearl appeared as counsel for Mr. Quince.

The State commenced its presentation by offering Mr. Quince's juvenile records to prospectively negate any contention

that the defendant was entitled to a finding that he had no significant history of criminal activity. (STR. 4-8). Defense counsel objected to the admission of these documents. (STR. 7). The Court admitted the juvenile records but reserved a ruling on their relevance to a finding of prior criminal activity. (STR. 8, 41).

The State then called as a witness Officer Larry Lewis, who had investigated the homicide and burglary. (STR. 9-10). Officer Lewis described the crime scene (STR. 13-16, 25-27, 29-34, 46, 58-70), the results of tests conducted by the Sanford Crime Lab (STR. 16-20, 47, 67-68), and the identification of latent fingerprints found at the decedent's house. (STR. 27-28, 35). Officer Lewis also testified about the arrest, interrogation, and statements of Mr. Quince. (STR. 35-37, 41-53, 55-58).

The State next called Dr. Arthur Botting, the medical examiner who conducted the autopsy of Ms. Bowdoin. (STR. 70-72). Dr. Botting recounted the injuries sustained by Ms. Bowdoin, as well as his opinion as to how they occurred, and the possible effects of the injuries. (STR. 77-98). Dr. Botting concluded that Ms. Bowdoin had been struck several times, sexually battered, and strangled.

The State then called Dr. Barnard (STR. 102) to render his opinion as to whether Mr. Quince met the criteria of two statutory mitigating circumstances: mental or emotional disturbance (6(b)) and substantial impairment (6(f)). (STR. 110-14). Based on the productivity and competency examination of Mr. Quince, which Dr. Barnard conducted in March of 1980, and a review of other material, the doctor responded negatively. (STR. 110-22, 127). At the conclusion of his testimony, Dr. Barnard's written report was admitted into evidence. (R.App. Vol I at 54; STR. 130).

Following Dr. Barnard's appearance, the productivity and competency reports prepared by Dr. Carrea and Dr. Rossario in April of 1980 were also admitted into evidence, upon Mr. Pearl's stipulation, without the testimony of either doctor. (R.App. Vol. I at 55-56; STR. 131-32). The State then rested its case-in-chief on aggravating circumstances. (STR. 132).

Mr. Pearl opened his presentation on behalf of Mr. Quince with the testimony of Dr. McMillan, the psychologist appointed by the Court in September to examine Mr. Quince. (R.App. Vol. I at 13-14; STR. 132-33). Dr. McMillan related the significance and results of various psychological tests she administered to Mr. Quince as well as her oral examination of him. (STR. 140-45).

Dr. McMillan concluded that Mr. Quince's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired but that he was not experiencing an extreme mental or emotional disturbance at the time of the offense. (STR. 145-49).

Mr. Pearl then called Dr. Stern, the psychiatrist whom the Court had appointed at his request to examine Mr. Quince prior to the sentencing hearing. (R.App. Vol. I at 13-14; STR. 150). Based on his examination of Mr. Quince, the evaluations of the other doctors, the presentence investigation report, and the police reports of the crime (STR. 153-56), Dr. Stern testified that he found no evidence to mitigate the offense. (STR. 157-58, 163-65).

The reports of Dr. McMillan and Dr. Stern were both admitted into evidence, and the defense rested. (R.App. Vol. I at 57-58; STR. 164-65). After hearing arguments from counsel, the Circuit Court took the matter under advisement. (STR. 207).

On October 21, 1980, the Circuit Court rendered its verdict. The Court found three aggravating factors: (1) the murder was committed during a rape (F.S. 921.141(5)(d)); (2) the murder was committed for pecuniary gain (F.S. 921.141(5)(f)) and (3) the

murder was especially heinous, atrocious, and cruel (F.S. 921, 141(5)(h)). (R.App. Vol. I at 18-19).

In view of Mr. Quince's juvenile record, the Court determined that he had a "significant prior criminal history," negating the first enumerated mitigating circumstance (F.S. 921.141 (6)(a)). Although the Court found that Mr. Quince was not under the influence of an extreme mental or emotional disturbance (F.S. 921.141(6)(b)), it did credit Mr. Quince with being substantially impaired (F.S. 921.141 (6)(f)). The Court further determined that Mr. Quince's age was not a mitigating circumstance (F.S. 921.141(6)(g)) and that the remaining statutory factors were inapplicable. (R.App. Vol. I at 19-20). The Court concluded that the aggravating circumstances outweighed the mitigating and sentenced Mr. Quince to death. (R.App. Vol. I at 20).

After appeal, a Motion for Post-Conviction Relief was filed in the Circuit Court of the Seventh Judicial Circuit In And For Volusia County, Florida on behalf of Mr. Quince on July 5, 1983, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (PCR. 602-11). Affidavits of Mr. Quince's mother and sister were later submitted in support of the motion (PCR. 613-19), and a Supplement to Motion for Post Conviction Relief was submitted on February 8, 1984. (PCR. 621-44). At Mr. Quince's

request (PCR. 645-49, 655-62), the Court stayed his execution set for February 20, 1984 (PCR. 669) and scheduled an evidentiary hearing on the post conviction motion for March 19, 1984. (PCR. 672-74). Mr. Quince's motion for the appointment of experts to present evidence to prove the allegations of his motion for post conviction relief (PCR. 663-66, 675-86) was opposed by the State (PCR. 687-94) and denied by the Circuit Court. (PCR. 695).

Due to the serious illness of defense counsel's mother, a continuance of the post conviction hearing date from March 19 to April 23, 1984 was sought (PCR. 700) and approved by the Circuit Court. (PCR. 701). Thereafter, defense counsel's mother died, and an additional three week continuance was requested. (PCR. 703-05). The Court denied this motion. (PCR. 706).

The post conviction hearing began on April 24 and ended on April 27, 1984. At the outset of the hearing, and once more midway through the proceeding, counsel for Mr. Quince renewed the motions for a continuance and the appointment of expert witnesses which the State opposed and the court again denied. (PCR. 4-7, 364)

Over the course of the hearing, the Court heard testimony from sixteen witnesses including several members of Mr. Quince's

family and friends who attested to his character and the absence of any communication from Mr. Pearl during the prosecution of Mr. Quince (PCR. 29-47, 49-60, 60-82, 82-91, 108-16, 128-35, 140-57, 158-65, 166-77) and Dr. Mootry, a social worker who provided a social history of Mr. Quince. (PCR. 178-217). In addition, Mr. Quince testified, inter alia, about his upbringing, his juvenile record, his drug and alcohol usage, the burglary and felony murder of Ms. Bowdoin, his contact with Mr. Pearl, and his understanding of capital proceedings. (PCR. 228-98). William McLivirty, who prepared the presentence investigation report on Mr. Quince, and Mr. Pearl testified on behalf of the State. (PCR. 366-96, 404-582).

On April 30, 1984, the Circuit Court issued an order denying Mr. Quince's motion for post conviction relief. (PCR. 707-08). Mr. Quince filed a timely notice of appeal (PCR. 709), and this appeal ensued.

SUMMARY OF ARGUMENT

Mr. Quince was not given a meaningful opportunity to review the presentence investigation report upon which the Circuit Court relied in imposing the death penalty. Because the report contained numerous material inaccuracies, Mr. Quince is entitled to

a new sentencing hearing at which he will have a chance to rebut these items. Gardner v. Florida, 430 U.S. 349 (1977); Raulerson v. Wainwright, 508 F.Supp. 381 (MD. Fla. 1980).

In evaluating the sentence to be imposed, the Circuit Court determined that Mr. Quince's juvenile records negated the statutory mitigating circumstance regarding the absence of any significant prior criminal activity. Because there has been no showing that Mr. Quince knowingly and voluntarily waived his right to counsel in those proceedings, the uncounseled juvenile adjudications were constitutionally infirm, In re Gault, 387 U.S. 1 (1967), and should not have been used against him in any way. United States v. Tucker, 404 U.S. 443 (1972). Consequently, this case must be remanded for a new sentencing hearing.

During its case-in-chief at the sentencing hearing, the State introduced testimonial and documentary evidence stemming from three psychiatric examinations of Mr. Quince conducted nearly five months before the entry of his guilty plea. Prior to the examinations, however, Mr. Quince was not advised of his privilege against self-incrimination, and neither he nor his counsel was aware that information gleaned from the examinations could be introduced by the State at sentencing. Accordingly, the State's use of this psychiatric evidence to prospectively rebut certain mitigating factors contravened Mr. Quince's Fifth, Sixth,

and Fourteenth Amendment rights, and he is entitled to a new sentencing hearing at which this evidence will be included. Estelle v. Smith, 451 U.S. 454 (1981).

During his representation of Mr. Quince, defense counsel failed to confer sufficiently with his client, undertook only a superficial investigation of defenses and mitigation, provided advice based on inadequate information and research, had a client he believed was incompetent to plead guilty, failed to interpose appropriate objections to evidence submitted at sentencing, and performed ineptly throughout the sentencing hearing. The conduct of Mr. Quince's attorney fell below constitutional standards and substantially prejudiced the defense. Because Mr. Quince was denied the effective assistance of counsel, his conviction and sentence must be vacated and the case remanded for further proceedings. Strickland v. Washington, 104 S.Ct. 2052 (1984).

The evidence below establishes that the Florida Death Penalty Statute is administered in an arbitrary and discriminatory fashion. This claim has been recognized to be legally sufficient to warrant relief. Spencer v. Zant, 715 F.2d 1562 (11th Cir.), reh'g en banc granted, 715 F.2d 1583 (1983). But see Adams v. Wainwright, 734 F.2d 511 (11th Cir. 1984).

An indigent capital defendant litigating the propriety and constitutionality of his death sentence is entitled to funds to retain experts and other necessary services. See generally Bounds v. Smith, 430 U.S. 817 (1977); Douglas v. California, 372 U.S. 353 (1963). The trial court's failure to provide Mr. Quince such funds, coupled with its denial of his request for a short continuance of the post conviction hearing, due to the death of his counsel's mother, resulted in a hearing which was neither full nor fair.

ARGUMENT

I. MR. QUINCE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO KNOW AND TO CONTEST NUMEROUS INACCURATE STATEMENTS CONTAINED IN THE PRE-SENTENCE INVESTIGATION REPORT

Because Mr. Quince was never provided a copy of nor allowed to read the presentence investigation (P.S.I.) report prepared in anticipation of his sentencing hearing, he had no meaningful opportunity to counter several material errors in the report which reflected adversely on his character. Therefore, his sentence of death must be vacated and this case returned to the Circuit Court for a new sentencing hearing.

In Gardner v. Florida, 430 U.S. 349 (1977), the United States Supreme Court determined that the defendant there had been:

> 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.

430 U.S. at 362. Accordingly, the Supreme Court vacated Mr. Gardner's death sentence and remanded the case to this Court for further proceedings. Id.

Three years later, the Gardner decision was invoked to grant federal habeas corpus relief to a Florida prisoner who contended that the trial court which sentenced him to death had relied in part on information contained in a presentence investigation report which had been shown to the petitioner's attorney, but not to the petitioner prior to the sentencing. Raulerson v. Wainwright, 508 F.Supp. 381 (M.D. Fla. 1980). The Court there reasoned that knowledge of errors or omissions in a P.S.I. is peculiarly within the defendant who has "'a constitutional right to know and to test the accuracy of any statement in the presentence report upon which the sentencing judge relied.'" 508 F.Supp. at 384 (citing United States v. Woody, 567 F.2d 1353, 1361, cert. denied, 436 U.S. 908 (1978)). The district court then concluded:

> That right is the right of Petitioner as well as his counsel. Petitioner must be given the opportunity to rebut and deny any portion of the report and such opportunity clearly requires personal knowledge of the information to be rebutted.

508 F.Supp. at 384.

Here, there is no dispute that the sentencing Court did rely on the presentence investigation report. (STR. 100; R.App. Vol. I at 18). Nor is there any doubt that Mr. Pearl did not review the entire report with his client: he did not furnish a copy to his client, he did not read the report to Mr. Quince, nor did he review the report in any great detail with his client. (PCR. 496-97, 553). Rather, Mr. Pearl reviewed only what he saw as the "high points" and then he only discussed them briefly with his client. (PCR. 553). Mr. Quince confirmed that he never saw the report. (PCR. 284-85). Such a procedure hardly comports with the requirements of Gardner and Raulerson.

The lack of opportunity to examine the P.S.I. report unquestionably was harmful because Mr. Quince does challenge the correctness of several factual statements in the P.S.I. report. More specifically, he disputes, inter alia, Mr. McLiverty's description of his interests and hobbies (PCR. 239-41, 243-44) as well as the characterization of his juvenile record (PCR. 245-

49),[3] an incident at the Deland County Jail (PCR. 249-50), his employment history (PCR. 256-60), and his remorse over the crimes. (PCR. 273-74, 321). Mr. Quince also denies that he ever set fires as a child, was cruel to animals, or forced himself sexually on one of his girlfriends. (PCR. 251).

In view of the numerous negative statements in the P.S.I. which Mr. Quince contests and which he never had the opportunity to review, it is evident that he was denied the chance to fully examine and rebut its contents. Since the Circuit Court considered the P.S.I. report in deciding to impose the death penalty, Mr. Quince was denied his right to due process and the sentence must be vacated.

II. THE USE OF INVALID JUVENILE ADJUDICATIONS TO DETERMINE MR. QUINCE'S SENTENCE OF OF DEATH WAS CONSTITUTIONAL ERROR

In determining Mr. Quince's sentence, Judge Foxman denied him the benefit of the statutory mitigating circumstance that he had not engaged in any significant prior criminal activity. The

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[3] For example, Mr. Quince was not committed to the Division of Youth Services for armed robbery on February 12, 1975. (Compare R.App. Vol 1 at 25 with R.App. Vol II at 50). Nor was he committed for two burglaries in November, 1975. One of these charges was not prosecuted by the State. (R.App. Vol II at 5).

Judge explained that he felt that Mr. Quince's juvenile record negated this mitigating circumstance. (R.App. Vol. I at 19)

As a juvenile, Mr. Quince had been adjudicated delinquent on five occasions. (R.App. Vol II. at 6, 47, 61, 80, 96).[4] Each adjudication, however, was invalid because in each instance Mr. Quince had been denied his right to counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution. In re Gault, 387 U.S. 1 (1967). The subsequent use of these invalid adjudications by Judge Foxman in determining Mr. Quince's sentence was, therefore, a violation of his constitutional rights. United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967).

The right to appointed counsel for an indigent child subject to juvenile proceedings which may result in his or her commitment is fully protected by the Constitution. In re Gault, 387 U.S. 1. In Gault, the Supreme Court, citing Johnson v. Zerbst, 304 U.S. 458 (1938) and Carnley v. Cochran, 369 U.S. 506 (1962), held

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[4] Contrary to the understanding of defense counsel Howard Pearl (PCR. 492, 544-45), as well as this Court, as evidenced in its opinion on direct appeal, Quince v. State, 414 So.2d 185 (Fla. 1982), none of these adjudications was for armed robbery (See R.App., Vol. II at 50 and 47). The charges of robbery and burglary involved sums of $26.50 and $7.00 and a lawn mower valued at $10.00. (R.App. Vol II at 30, 55, 72).

that a waiver of counsel by a juvenile must be "an 'intentional relinquishment or abandonment' of a fully known right." In re Gault, 387 U.S. at 42. Since courts must indulge every reasonable presumption against the waiver of counsel, a judge receiving a waiver has a "serious and weighty responsibility" to determine whether it is made intelligently and competently. Johnson v. Zerbst, 304 U.S. at 464-65. The Supreme Court has indicated that this duty may be discharged "only by a penetrating and comprehensive examination of all the circumstances under which [a waiver] is tendered," Von Moltke v. Gillies, 332 U.S. 708, 724 (1947), and, furthermore, "(t)he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." Carnley v. Cochran, 369 U.S. at 516.

At no time during any of the judicial proceedings which resulted in his adjudications of delinquency was Mr. Quince represented by counsel. (R.App. Vol. II). Mr. Quince testified that to his memory he was never told by Judge Lee in Juvenile Court that he could be represented by an attorney (PCR. 299-305); nor did he waive counsel at anytime. (PCR. 304). In fact, he was not even familiar with the concept of waiver when he was a juvenile. (PCR. 249).

The records, offered by the State, from Mr. Quince's juvenile file which pertain to his court appearances - arraignment sheets and minutes of hearings - recite merely that Mr. Quince waived counsel (R.App. Vol. II at 13, 26, 49) or that he was advised of unspecified Constitutional rights and waived counsel. (R.App. Vol II. at 14, 27, 50, 65). They proved nothing at all concerning the circumstances of these purported waivers, whether they may have been understandingly and intelligently made, or what questions, if any, were asked of Mr. Quince to secure any purported waiver.

In similar situations, courts have held that a state has not sustained its burden of proving that an accused made an intelligent and competent waiver of the right to counsel. Craig v. Beto, 458 F.2d 1131 (5th Cir. 1972); Irby v. State of Missouri, 502 F.2d 1096 (8th Cir. 1974), cert. denied, 425 U.S. 997 (1976). This is so even when the documents relied upon by the state were signed by a judge, as were the arraignment sheets in this record. (R.App. Vol. II at 14, 27, 50, 65). Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979). The rationale of these decisions stems from the requirement that a judge carry out a "penetrating and comprehensive examination" of the circumstances of a waiver:

> While a minute entry or docket entry reciting that the defendant was asked if he wished to be represented and that he declined the invitation is evidence of the fact of a waiver, the typical entry does not give us a full enough picture of the proceedings to allow us to determine whether the waiver was knowingly and intelligently made. Such evidence tells us only that the defendant waived his rights, not how or why he did so.

Id. at 1144.

In cases involving juveniles, this jurisdiction and others have been no less stringent in requiring that the circumstances of a purported waiver appear in the record for the waiver to be considered effective. H. v. State, 404 So.2d 400 (Fla.App. D5 1981); P. v. State, 395 So.2d 291 (Fla.App. D5 1981);[5] In re B., 98 Cal.Rptr. 178 20 C.A.3d 816 (1971); S. v. State, 134 Ga.App. 843, 216 S.E.2d 670 (1975). From the record before this Court, it is clear that the State failed to carry its constitutional burden to show any purported waiver was knowing and intelligent. Hence, the adjudications of delinquency, which Judge Foxman relied upon to determine Mr. Quince's sentence, were constitutionally invalid.

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[5] The two Florida decisions cited are reversals of delinquent adjudications made by the same judge who adjudicated Mr. Quince delinquent on five occasions. The procedures followed by the judge in these cases appear to be the same he followed in proceedings involving Mr. Quince.

The invalidity of these adjudications, in turn, completely vitiates the balancing process by which Judge Foxman concluded that the death penalty was warranted for Mr. Quince. An invalid uncounseled conviction cannot be used against an individual "either to support guilt or enhance punishment for another offense." Burgett v. Texas, 389 U.S. at 115. This principle has been applied by the Supreme Court to preclude the use of a prior uncounseled conviction to convert a subsequent conviction into a felony under an enhanced penalty statute, Baldasar v. Illinois, 446 U.S. 222 (1980); to enhance punishment under a recidivist statute, Burgett v. Texas, 389 U.S. 109 (1967); to determine the severity of a sentence, United States v. Tucker, 404 U.S. 443 (1972); or to impeach a defendant at trial, Lopez v. Beto, 405 U.S. 473 (1972).

These decisions have been cited by a number of courts holding that the subsequent judicial use of invalid juvenile adjudications is unconstitutional. State Ex Rel. Alton v. Conkling, 421 So.2d 1108 (Fla. 1982); Carroll v. State, 19 Md.App. 179 310 A.2d 161 (1973); State v. Flores, 13 Or.App. 556, 511 P.2d 414 (1973); Stockwell v. State, 59 Wis.2d 21, 207 N.W.2d 883 (1973).

Among the Supreme Court decisions noted above, Tucker, 404 U.S. 443, is especially relevant by analogy to Mr. Quince's case,

inasmuch as, there, the court rejected the government's argument that uncounselled convictions, even if invalid, could be used by a sentencing judge as evidence that the defendant had in fact engaged in criminal or antisocial conduct. Id. at 446. The court refused to speculate about the possible outcome of the prior proceedings against Mr. Tucker had he received the benefit of counsel. Instead it asked whether the subsequent sentence might have been different had the sentencing judge been aware of the unconstitutional nature of the earlier convictions. Id. at 447-48. The court decided that it might have been different and its reasoning is equally applicable here. Id. at 448.

When Judge Foxman used Mr. Quince's uncounseled juvenile adjudications to negate an important mitigating circumstance, he was basing his sentence, as the trial judge in Tucker had, "at least in part on misinformation of a constitutional magnitude ... [and] assumptions concerning [the defendant's] criminal record which were materially untrue." Id. at 447. Had Judge Foxman been aware that Mr. Quince's juvenile adjudications were invalid, Mr. Quince's background would have appeared in a dramatically different light at the sentencing proceeding. Id. at 448. Instead of facing a defendant who had been legally adjudicated delinquent for a number of juvenile offenses, Judge Foxman would

have been dealing with a man who had been unconstitutionally committed to detention centers on several occasions as a youth and who had an insignificant criminal record as an adult. Id. Under these circumstances, clearly the results of his sentencing deliberation might have been different.

Mr. Quince's delinquent adjudications in juvenile court were invalid because he had been denied the right to counsel in the course of the proceedings there. The subsequent use of these adjudications by Judge Foxman in determining Mr. Quince's sentence was a further deprivation of his Sixth, Eighth and Fourteenth Amendment rights. Likewise, since a capital defendant has the constitutional right to have the sentencer consider any circumstance in mitigation of punishment, Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982), a court cannot use an uncounseled conviction to preclude the consideration of factors favorable to the defendant. Therefore, the death penalty in this case must be reversed.

III. THE STATE'S INTRODUCTION OF PSYCHIATRIC EVIDENCE AT MR. QUINCE'S CAPITAL SENTENCING HEARING VIOLATED HIS CONSTITUTIONAL RIGHTS

During its case-in-chief at the sentencing hearing, the State introduced both testimonial and documentary evidence stem-

ming from the productivity and competency examinations performed in March of 1980, about Mr. Quince's criminal responsibility for the death of Ms. Bowdoin. Because Mr. Quince was not given warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) before submitting to the examinations and neither he nor his attorney knew the findings would be used against him at sentencing, the introduction of this evidence was improper. Consequently, Mr. Quince is entitled to a new sentencing hearing.

As both the Supreme Court and the former Fifth Circuit have held, the Fifth and Fourteenth Amendments are violated when an expert psychiatrist testifies for the State to an opinion derived from a criminal defendant's statements during a court-ordered psychiatric examination if the defendant was not advised of his constitutional rights before making the statements. Estelle v. Smith, 451 U.S. 454, 467-68 (1981); Battie v. Estelle, 655 F.2d 692, 695-96, 699-701 (5th Cir. 1981).[6] See also Cape v. Francis, No. 83-8341 (11th Cir. 1984)(citing Battie v. Estelle, 655 F.2d at 700-01).

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[6] It is irrelevant whether the defendant or the State requests the competency examination. Booker v. Wainwright, 703 F.2d 1251, 1256 (11th Cir. 1983)(citing Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981).

The Sixth and Fourteenth Amendment right to counsel, Cuyler v. Sullivan, 446 U.S. 335 (1980); Argersinger v. Hamlin, 407 U.S. 25 (1972); is also implicated by testimony arising from a court-ordered psychiatric examination which takes place after counsel has been appointed because that examination can be a "critical stage" of the case. Estelle v. Smith, 451 U.S. at 470; Spivey v. Zant, 661 F.2d 464, 476 (5th Cir. Unit B 1981); cert. denied, 458 U.S. 1111 (1982). Thus, the Sixth and Fourteenth Amendments are violated if defense counsel is not notified in advance of the examination that the psychiatrist may be called to testify to matters other than the defendant's competency to stand trial. This rule prevails even if defense counsel is aware that an examination will take place because the defendant has been:

> denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

Estelle v. Smith, 451 U.S. at 471.

Here, Mr. Quince's attorney, Mr. Pearl, sought and obtained court-ordered productivity and competency examinations of his client during the initial stages of his representation. (R.App.

Vol. I at 4-8).[7] In discussing the impending examinations with Mr. Quince, Mr. Pearl merely informed his client that the psychiatrists would be questioning him to determine whether he suffered from any disorder (PCR. 432-33), and Mr. Pearl did not advise Mr. Quince of his constitutional rights under the Miranda doctrine prior to the interviews with the doctors. (PCR. 506, 566).

Meanwhile, Mr. Quince understood that he was being examined simply to determine his competency to stand trial. (PCR. 292-93). He was not informed of his Miranda rights by th doctors prior to the examinations (PCR. 294-95), did not realize until the sentencing hearing that the doctors could testify against him (PCR. 293, 296), and would not have spoken to them outside the presence of his lawyer had he known his statements could be used against him at sentencing. (PCR. 296-97).

During the sentencing hearing, however, the State submitted its psychiatric evidence, consisting of Dr. Barnard's testimony and the written reports of Drs. Barnard, Carrera, and Rossario, to prospectively counter the mitigating factors of substantial impairment and extreme emotional or mental distress. (STR. 102-

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[7] See footnote 6, supra.

31). The introduction of this evidence was improper under the caselaw outlined above for two reasons.

First, the privilege against self-incrimination is personal in nature and could only have been waived by Mr. Quince. As noted above, however, he was never apprised of his right to remain silent during the first set of psychiatric examinations, nor of the possibility that his statements would be used against him at the penalty stage of the criminal proceedings. Therefore, although psychiatric testimony was subsequently adduced on behalf of Mr. Quince, it cannot be said that he knowingly and voluntarily waived his Fifth Amendment right by participating in the earlier court-ordered examinations which had been designed to test his competency and sanity.[8]

Second, because Mr. Pearl did not realize that the State could use the results of the productivity and competency evaluations at sentencing, he was in no position to adequately advise his clients about the implications of undergoing the psychiatric examinations. Accordingly, Mr. Quinn was effectively denied his Sixth Amendment right to counsel at a critical state of his prosecution.

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[8] In that regard, Mr. Pearl's objection to Dr. Barnard's testimony because his examination had not been geared toward the mitigating factors, is well taken.

The psychiatric evidence used by the State in its case-in-chief at sentencing was obtained in violation of Mr. Quince's Constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. Consequently, his death sentence must be vacated and the matter remanded for a new sentencing hearing at which this material will be excluded.

IV. MR. QUINCE'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE INEFFECTIVE ASSISTANCE OF HIS COUNSEL

Mr. Quince was entitled to counsel rendering reasonably effective assistance. His counsel, Mr. Pearl, however, committed numerous errors throughout his representation of Mr. Quince. Because the relevant case law has held that the errors made by Mr Pearl constitute ineffectiveness, and there is a reasonable probability that but for the attorney's conduct the result would have been different, Mr. Quince has established a violation of his Sixth and Fourteenth Amendment rights which warrants post conviction relief. Strickland v. Washington, 104 S.Ct. 2052 (1984).

A. Mr. Quince Was Entitled to Effective Counsel

Under the Sixth and Fourteenth Amendments, Mr. Quince was due the effective assistance of counsel: i.e., counsel reasonably

likely to provide, and who does provide, reasonably effective assistance. E.g., Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982), cert. denied, 103 S.Ct. 1798 (1983). Considering the totality of the circumstances, Id.; Proffitt v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982), as mod., 706 F.2d 311, cert. denied, 104 S.Ct. 508 (1983), it will be demonstrated below that Mr. Quince's attorney did not provide reasonably effective assistance and that this prejudiced his defense. Because this Court must evaluate counsel's errors in light of his total performance, a review of that performance at all stages of the proceedings and its inadequacy is appropriate.

B. Defense Counsel's Actions Prior to the Entry of Mr. Quince's Guilty Plea

From the inception of the attorney/client relationship between Mr. Pearl and Mr. Quince, counsel's performance was deficient. First, between the date he was appointed to the case through the entry of the guilty plea, a period of over seven months, Mr. Pearl conferred with his client on only four or five occasions (PCR. 412, 547-48, 563-64) for periods of fifteen to forty-five minutes. (PCR. 548). Such limited contact was patently insufficient to obtain information from Mr. Quince pertinent to his defense, to review in detail with Mr. Quince all

developments in the case, and to advise Mr. Quince thoroughly about his options. In addition, it appears that Mr. Pearl deliberately curtailed his efforts to elicit information from or share information with Mr. Quince and restricted Mr. Quince's participation in the evolution of the case, based on Mr. Pearl's perception that his client was uncommunicative, impaired, and unable to comprehend the proceedings (PCR. 429-33, 499-500, 522-23): a situation which Mr. Pearl did nothing to alleviate. (PCR. 524-29).

Second, Mr. Pearl conducted little independent investigation of the crime or the evidence against Mr. Quince. For example, he relied exclusively on the findings of the government's pathology, serology, microanalysis and fingerprint experts and did not seek the appointment of any neutral forensic or scientific experts to examine the physical evidence or review the report of the state's experts. (PCR. 444-45, 447, 502-03, 550-51). In addition, although Mr. Pearl testified that he deposed or talked with everyone who might have had knowledge about either the prosecution or defense (PCR. 479), he identified few people with whom he actually spoke, and his own notes do not reflect any extensive investigation by Mr. Pearl. (PCR. 561, 564-66, 726). Moreover, Mr. Pearl did not attempt to contact Mr. Quince's family,

friends, educators, or employers (PCR. 468, 525-29),[9] provided limited information to the psychiatrists appointed to conduct a competency and productivity exam (PCR. 531-32), and it appears that Mr. Pearl interviewed only one of the arresting officers. (PCR. 440).

Third, Mr. Pearl did not file a demand for discovery pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure. (PCR. 415-16, 420). While Mr. Pearl testified about an open file discovery policy by the state's attorney (PCR. 415-17), this practice did not cover other agencies. (PCR. 420-21).

Fourth, Mr. Pearl did not attempt to suppress any of the confessions made by Mr. Quince to the police. (PCR. 428-29). In view of the circumstances surrounding the confessions, and Mr. Pearl's assessment of his client, this omission was inexcusable.

Mr. Pearl stated that he investigated the legality of Mr. Quince's arrest and the statements his client made to the police. (PCR. 503-04). However, he furnished few specifics about his efforts, and again his notes do not reveal that he

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[9] Mr. Pearl's recollection that he spoke to Mr. Quince's mother on one occasion was equivocal at best. (PCR. 468, 525). Moreover, he had no notes of such a conversation (PCR. 726), and Mrs. Quince testified that despite her numerous efforts, she had been unable to contact Mr. Pearl. (PCR. 38-42).

undertook such an inquiry. (PCR. 423, 428-29, 482, 503-04, 561, 564-66, 726). Actually, the record suggests that any consideration of this issue was perfunctory at best; according to Mr. Pearl he determined that the confessions were made voluntarily and in conformance with Miranda v. Arizona, 384 U.S. 436 (1966), based solely on a conversation with the police officer who obtained the confession and with Mr. Quince (PCR. 482) who, he knew, used drugs, and alcohol (PCR. 483), and whom he considered to be uncommunicative extremely impaired, and incompetent. (PCR. 429-33, 499-500, 522-23). This was hardly a thorough examination of the validity of confessions obtained during custodial interrogations without the benefit of counsel. Moreover, the confession to the sexual battery, which was elicited outside the presence of Mr. Quince's appointed counsel, patently contravened the Supreme Court's holding in Edwards v. Arizona, 451 U.S. 477, reh'g denied, 452 U.S. 473 (1981) and Massiah v. United States, 337 U.S. 201 (1964).

C. Defense Counsel's Recommendation to Plead Guilty

Mr. Pearl's ineffectiveness extended through the guilty plea phase of Mr. Quince's prosecution. Essentially, Mr. Pearl persuaded Mr. Quince to plead guilty to a capital offense and waive his right to an advisory jury sentence notwithstanding strong misgivings about his client's ability to appreciate the

implications of such actions. (PCR. 465-66, 497-501, 521-24).[10] Given his substantial doubts about Mr. Quince's competency, it was insupportable for Mr. Pearl to urge his client to plead guilty and to represent to the Court that his client understood the nature of the plea and its possible consequences. (PTR. 15). At a minimum, Mr. Pearl had an obligation to seek a determination of his client's competency to plead guilty.[11]

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[10] Mr. Quince maintains that Mr. Pearl did not fully and accurately disclose the consequences of a guilty plea and waiver of an advisory sentencing jury. (PCR. 285-92, 324, 326-27, 329-30, 334-35, 339). Although Mr. Pearl disputed Mr. Quince's recollection on this point (PCR. 451, 464-68, 501-02), the record reflects that Mr. Pearl did not always keep his client completely informed. For instance, Mr. Pearl stated that he restricted the information he shared with Mr. Quince (PCR. 430) and that he unilaterally determined that Mr. Quince would not testify. (PCR. 467). In any event, to the extent that Mr. Quince and Mr. Pearl indicated that Mr. Quince did not understand aspects of the capital proceeding, their testimony was consistent. (Compare PCR. 324, 329-30, 334 with PCR. 429-30, 465-66, 497-501, 521-25).

[11] Although psychiatric assessments of Mr. Quince were available, they had been conducted to evaluate his competency to stand trial and his sanity at the time of the offense (PCR. 439), not his competence to waive the fundamental right of trial by jury. Cf. Westbrook v. Arizona, 384 U.S. 150 (1966)(competency to stand trial does not equate with competency to waive right to counsel). See also, United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976); and Seiling v. Eyman, 478 F.2d 211 (9th Cir. 1973). The Court's abbreviated inquiry at the plea did little to elucidate Mr. Quince's state of mind (PTR. 8-12, 14-19) and was no substitute for a full competency hearing. Moreover, the Circuit Court's findings that Mr. Quince was "alert and intelligent" and able to appreciate the plea (STR. 17) conflict with the Court's later observations (R.App. Vol. I at 20), and Mr. Pearl's perception of the Court's observations. (PCR. 460, 540).

In addition, it seems that Mr. Pearl favored a guilty plea, in part due either to a misunderstanding of the government's position or ignorance of Florida law governing aggravating circumstances. At the sentencing hearing, the government argued that aggravating factor 5(f) existed because the felony murder had been committed for pecuniary gain: i.e. a burglary. (STR. 167-68). Mr. Pearl countered that under the plea agreement, in which the sexual battery was merged with the murder, the burglary was unconnected to the homicide and could not be used to aggravate the capital offense. (STR. 185-91). Under such a strained view, however, it is clear that Mr. Pearl had misconstrued the plea agreement with the State or was unfamiliar with the case law.[12] Regardless of the confusion, to the extent Mr. Pearl's advice to Mr. Quince was predicated on a misapprehension of fact or law, it was incompetent.

D. Defense Counsel's Preparation for the Sentencing Hearing

Mr. Pearl's ineffective representation of Mr. Quince continued after the entry of the guilty plea. Although his approach

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[12] As of 1980, it was well-settled that the State's position was the accepted view. Brown v. State, 381 So.2d 690 (Fla. 1980); Provence v. State, 337 So.2d 783 (Fla. 1976).

to the sentencing was to demonstrate the existence of certain mitigating factors (PCR. 469, 546), Mr. Pearl's investigation was woefully inadequate, causing considerable prejudice to his client.

The record reflects that Mr. Pearl undertook minimal if any effort to prepare for the sentencing hearing. First, while Mr. Pearl testified that his strategy was to stress his client's impaired state (PCR. 469, 546), he did not seek the appointment of additional experts until three weeks before the scheduled hearing. (R.App. Vol. I at 15-17). Due to this delay, the reports of the experts were not available until shortly before the sentencing. (PCR. 57, 58).

Second, Mr. Pearl met with his client for not more than forty-five minutes on only one occasion between the guilty plea and the sentencing hearing, a period of nearly two and one-half months. (PCR. 548). Undoubtedly this afforded an insufficient opportunity to obtain additional information from Mr. Quince pertinent to the sentencing, to prepare Mr. Quince for his interview with Drs. Stern and McMillan as well as with the probation officer who conducted the pre-sentence investigation, to discuss the results of the examinations and the P.S.I. report,[13] and to consult with Mr. Quince about the sentencing hearing.

[13] See, Section I, supra.

Third, Mr. Pearl did not contact or interview any potential character witnesses, nor did he adequately confer with the expert witnesses he planned to call at the hearing. (PCR. 570-72). Fourth, Mr. Pearl did not provide any information to or confer at any length with Mr. McLiverty, who prepared his client's presentence report. (PCR. 383, 385-86).

Finally, it appears that Mr. Pearl undertook no thorough examination of Mr. Quince's juvenile records[14] and no research of their admissibility at sentencing[15] or of the Court's authority to double the aggravating circumstances of a felony murder, in which the underlying felony is a sexual battery, and a concomitant burglary.[16]

E. Defense Counsel's Conduct of The Sentencing Hearing

Mr. Pearl's failure adequately to prepare for the sentencing hearing was demonstrated repeatedly throughout the proceedings on

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[14] See, Section II, and footnote 4, supra.

[15] Mr. Pearl cited no authority for his objection to the records on relevancy grounds (STR. 7), and he admitted that he did not research the validity of the uncounseled juvenile adjudications. (PCR. 568-69).

[16] See, footnote 12 and accompanying text, supra.

October 20, 1980. The most egregious examples of his performance are outlined below.

As mentioned in Section I, Mr. Pearl did not adequately review the presentence investigation report with Mr. Quince and was, therefore unaware of objections his client had to certain statements in the report. In addition, Mr. Pearl failed to object to several items contained in the report which were irrelevant to evidence of statutory aggravating factors or were incompetent statements of opinion. (PCR. 487). For example, the report reflected the recommendation of the prosecutor, two police officers and the author of the P.S.I. that Mr. Quince should receive the death penalty; two of those recommendations were based on the conclusion that the defendant had shown no remorse and could not be rehabilitated. Moreover, the Summary and Analysis Section of the P.S.I. was replete with unsubstantiated conclusions or opinions which Mr. McLiverty was not qualified to make.[17]

To justify his failure to object to this material, Mr. Pearl testified that he assumed the Court would not take these comments

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[17] Mr. Pearl admitted that he failed to object to portions of the P.S.I. containing uncomplimentary comments about Mr. Quince's background. (PCR. 538-39). Mr. Pearl also did not attempt to rebut them.

into consideration. (PCR. 567-68). The record reflects, however, that apart from the report's reference to Mr. Quince's juvenile record, the parties agreed that the Court could otherwise consider the contents of the P.S.I. (STR. 100).

Mr. Pearl also failed to contest the State's introduction in its case-in-chief of the written productivity and competency reports prepared in April of 1980, even though the constitutional basis for such a challenge was evident.[18] Smith v. Estelle, 445 F.Supp. 647 (N.D. Tex. 1977), had been decided three years earlier and affirmed by the Federal Circuit then encompassing Florida more than one year before Mr. Quince's sentencing hearing. Smith v. Estelle, 602 F.2d 694 (5th Cir.) reh'g and reh'g en banc denied (1979). Apparently, however, Mr. Pearl was unaware of this case law at the time of the sentencing. (PCR. 505-06).

All of the psychiatric evidence submitted by the State, including the written reports of Drs. Barnard, Rossario and Carrera, was also objectionable because the examinations underlying this evidence were conducted solely for the purpose of determining Mr. Quince's competency and sanity, not to explore areas of mitigation. (R.App. Vol. I at 4-8). Given this

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[18] See Section III, supra.

perspective, Mr. Pearl's explanation that to oppose this evidence would have been inconsistent with the defense being presented (PCR. 505-06) was insupportable.[19]

Moreover, Mr. Pearl's handling of the experts appointed by the Court, at his request, to assess Mr. Quince's capacity to appreciate his conduct or conform his conduct to the requirements of law (R.App. Vol. I at 43-47) was abysmal. Although Dr. Stern's written report was unfavorable (R.App. Vol. I at 58; PCR. 569-70) Mr. Pearl, nonetheless, elected to call him as a witness on the basis of an impression Mr. Pearl formed following a comment the doctor purportedly made to him during a brief recess of the sentencing hearing, that the doctor would soften his opinion. (PCR. 569-75). Upon taking the stand, Dr. Stern testified consistent with his written report. (STR. 158-59; PCR. 505). Dr. Stern's answers to subsequent questions posed by Mr. Pearl only served to reinforce his adverse testimony. (STR. 159-63).

Mr. Pearl's examination of Dr. McMillan was also damaging. Without having discussed with Dr. McMillan the possibility of mitigating factors other than impairment, Mr. Pearl, on direct

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[19] Indeed, Mr. Pearl objected to Dr. Bernard's testimony on the very basis that his psychiatric evaluation had related solely to competency and sanity. (STR. 111-113).

examination, inquired whether Mr. Quince had been under the influence of an extreme mental or emotional disturbance at the time of the offense. (STR. 145-46). The question, asked with no foundation, and Dr. McMillan's negative response merely detracted from Mr. Pearl's impairment "theme."[20]

Finally, Mr. Pearl failed to adduce any independent evidence of several nonstatutory mitigating factors such as Mr. Quince's remorse, his childhood, his relationship with family members, his reputation, and his work record. Notwithstanding the availability and willingness of numerous family members, residents of the community, and former educators to testify regarding these matters on behalf of Mr. Quince (PCR. 29-175, 218-26), Mr. Pearl, without ever contacting any of these people to assess their knowledge and potential as witnesses, concluded that he would not call any of them. (PCR. 525-30, 534-38).[21] Instead, Mr. Pearl chose to rely on the written submissions of the psychiatric experts and the PSI report to present Mr. Quince's social history and other nonstatutory mitigating factors. (PCR. 468-71, 494-95).

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[20] Mr. Pearl asked Dr. Stern the same question with similar results. (STR. 157-58).

[21] Mr. Pearl also usurped Mr. Quince's prerogative by unilaterally determining that he would not allow his client to testify. (PCR. 467).

Mr. Pearl's reliance on these reports, however, was grossly misplaced. The doctors relied solely on information they obtained from Mr. Quince or each other's reports. (R.App. Vol. I at 54-58; PCR. 110-14, 155-58, 547-48). In addition, three of these reports were not designed to encompass mitigating factors for a capital sentencing. Meanwhile, the author of the P.S.I. report, who had not previously conducted a presentence investigation in a capital case (PCR. 380-81), and who was less than neutral, spoke to one family member. Moreover, many favorable aspects of Mr. Quince's life, such as his close-knit, loving family; his caring attitude; and his reputation for nonviolence[22] were not contained in any of these reports. Mr. Pearl's failure to present this evidence to the Court was inexplicable.

F. Defense Counsel's Representation Did Not Meet Constitutional Standards

The legal assistance Mr. Pearl provided to Mr. Quince fell well below the standards set forth in Strickland v. Washington,

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[22] Mr. Pearl conceded that he was unaware of Mr. Quince's reputation for nonviolence but dismissed it as irrelevant. (PCR. 494). Contrary to Mr. Pearl's ex post facto rationalization for his neglect, such evidence would have underscored the aberrational nature of Mr. Quince's conduct.

104 S.Ct. 2052 (1984). Mr. Pearl conducted inadequate investigation and research at both the guilt/innocence stage and the sentencing stage of the criminal proceedings, rendering it impossible for him to exercise professional judgment on behalf of Mr. Quince and to present "an intelligent and knowledgeable defense" for his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). See also King v. Strickland, 714 F.2d 1481 (11th Cir. 1983) vacated and remanded, 104 S.Ct. 2651, reinstated, (11th Cir. 1984); Goodwin v. Balkcom, 684 F.2d at 805. In view of Mr. Pearl's deficient performance at all levels of his representation, and the resulting prejudice to his client, relief is warranted.

V. THE DEATH PENALTY IS IMPOSED IN FLORIDA IN AN ARBITRARY AND DISCRIMINATORY MANNER

In Count F of his motion, Mr. Quince asserts that his rights guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the arbitrary and discrimatory manner in which the Florida death penalty statute is administered. In support of his allegation, appellant submitted as evidence below a number of studies and reports concerning the administration of Florida's capital punishment statutes. (See, PCR. 717-24, Exhibits 1-8).

Appellant submits that these studies provide a legally sufficient basis to provide post-conviction relief. See Spencer v. Zant, 715 F.2d 1562 (11th Cir.), reh'g. en banc granted, 715 F.2d 1583 (1983). The Constitution clearly prohibits the discriminatory enforcement of a facially nondiscriminatory statute. Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886); Furman v. Georgia, 408 U.S. 238, 389 n. 12 (1972) (Burger, C.J., dissenting). A sophisticated statistical analysis which establishes a pattern of discrimination makes out a prima facie case of denial of equal treatment. See Jean v. Nelson, 711 F.2d 1455, 1495 (11th Cir.), reh'g granted, 714 F.2d 96 (1983)(statistical demonstration of discriminatory impact on Haitian refugees supports inference that disparate result is product of intentional discrimination); Fisher v. Procter & Gamble, 613 F.2d 527 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981). The burden is then on the State to dispel the presumption of discrimination. Castaneda v. Partida, 430 U.S. 482, 494-495 (1977). Here, the State made no showing and, therefore, relief is appropriate.

VI. MR QUINCE WAS DENIED A FULL AND FAIR HEARING BELOW

Prior to the evidentiary hearing, Mr. Quince, an indigent, through his pro bono counsel, moved the post-conviction court for funds to retain experts and investigators. (PCR. 663-66, 675-

86). That request was denied (PCR. 695). The inability of Mr. Quince to obtain these services not available to him solely because of his indigency, rendered the evidentiary hearing fundamentally unfair.

Over the last two decades, the Supreme Court has consistently recognized that indigent criminal defendants are entitled to an increasing variety of services to assist in their defense. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956)(right to trial transcript); Gideon v. Wainwright, 372 U.S. 335 (1963)(right to counsel in state trial courts); Douglas v. California, 372 U.S. 353 (1963)(right to counsel on appeal); Roberts v. LaVallee, 389 U.S. 40 (1967)(right to transcript of preliminary hearing); Argersinger v. Hamlin, 407 U.S. 25 (1972)(right to counsel for misdemeanors); Bounds v. Smith, 430 U.S. 817 (1977)(right of prisoners to have access to law libraries or professional assistance in habeas corpus proceedings). But see, Ross v. Moffitt, 417 U.S. 600 (1973)(states not required to provide counsel for discretionary appeals). The Court has also recognized that, to satisfy the requirements of the Sixth Amendment, indigent defendants must be provided with effective assistance of counsel. Strickland v. Washington 104 S.Ct. 2052; Powell v. Alabama, 287 U.S. 45 (1932); McMann v. Richardson, 397 U.S. 759 (1970).

Several federal courts have construed the rationale of these cases to embody the provision of expert assistance to indigent defendants. See, e.g., Knott v. Mabry, 671 F.2d 1208, 1212-13 (8th Cir. 1982); Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980); Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975). See also cases collected in Annotation, Right of Defendant in a Criminal Case to Aid of State Appointment of Investigator or Expert, 34 A.L.R.3d 1256.

Although cases dealing with the provision of services and representation to indigent defendants have focused to a large extent on trial and direct appeal, the Supreme Court has recently recognized, as a matter of judicial notice, that capital cases are expected to be litigated in both state and federal post-conviction. See Barefoot v. Estelle, 103 S.Ct. 3383 (1983). The Court also has recognized that such post-conviction litigation in death penalty cases is inevitible because of the nature of the penalty:

> (D)eath is a different kind of punishment than any other which may be imposed in this country ... the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Gardner v. Florida, 430 U.S. at 357. Appellant submits that asking him as an indigent defendant to effectively litigate post-conviction matters without the necessary services and funds renders those proceedings a "meaningless ritual." Douglas v. California, 372 U.S. at 350.

Compounding these financial constraints, was the lower court's failure to grant counsel sufficient time to effectively prepare and investigate this case. Prior to the conduct of the evidentiary hearing, counsel requested and was granted a continuance of less than a month because his mother was seriously ill. (PCR. 700-701). Thereafter, counsel's mother died. An additional short continuance of three weeks was requested so that counsel could effectively prepare the case. That request was denied. (PCR. 703-706). Further requests to keep open the record and take further evidence made during the evidentiary hearing were similarly denied. (PCR. 4-7, 364). Appellant submits that the lower court erred in denying these requests in manifestly compelling circumstances which rendered a short continuance necessary. For both of the reasons cited this matter should be remanded for further proceedings.

CONCLUSION

For all the reasons set forth above, Mr. Quince respectfully requests this Court to reverse the judgment of the Circuit Court and grant post-conviction relief to vacate his conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was mailed, postage prepaid, to James Smith, Attorney General, Department of Legal Affairs, The Capital, Suite 1502, Tallahassee, Florida, 32301 on this 25th day of October, 1984.

Russell F. Canan

Russell F. Canan