66,156

IN THE SUPREME COURT OF FLORIDA

CASE NO.

JESSIE JOSEPH TAFERO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/



# BRIEF OF APPELLANT

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## INTRODUCTION

Defendant/Appellant JESSIE JOSEPH TAFERO will be referred to as he stood before the trial court and as TAFERO. Plaintiff/Appellee STATE OF FLORIDA will be referred to as the State.

"T", with the volume number, refers to portions of the transcript of TAFERO's original trial. "R" refers to portions of the original record on TAFERO's appeal to this court from his judgment and death sentence. "SR" refers to portions of the supplemental record on that appeal. "P" refers to portions of the record in the post-conviction proceedings below. "H" refers to portions of the hearing transcript on TAFERO's motion to vacate pursuant to Fla.R.Crim.P. 3.850.

"A" refers to the appendix filed together with this brief. That appendix includes TAFERO's Rule 3.850 motion, his amendments to that motion, and the original trial testimony of Hyman, MacKenzie and Rhodes, the key trial witnesses.

## STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of TAFERO's motion to vacate his conviction and death sentence. The Governor signed a warrant for TAFERO's execution on November 2, 1984. That execution is scheduled for November 29, 1984. This is TAFERO's first warrant.

Background. TAFERO was convicted and sentenced to death on May 18, 1976. He had been charged with four counts of premeditated murder, robbery and kidnapping. TAFERO appealed to this Court. This Court affirmed his conviction on June 11, 1981. 403 So.2d 355 (Fla. 1981). He then filed a petition for writ of certiorari in the Supreme Court of the United States seeking review of this Court's decision. The United States Supreme Court denied certiorari on February 22, 1982. Tafero v. Florida, 455 U.S. 983, 102 S.Ct. 1492, rehearing denied 456 U.S. 939, 102 S.Ct. 2000 (1982). Otherwise TAFERO has not previously filed any petitions, applications or motions in the state trial court.[1/]

On November 9, 1982, TAFERO filed in this Court a Motion for Leave to File a Petition for Writ of Error Coram Nobis based on newly discovered evidence. This Court denied the petition, with two justices dissenting. 440 So.2d 350 (Fla. 1983). TAFERO sought review in the United States Supreme Court. That court denied certiorari on March 5, 1984. Tafero v. Florida, 104 S.Ct. 1456 (1984).

Facts underlying the conviction. On March 3, 1975, a four count indictment was filed against TAFERO, Sonia Jacobs Linder and Walter Norman Rhodes, Jr., charging

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1/ While his direct appeal to this Court was pending, TAFERO, along with numerous other death-sentenced appellants, filed an Application for Extraordinary Relief and Petition for Writ of Habeas Corpus in this Court challenging this Court's practice of reviewing, ex parte, non-record information concerning capital appellants' mental health status and personal backgrounds. This Court denied relief on January 15, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The Supreme Court of the United States declined to review that decision by writ of certiorari. Brown v. Wainwright, 454 U.S. 1000, 102 S.Ct. 542 (1981). No evidentiary hearing was ever held on those proceedings.

them with the first degree murders of Phillip A. Black and Donald Robert Irwin, theft of a firearm and motor vehicle from Black, and the abduction of Leonard Levinson.

This incident began at a rest stop on I-95 in Broward County where TAFERO, Linder, her two children and Rhodes had pulled over to sleep. Early in the morning they were awakened by Black, a state trooper, looking into the car. He noticed a gun between the seats, opened the front door and took the gun. He then began questioning Rhodes, TAFERO and Linder. The events which followed and culminated in the shooting of the state trooper and Irwin, a visiting Canadian officer, were in substantial conflict at trial.

Three primary witnesses testified at TAFERO's trial concerning the shooting. Two of those witnesses were disinterested and independent. They were truck drivers who pulled into the rest area and parked about 125-150 feet behind the trooper's car. They watched almost the entire sequence of events. Each of them testified that the Canadian officer was holding TAFERO up against the trooper's car with his arm pinned behind his back at the time the shots were fired. The third witness was Rhodes, the co-defendant who testified in return for the State's agreement not to seek the death penalty against him. Rhodes testified that Sonia Linder fired a series of shots from the rear seat of the Camaro. TAFERO then ran over to her, took the gun and fired the remaining shots. Neither of the truck drivers saw any such actions by TAFERO. TAFERO was convicted of first degree murder.[2/]

The evidence at trial as to the shooting was as follows:

Robert McKenzie, a truck driver, pulled into a rest area for a 15 minute break in his route. (T-III. 61-62). He pulled in behind the trooper's car which was parked to, and about six feet away from, the Camaro. (T-III. 63). He saw the trooper talking to

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2/ The same trial judge who sentenced TAFERO sentenced Jacobs to death, but her sentence was reversed by this Court. Jacobs v. State, 396 So.2d 713 (Fla. 1981). Thus, although three persons were involved in this incident, only TAFERO now faces the death penalty.

TAFERO who was standing next to the open driver's door of the Camaro. (T-III. 64-65). Rhodes was standing in front of the Camaro. Rhodes began to move, but the trooper directed him to move back. (T-III. 68). TAFERO pointed to the bushes and walked over to a tree nearby. (T-III. 69). He then walked back and began talking to the trooper. He sat down in the driver's seat, then stood up again. (T-III. 71). He seemed angry. He pulled a suitcase from the car. (T-III. 72). The trooper took it and put it in the back seat of the trooper's car. (T-III. 72-73). At that point another truck pulled up.[3/] (T-III. 73).

McKenzie pulled slowly out of the rest stop because his break was over. (T-III. 73). As he pulled away, he continued to watch in his rear view mirror. He saw the trooper begin to pat down TAFERO. TAFERO jumped, the trooper swung and a scuffle started. (T-III. 75). The trooper shoved TAFERO against the trooper's car, the Canadian came over, held TAFERO's left arm up behind his back, pushed him over the hood and held him there. The trooper backed off a few feet and pulled his gun. Rhodes walked around to the back of the Camaro on the passenger side. Then he wandered to the driver's side. (T-III. 76).

Meanwhile, the trooper went to the driver's side of his car, leaned in and called on the radio. (T-III. 78). As he came back around the car, he noticed Rhodes moved. He swung at him. Rhodes put his hands up and returned to the passenger side of the Camaro. (T-III. 78). McKenzie began pulling out on the highway. (T-III. 81). He suddenly heard fast shots. He looked in his mirror. The trooper fell instantly; the Canadian officer fell right behind him. Rhodes ran to the trooper's car. TAFERO turned around <u>after</u> the shots were fired. (T-III. 81).

McKenzie said that Rhodes had his hands in the air while the five shots were fired. (T-III. 81). At the time of the shots, the Canadian officer was holding TAFERO with his arm bent behind his back over the hood of the trooper's car. (T-III. 81, 94).

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3/ This was the truck driven by Pierce Hyman, the other witness.

TAFERO did not turn around until after the shots were fired and after the officers fell to the ground.

Q: Did you see what the guy in the brown jacket [TAFERO] was doing?

A: All I could see was his head and his shoulders, like he turned around.

Q: He turned around during the shots, or before the shots?

A: He turned around after the shots were fired.

(T-III. 81).

Q. It was at that point, as I understand, it, and again, you correct me now, Bobby, if I am wrong, this is at the period of time when the man with the brown jacket and the tan pants [TAFERO] was up near, or against, the trooper's car; and the fellow with the white T-shirt [the Canadian constable] was behind him?

A. Right.

Q. And, had ahold of him?

A. He had ahold of him.

Q. He had his arm bent up behind his back?

A. One arm up behind his back.

Q: You are indicating the left arm?

A: Right.

Q. Then, it was at this period of time, as I understand it, that you heard the shots going, when everybody was in that posture?

A. Yes; maybe about a second.

Q: But, those people were situated just as you have now explained to me?

A: Yes.

Q. The man in the brown jacket and tan pants [TAFERO], as I understand it, according to what you just told the jury, then, after the shots were fired, turned around?

A. Yeah.

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103 S.Ct. 2733 (1983) 30,31

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Q. Did you see what he did then?

A. No; I didn't see. I know he turned around, and the guy in the blue [Rhodes] ran through them, and went to the officer's car.

(T-III. 94-95). After the shooting stopped, Rhodes ran to the trooper's car and got in the driver's seat. (T-III. 81, 95).

Pierce Hyman pulled into the rest area shortly after McKenzie. He pulled his truck up parallel to McKenzie's but a bit closer to the trooper's car. (T-III. 18, 19). He saw the trooper bent over the open door of the Camaro as if he were looking for something inside. (T-III. 21). He then saw the trooper walk back to his own car, open the driver's door and apparently speak on the radio. (T-III. 24-25). The trooper then walked back to the door of the Camaro where TAFERO had been sitting in the driver's seat. (T-III. 25). TAFERO had gotten out when the trooper went to the radio, gone around the front of the Camaro, walked over to the grass and stretched. (T-III. 25). He came back and appeared to lean against the Camaro's fender. (T-III. 28). When the trooper returned, they appeared to exchange angry words and the trooper grabbed TAFERO by the shoulder. He grabbed his arm and twisted it up behind his back. The Canadian came over, took TAFERO's bent arm and pushed TAFERO over the hood of the trooper's car. The trooper stepped back and pulled his gun. (T-III. 29). The trooper swung his gun back and forth between TAFERO and Rhodes and Rhodes raised his hands. (T-III. 30). Rhodes was still in front of the Camaro.

As the trooper began to turn toward the Camaro, Hyman heard a shot. The trooper lost his balance, regained it, then Hyman heard several shots in rapid succession. (T-III. 31). Rhodes' hands were still in the air; he appeared to have nothing in his hands. He saw no gun other than the trooper's. After the first shot, he saw TAFERO and the Canadian officer scuffling. (T-III. 32). The shots appeared to come from the back of the Camaro. When he heard the rapid shots, he saw the Canadian officer fall. Rhodes got in

the driver's seat of the patrol car. (T-III. 33). TAFERO, Linder and the children followed. (T-III. 34).

Rhodes' story at trial. Rhodes, TAFERO and Linder were traveling to West Palm Beach and decided to stop and sleep in the car overnight at the rest stop. Rhodes was in the driver's seat. He was awakened early in the morning by a state trooper looking into the window. (T-IV. 267). The police car was parked parallel to the Camaro about six feet away. (T-IV. 268). The trooper opened the driver's door and pulled a gun out from between the seats where Rhodes had placed it. (T-IV. 269). The trooper returned to his own car and got on the radio. (T-IV. 272, 273). There was another man with him in plain clothes who simply stood toward the rear between the two cars. The trooper returned and asked Rhodes about his parole. (T-IV. 275). He then told Rhodes to get out of the car and stand in front of the patrol car, which he did. (T-IV. 276).

The trooper then began talking to TAFERO. TAFERO gave him a false name and said he had no identification. The trooper then asked for Linder's identification. (T-IV. 278). She began rifling through her purse. The trooper leaned in and began going through her purse with her. He found a baggie of marijuana in there and threw it on the ground. (T-IV. 279). Then he pulled an empty shoulder holster out which he saw in the car between Linder's legs. He ordered everyone out of the car with their weapons. (T-IV. 280).

TAFERO began moving very slowly out of the front seat. The officer reached in and grabbed him as if to help him out. They began scuffling. (T-IV. 281). The trooper pushed him up against the trooper's car, with one hand behind him. The Canadian officer then held TAFERO while the trooper pulled out his gun. (T-IV. 281). The trooper began waving his gun back and forth and Rhodes put up his hands. (T-IV. 283). He turned to face away, but periodically looked back to see what was going on. He turned and saw the trooper on the radio on the passenger side of the car. (T-IV. 284). He turned again and saw the trooper scuffling again with TAFERO. (T-IV. 285). He did not notice what the Canadian officer was doing at that time. He turned away again and heard two shots, the

second one much louder than the first. He turned around to see. (T-IV. 286).

The trooper was standing there as if frozen. Linder had a gun in her hand and looked scared. TAFERO darted over to her, scuffled for the gun, grabbed it and shot at the officers. (T-IV. 286, 287). Rhodes said he heard four distinct shots, then two more shots at the Canadian officer. (T-IV. 288).

Rhodes began to walk back to the Camaro, but TAFERO told him to take the trooper's car. (T-IV. 289). Rhodes turned and got in the driver's seat. All the shooting had ended at the point when TAFERO announced that they were taking the trooper's car. (T-IV. 303).

In sum, the evidence as to whether TAFERO pulled the trigger was in substantial conflict between two independent and disinterested witnesses who said he did not and a codefendant who testified to avoid the death penalty who said he did. Without Rhodes' testimony, the evidence does not establish beyond a reasonable doubt that TAFERO shot anyone.

The Penalty Phase of the Trial. At the penalty phase of the trial, the State introduced evidence of TAFERO's prior criminal conviction. In response, Mr. McCain, TAFERO's court-appointed lawyer, did nothing. He put on no evidence on TAFERO's behalf in mitigation of the death penalty:

> THE COURT: Does the defendant have any evidence at all that they would like to present?
>
> MR. McCAIN: No evidence, judge.

(SR. 47). The prosecutor then made an extended argument about why the death penalty should be imposed against TAFERO. Again, McCain did nothing in response. He did not make the slightest effort to persuade the jury to recommend life imprisonment instead of the death penalty. To the contrary, his "argument" to the jurors was intended to alienate them. In substance he asked them to impose the death penalty. This was McCain's entire "argument":

> MR. McCAIN: May it please the Court, and the ladies and gentlemen of the jury. I will be very brief here today, in that I have consulted with Jessie Tafero, and he feels very strongly that he did not receive a fair trial.
>
> He feels very strongly that this verdict was not fair, and he feels that to participate in the sentencing argument in any way, would be a charade.
>
> He will not beg for his life, nor mercy.
>
> Thank you.

(SR. 54). The trial court made no effort to determine whether TAFERO personally agreed to this "argument" which directly invited the jury to return a recommendation of death. Having received this "argument", the jury did the only thing it was asked to do and recommended the death penalty. The trial court imposed the death penalty.

The evidence at the Rule 3.850 hearing. The trial court granted TAFERO an evidentiary hearing on his motion for post conviction relief a week after he filed his motion. The court heard the testimony of numerous witnesses.

McCain's testimony. TAFERO was represented at his trial by court-appointed counsel, Robert McCain. McCain was convicted on both state and federal charges after TAFERO's trial. The primary charge on the federal offense was obstruction of justice. The primary charge on the state offense was a narcotics conspiracy. The federal charge arose out of his attempt to bribe an ex-client as a witness in a case. He was sentenced to a lengthy prison term. He has been under automatic suspension from the Florida Bar because of the felony conviction. McCain thinks that he has been disbarred. (H. 25-26).

McCain was appointed to represent TAFERO on March 9, 1976. (R. 6).[4/] McCain could not recall how many prior death penalty cases he had handled. (H. 29).[5/] At the least, he had represented William Elledge, who had entered a guilty plea on McCain's

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4/ McCain thought that he therefore had six weeks before trial. (H. 30). In fact it was a bit over two months.

5/ McCain response to the vast majority of questions put to him was "I cannot recall".

advice and then received the death penalty. (H. 29). McCain could not remember what his case load was at the time he represented TAFERO, whether it was busy or not. (H. 30). McCain submitted a sworn petition for attorney's fees on May 25, only a week after he completed his representation at trial. The petition is notable for it brevity. It states that McCain: (1) "conducted extensive interviews with Defendant to prepare"; (2) "thoroughly prepared for trial"; (3) "thoroughly interviewed and deposed many of the State's witnesses", the codefendant Linder and members of Defendant's family; (4) researched; and (5) "drafted voir dire" and "reviewed jury instructions". He concluded by stating that he had spent "in excess of 100 hours" on the case. Since the trial lasted six days, this meanth that he spent somewhere around 50 hours in pretrial preparation. The court awarded $1,500 as a fee.

McCain also submitted a request for reimbursement of costs. He requested reimbursement for one subpoena to the sheriff's office. He requested $561.75 for the time of an investigator, Don Pearce, who worked from April 1 through May 11, 1976. The remainder of the approximately $2,700 cost request covers only copies of 23 depositions.

McCain said he saw TAFERO in the Broward County jail on a number of occasions. He did not remember how often. He did not remember for how long. (H. 31).[6/]

McCain claimed that he consulted with TAFERO on everything he did, including the penalty phase of the trial. However he "had no recollection of the specifics of the conversation". (H. 63). He knew that he was not limited in the presentation of mitigating evidence on TAFERO's behalf. "If I had anything to present, I would have attempted to present it". (H. 60). Yet he admitted that he did nothing in preparation for sentencing phase:

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6/ McCain said the record would reflect how often he had been to the jail, although it might not be completely accurate because he had also visited with other clients during that same time period. (H. 31). Unfortunately, the jail visitation records were destroyed in 1981. (H. 257).

Q: What had you done to prepare for sentencing?

A: Went over the entire matter with Jessie and we concluded then not to put on any witnesses.

Q: Did you issue a single subpoena to any possible defense witness.

A: No, sir.

Q: Did you talk to any possible defense witness?

A: No, sir.

Q: Did you file a list of any possible defense witnesses?

A: No, sir. Not to my knowledge.

(H. 60-61).

Q: Is it fair to say you did no independent—Jessie not having come forward with any people to present in his defense, that you did nothing to find them on your own?

A: To find those people that you just named?

Q: Anyone who would come forward and say anything about him at the sentencing hearing.

A: That's correct.

(H. 79-80). In sum, McCain simply relied on TAFERO to determine who the relevant witnesses might be. Since TAFERO did not suggest particular individuals to him,[7/] he did nothing on his own.[8/]

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7/ McCain admitted that TAFERO did not refuse to give him names. (H. 40). TAFERO simply could not come up with names of people who TAFERO thought were relevant. But that is the job of the lawyer, not the client. Here, McCain left it to his client to determine what was relevant and important.

8/ For example:

Q: Did you do anything to find out what he might have done while he was in jail to rehabilitate himself and to show to someone that he was not such a bad fellow?

A: No, sir.

(H. 114). As outlined in the evidentiary hearing, such beneficial evidence could have (footnote continued)

McCain's attempt to justify his "argument" in penalty phase. He explained that his purpose was to "tone down" the sentencing proceedings. According to McCain, his argument, made after all evidence in the sentencing phase had been introduced, was somehow designed to keep the state from introducing more evidence:

> Q: Wouldn't you agree that your statement to the jury challenged them to invoke the death penalty?
>
> A: Not necessarily. My objective here, after talking with Jessie, was to close the door and not permit the state to introduce anything which might have been derogatory to him other than what's already come in. I think that was more my recollection of the thrust of it than anything else.
>
> Q: Excuse me. How would that have precluded the State from coming forward with withever?
>
> A: It wouldn't preclude them legally from doing anything.
>
> Q: You thought your statement was a bar to the introduction —
>
> A: No. No.
>
> Q: —by the State of incriminating evidence?
>
> A: No, no, no. I wanted, and Jessie wanted to tone the sentencing portion down.
>
> Q: Mr. McCain, one more time. Having told the jury that the Defendant will not beg for his life, nor ask for mercy, that he didn't get a fair trial, that he doesn't like the jury, how could you expect him to get anything other than the death penalty.
>
> A: I don't think that the record indicates that we told the jury that Jessie didn't like 'em.

(H. 72-73).

> Q: How could you have expected that jury to render any advisory verdict other than death, given what you told them?
>
> A: As I said, I think that the purpose was to simply tone the

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been easily discovered. See, e.g., Defendant's Exhibit 3 (deposition of Esther Cauliflower).

State down on the sentencing portion, not have the State come up with some other material which they may have had.

(H. 73).

McCain admitted that he did not believe TAFERO fired any shots (H. 44), that the trial evidence was strong that TAFERO did not fire the shots (H. 74)[9/] and that the jury's verdict in the guilt phase, in light of the felony murder instructions, did not resolve whether TAFERO fired any shots. (H. 75).[10/] Yet he admitted that he did not see that this had any relevence to potential sentencing phase arguments:

Q: I'll ask you another question. Even if he had been a felon guilty of felony murder, or guilty of aiding and abetting someone else in the homicide, did the fact that he was not the shooter of the two officers have any signficance to you as to his sentence?

A: I can't recall that.

(H. 54).

McCain summed up his penalty phase performance:

Q: Did you present any evidence on Jessie's behalf?

A: At the sentencing?

Q: Yes.

A: No. The record I think will show that I did not.

Q: You knew, did you not, that you could make an argument on his behalf even if you didn't present any evidence?

A: Sure.

Q: You knew, did you not, that you could argue, if nothing else, against the death penalty as an institution?

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9/ As McCain stated, "there were some independent, impartial eyewitnesses to this who did not place a gun in Jessie's hand or make him the shooter in the case". (H. 74).

10/ As McCain stated, "[i]t depends on what, whose testimony they believed when they got into the jury room, and I can't tell you that". (H. 75).

A: Sure, I knew that.

Q: But you didn't either.

A: I did not.

(H. 61-62).

McCain also attempted to justify his conduct in penalty phase by explaining that it was the result of an agreement reached between him and TAFERO. (H. 103).[11/] But McCain admitted that he made no attempt to persuade TAFERO to follow another, more rational course because McCain believed what he actually did in penalty phase was the best thing to do:

A: I think it was both of our ideas after we discussed it.

Q: Is it fair to say there was certainly no disagreement—

A: That would be fair.

Q: —between you and Jessie?

(H. 83).

Q: Was that strategy, the strategy not to present any evidence, shared by Jessie and you equally?

A: Yes, sir.

Q: I assume then, being in agreement, there was no effort on your part to dissuade Jessie from that strategic avenue?

A: No. We took that strategy and —

Q: You would agree with me, it's fair to say, you never said, "Jessie, you're out of your mind, that's the wrong way to handle this case"?

A.: I think in this case that was the right way.

(H. 89).

Although McCain believed that a death recommendation was a likely result in this

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11/ McCain could not state where or when his "agreement" was reached, or the specific discussion which lead to this agreement. (H. 66, 71).

case (H. 38), he did not warn TAFERO that the course of conduct to which they "agreed" would enhance that likelihood. (H. 40-41).

> Q: Without the witnesses, without things to present in his defense, didn't you tell him that he was going to be sentenced to death; that that was a foregone conclusion?
>
> A: Not to my recollection.

(H. 66).

According to TAFERO, McCain's argument was solely his own. It was not TAFERO's. At no time did McCain or the court inform TAFERO of his right to put on evidence in mitigation of the death penalty, the type of evidence which he was entitled to introduce, the effect of a jury's recommendation of the death penalty or the likely effect of his refusal to participate in the sentencing proceedings. In short, at no time did McCain or the Court fully inform TAFERO of his rights with respect to the sentencing proceeding. At no time did TAFERO knowingly and intelligently waive his right to fully participate in those proceedings, through introduction of appropriate evidence and appropriate argument to the jury.

TAFERO testified that he met with McCain 7-10 times prior to trial, usually for 10-20 minutes each time. (H. 130). TAFERO told McCain of his desire to call numerous witnesses on his behalf. To TAFERO's knowledge, McCain did not contact anyone. (H. 133).[12/] As a result, TAFERO filed numerous pro se motions. (H. 133, R. 33-42, 63-75, 82-83, 102-03).[13/]

TAFERO wanted to seek recusal of the trial court. He explained his reasons:

> The first reason was that I knew from the onset that Judge Futch had appointed Mr. McCain to my case and I also I had personal knowledge that Judge Futch was an ex-highway pa-

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12/ As outlined above, McCain acknowledged that he did not contact any witnesses.

13/ Among other motions, TAFERO filed a pro se motion requesting that he be given the right to personally contact witnesses.

> trolman; that he had gone to the—Mr. Black's funeral, was crying at the funeral. That he had been in the highway patrol for a number of years.
>
> That he—it would just be unreasonable for him to be so closely associated with a group that there—it would just be basic human nature that he would have some type of internal or external pressure from being so closely associated with this group.

(H. 138). TAFERO made his concerns known to McCain, but McCain refused to seek recusal. (H. 138). As a result, TAFERO filed a pro se motion for recusal which the court denied.[14/] TAFERO also was concerned because of the enormous amount of publicity which the case had generated.[15/] Again, he made those concerns known to McCain. McCain failed to file any motion. (H. 139).

TAFERO knew the state had listed 120-140 potential witnesses. McCain told TAFERO that he was not receiving enough money to properly investigate all the witnesses. (H. 140). TAFERO therefore believed that McCain was not prepared to go to trial. McCain admitted that he was not ready:

> A: I think I announced at trial I was not ready.
>
> Q: Not ready.
>
> A: I wanted more time.

(H. 51).

TAFERO explained the extent of his participation in the sentencing phase. McCain never sat down with him and discussed the concept of a separate sentencing phase trial. The first time he heard about aggravating and mitigating circumstances was when the matter was presented to the jury. (H. 145). McCain simply told TAFERO that

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14/ This court on direct appeal held that the allegations of TAFERO's pro se motion were insufficient to require recusal. This does not compel the conclusion that counsel could not have filed an adequate motion.

15/ A composite of some of the newspaper articles generated by this case prior to and during trial were tendered to the court in the hearing below.

the death penalty was inevitable if the jury returned a guilty verdict. (H. 148).

The guilty verdict was returned at 8:43 p.m. (SR.IA-45). The penalty phase began at 9:50 a.m. the next morning. (SR.IA-45). McCain did not visit TAFERO during the night after the guilty verdict. (H. 146). The next morning, when TAFERO walked into court, McCain asked TAFERO if he thought he had received a fair trial. (H. 147). McCain gave his penalty phase "argument" to the jury based on TAFERO's reply that he had not. (H. 147). TAFERO did not know what McCain was going to say in his argument and did not tell McCain what to say. (H. 149).[16/]

TAFERO explained the discussions he had with McCain concerning the potential death penalty:

> Q: During these pretrial conversations you had with Mr. McCain or Mr. Sutton, did you discuss what would happen if you were convicted?
>
> A: Yes, sir.
>
> Q: What was that discussion?
>
> A: Well, it basically revolved around that with the circumstances of publicity and the community pressures on this case, that a finding of guilty, along with the the trial judge that we had in the case, would almost necessitate a finding of guilty in my behalf and that I didn't have too much chance of anything else.
>
> Q: What about the penalty phase? Was there discussion prior to trial about the separate hearing that would be conducted if you were convicted?
>
> A: No, sir. The only real notice that I had of it was what I heard was read to the jury from—I believe it was the prosecution, I'm not sure, just from my recollection.

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16/ TAFERO stated that McCain wrote him letters after trial apologizing for his defense of the case. (H. 150). Those letters, as well as other documents which TAFERO had in his cell, were destroyed by the State in a death-row "shake-down". This was confirmed by Defendant's Exhibit 1, reflecting a monetary settlement in an action brought by death-row inmates, including TAFERO, against the State. TAFERO submits that he has been denied due process as a result of the intentional destruction of these documents, as well as other documents in his cell. See (P. 770-71).

Q: Sometime during trial?

A: Yes, sir. That's when I became aware of what was going on.

Q: Was there any discussion between you and Mr. McCain concerning defending against the imposition of the death case if you were found guilty? The death penalty if you were found guilty?

A: Well, Mr. McCain has known from the time I first had him as an attorney that I wanted to bring forward witnesses in my defense and things, and he knew that I wanted to bring forward any type of defense.

Q: Yes, but what I'm asking you is was there discussion prior to trial about getting witnesses together for the death penalty phase of this trial?

A: He didn't bring these things up to me.

(H. 137).

Defendant's expert witness succinctly outlined the proper role of defense counsel in this case, first with respect to pretrial preparation for the penalty phase:

> It would entail having conversations with my client, discussing with him what the penalty phase would be about, discussing with him the statute and pretty much preparing a parade of people that humanize my client so that when it goes to the point where they are going to deliberate they are deliberating over the fate of a human being and not just over a body that they've seen in the past week.

(H. 210-11). This duty to prepare and investigate is not altered by the fact that the client might be uncooperative:

> Well, often a client can be helpful and a good resource of information and often he can't. And an attorney's responsibilites don't end with an uncooperative client or a client who may acquiesce to something that is not in his best interest.

(H. 211).

The expert's opinion was clear and direct:

> The basis of my opinion that Mr. McCain rendered Mr. Tafero ineffective assistance of counsel at the sentencing phase is because Mr. McCain's argument advocated death and I don't think it's the responsibility of an attorney to be his client's adversary.

(H. 213).

> I think if you cannot advocate for your client then you don't advocate. You certainly don't advocate against him and I think that was the up-shot of Mr. McCain's closing argument. I think he dared the jury to impose the death penalty which was the wrong thing to do.

(H. 213-14).

> Q: All right. Can you conceive of the speech that Mr. McCain did give doing anything other than inviting the imposition of the death penalty?
>
> A: No, I think he clearly advocated against his client in that closing argument. I think that if, as he claims, he went over that with his client and his client agreed to that, I think it's completely improper, if not unethical to acquiesce to a client in a situation like that.

(H. 219).

As outlined in the evidentiary hearing below, competent defense counsel, whose goal was to save TAFERO from the death penalty, could have introduced evidence of the following in mitigation:

1. TAFERO was the father of two children for whom he cared deeply and, regardless of the problems he may have had in his life, was a good father to those children.[17/]

2. TAFERO's parents would have testified to his upbringing, his schooling, his character, his work history, and how he helped his family. In particular TAFERO's

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17/ Codefendant Jacobs was the mother of the same children. This Court held that the jury's recommendation of life imprisonment instead of the death penalty was appropriate because

> The jurors in this case may have considered the fact that Ms. Jacobs was the mother of two children for whom she cared. . . . They may have felt that her actions were what she perceived to be a necessary measure to protect her family.

Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). Here, TAFERO's jury should have been entitled to reach the same conclusion since the family was his as well. Mr. McCain's handling of the sentencing proceeding precluded any such consideration by the jury.

mother would have testified about his kindness and helpfulness to his family and others, about the family's good times and hard times. He went to work at an early age and had a good attitude toward working. He had ambitions and promising artistic abilities. See, e.g., (H. 233-38).

3. Esther Cauliflower, a psychologist, would have testified about TAFERO's voluntary participation in the Life Lab program, an alternative learning program, during his prior incarceration. TAFERO designed his own college level curriculum. His participation was enthusiastic. He also helped administer the program for other inmates. Cauliflower was also personally aware of TAFERO's relationship with his family, which she characterized as one of caring and concern, as well as TAFERO's artistic abilities. See Defendant's Exhibit 3 (Deposition of Esther Cauliflower).

4. Rene Siebert has known TAFERO since his teens and would have testified to his good character, his close family life and how is a good parent and good provider. (H. 244-46).

Other witnesses also could have been called. As proffered by defense counsel:

> There are a number of witnesses who are unavailable to us know because they are dead. One is Jessie Tafero's father, who died recently this year. I would proffer that he would have been available at the time of the sentencing proceeding in this case, and that he would have been willing and able to testify on Jessie's behalf.
>
> The same proffer applies to Mr. Tafero's grandmother, Mary Jones, who passed away in 1982. She, too, was available and capable and willing to testify on his behalf at the sentencing.
>
> There is a Mr. Irving Settler, S-e-t-t-l-e-r. That is Mr. Tafero's first employer. He died in 1978. I have no reason to believe that he was not available at that time, or that he would not have come forward and testified on Jessie's behalf as to his employment with him at that time.
>
> There is also Mr. and Mrs. Jacobs, that is Sonia Linder's parents, who, as the Court has already heard, died in the New Orleans airplane crash sometime subsequent to the trial proceedings in this case.

(H. 264-65). Counsel also proffered the testimony of other witnesses who, although alive,

could not be produced within the short period allowed for the preparation below. As counsel explained:

> With respect to the proffers, generally, I would like to say to the Court, we understand the Court has done everything possible, as well as the State and Defense counsel, to expedite this matter, given the urgency of it, and to have this hearing as quickly as possible and as fully as possible.
>
> It was simply impossible for Defense counse, in the short period of time that it had, to either perpetuate witnesses who could not attend live, or subpoena them, get subpoenas out on them within the short period of time that we had.
>
> If the State is taking the position that, therefore, those proffers are worth no weight at all, we would ask the Court to afford us a reasonable period of time, not a few days' notice, for a hearing to get these witnesses. And we're talking about witnesses now who are all over the country, some of whom are up in New York —

(H. 275-76). Counsel therefore proffered the testimony of these additional witnesses:

> In another category, there is one Lucy Batchlor who I have personally spoken to. . . . I was not able to get her here. I have been in telephonic conversation with her . . . She would testify to an associaton with Jessie Tafero that goes back to the late sixties where she met him in Belle Glade where he was serving his first sentence.
>
> She participated with him in Operation Teenager. That is where Jessie went out into the community and talked to children . . .

(H. 265-66).

> She knew him in what's called the Life Lab Program at Operation Teenager. That was a voluntary program in which Mr. Tafero participated enthusiastically.
>
> She characterized him as a nice person, a caring person, a person who she never knew as violent, an intelligent person and a good student. She learned of the issuance of the death warrant within the last few days, and her response to it was one of sorrow. She did not believe, knowing Jessie Tafero, and being aware of the offense for which he stands convicted, that it was an appropriate sentence for him. She was available in 1976, and she was willing to testify in 1976. She expressed to me that she was not one of those people who was unalterably opposed to the death penalty, but that it did not apply to Jessie Tafero.

(H. 270).

> There is a man named McGregor Smith, who an associate in my office talked to, who would corroborate Mr. Tafero's participation in the Life Lab Program at Belle Glade.

(H. 270).

> There is a James Beckett, who was also a Belle Glade teacher with whom Mr. Tafero had contact. The last I know he was a New York stockbroker, and I have not been able, within the short period of time to prepare for his hearing, to find him or issue a subpoena for him.
>
> There is Mrs. Lowenstein, an art instructor who Mr. Tafero worked with and learned from. I tracked her down as recently as 1975 being in the New York Academy of Fine Arts. I don't know where she went from there, and she is unavailable to me.

(H. 271).

Apart from this evidence which related to the general character and the inappropriateness of the death penalty in light of that character, competent defense counsel could have introduced substantial evidence establishing that the death penalty was inappropriate in this case. One of the primary aggravating factors proven by the State and found by this Court was TAFERO's prior convictions in 1967, all arising from the same criminal episode.

On December 15, 1975, two months before the shootings in this case took place and five months before TAFERO's trial, Mr. Sheley wrote to TAFERO's mother, stating that he had committed the 1967 crimes to which TAFERO had been sentenced.

McCain admitted that he knew about Sheley's letter. (H. 81). Yet he did nothing to use it the penalty phase. He recollected that he might have tried to get in touch with Sheley, but could not find him (H. 81), although Sheley could have been located with a phone call since he was in prison at the time.

Sheley finally testified under oath in a proceeding to set aside TAFERO's 1967 convictions. His testimony, together with the supporting sworn testimony of William Dennis Leiser, were admitted in evidence at the hearing below. (H. 201). Also admitted

was the sworn testimony of George B. Slattery, an expert polygraph examiner, establishing the truthfulness of Sheley's and Leiser's testimony. Sheley's, Leiser's and Slattery's testimony constitute evidence which could have been admitted in the penalty phase to show that TAFERO did not commit the 1967 offenses. Competent defense counsel, supplied with Sheley's letter, would have fully discovered this evidence and could have introduced it during the penalty phase of TAFERO's trial.

Additional facts will be presented in the argument section of the brief.

## ARGUMENT

I. THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF ENMUND V. FLORIDA, 458 U.S. 782, 102 S.Ct. 3368 (1982). THE JURY MADE NO FINDING THAT TAFERO HIMSELF KILLED ANYONE, ATTEMPTED TO KILL ANYONE OR INTENDED THAT A KILLING TAKE PLACE AND THE JURY INSTRUCTIONS ALLOWED THE JURY TO IMPOSE THE DEATH PENALTY FOR FELONY MURDER IN THE ABSENCE OF THAT INTENT.

Introduction. The jury instructions in this case allowed the jury to recommend the death penalty without finding that TAFERO either killed, attempted to kill or intended to kill. At the outset, TAFERO notes that the United States Court of Appeals for the Fifth Circuit has ruled that such a death sentence is constitutionally infirm. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984); Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984); Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984), on rehearing 732 F.2d 494 (5th Cir. 1984). The issue does not appear to have been directly addressed by this Court or the Eleventh Circuit. This issue alone has substantial merit and warrants a stay of execution and reversal.

The jury in this case never determined who actually shot the victims. TAFERO was charged with premeditated murder based on direct participation in the shooting and with felony murder. The prosecutor argued, and the trial court charged the jury, that it could find TAFERO guilty of first degree murder regardless of who did the shooting or intended the killing. As the prosecutor stated to the jury: "It doesn't matter who fired the weapon, they are both responsible." (T-X. 419). Based on that argument and direction from the court, the jury found TAFERO guilty of first degree murder. But it did not indicate whether its verdict was based on felony murder or direct participation in the shooting. That general and ambiguous verdict in the guilt phase then carried over into penalty phase. It became the basis for the death sentence. The absence of any determination of felony murder or premeditated murder is critical because of the United

States Supreme Court's determination that it is unconstitutional to impose the death penalty on someone who is guilty of felony murder but did not pull the trigger or intend to kill. Enmund v. Florida, 102 S.Ct. 3368 (1982).

This issue has three aspects: (1) the guilt phase instructions, in combination with the general verdict, permitted the imposition of the death penalty based solely on felony murder; (2) the instructions in the penalty phase were unconstitutional and misleading because they treated the Enmund question as a mitigating factor, not as a complete bar to the death penalty, and (3) the ambiguity of the general verdict which could have been based on an unconstitutional ground. Enmund mandates a new trial for all these reasons.[18/]

a. This new issue of constitutional law is properly raised in this motion for post conviction relief.

The State moved to strike this issue below on the ground that the constitutionality of the jury instructions and verdict could have been raised on direct appeal and could therefore not be considered in a Rule 3.850 motion. The trial court denied the State's motion to strike and thus ruled on the merits. (H. 335). This Court should do the same.

This Court's decision in Witt v. State, 387 So.2d 922 (Fla. 1980) held that in a death penalty case, issues arising as a result of major constitutional changes can be litigated in a Rule 3.850 motion even though those issues could have been raised on direct appeal. This Court described the type of constitutional changes which fell within this exception:

> We emphasize at this point that only major constitutional changes of law will be cognizable in capital cases under Rule 3.850. Although specific determinations regarding the significance of various legal developments must be made on a case-

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18/ The State's response below to the motion for post conviction relief at 12-13 purports to address TAFERO's Enmund issue. However the State's response misses the issue. TAFERO does not claim here that the evidence was insufficient under Enmund. He claims a problem arising out of the jury instructions. The issue is one of whether the jury instructions were proper, not whether the evidence is sufficient. See argument b, infra.

> by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment.

387 So.2d at 929. Enmund v. Florida is identical in effect to Coker v. Georgia. It removes from the scope of the death penalty a certain type of conduct. Enmund, like Coker, involves a major constitutional change of law which can be considered on a Rule 3.850 motion even though it could have been raised on direct appeal. The trial court reached the merits of this issue. This Court should do the same.

b. The guilt phase instructions, as carried into the penalty phase, permitted the unconstitutional imposition of the death penalty for felony murder.

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982), the Supreme Court held that imposition of the death penalty against a defendant who was engaged in a robbery but did not pull the trigger and did not intend to kill would be unconstitutional because the penalty was excessive in light of the nature of the crime. It stated:

> [I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

102 S.Ct. at 3377.

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

102 S.Ct. at 3378.

In the guilt phase of this case, the jury was instructed that it could find first degree murder if it found felony murder or premeditated murder. But the instructions on

felony murder did not include any requirement that the jury find the defendant actually killed or intended to kill the victim. The instructions allowed the jury to recommend the death penalty without making any such finding. As a result, the instructions violated the eighth amendment and United States Supreme Court decision in Enmund v. Florida.

Based on Enmund, the Fifth Circuit has concluded that a death penalty is constitutionally infirm if based on jury instructions, like those in this case, which permit a finding of guilt and imposition of the death penalty without regard to whether the guilt was based on a felony murder determination without the necessary intent to kill. Its holding could not be clearer:

> Bullock contends that his death sentence is constitutionally infirm under Enmund because the instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in Reddix. We were persuaded in Reddix; we are likewise now so persuaded.

Bullock v. Lucas, 743 F.2d 244, 247 (5th Cir. 1984).

The State argues in response that the evidence is sufficient to support a jury determination that TAFERO participated in the shooting. But the issue is sufficiency of the instructions, not sufficiency of the evidence. This was made clear by the Reddix court when it rejected an identical argument made by the state on rehearing:

> In its petition for rehearing, the state essentially urges us to adopt a position we already have adopted. We agree with the state that a felony murder conviction may support a death sentence. We also agree that the evidence in this case is sufficient to support a jury conclusion that Reddix had personal intent to kill.
>
> What the panel opinion held, however, and a point with which the state takes issue, is that because the jury instructions might have led the jury to believe it could impute the intent of Reddix's accomplice, who actually committed the murder, to Reddix, we do not know whether the jury concluded that Reddix had the personal intent to kill necessary before the state may impose the death sentence. This holding is exactly what Enmund . . . require[s].

732 F.2d at 494.

Relying on Reddix, Jones v. Thigpen clarifies the distinction between sufficient evidence and sufficient instructions. There must be sufficient evidence under Enmund and sufficient instructions under Enmund before the death penalty can be constitutionally imposed:

> Enmund requies that before a state may impose the uniquely severe and irrevocable sentence of death it must "focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." Reddix, 728 F.2d at 708. To that end, the Court established an Eighth Amendment principle that exists at two levels: first, an accused may not constitutionally receive the death penalty except upon a finding that he himself killed, attempted to kill, or intended to kill; and second, he may not be sentenced to death unless that finding is supported by sufficient evidence in the record. See, Skillern, 720 F.2d at 843-49.

Jones v. Thigpen, supra, 741 F.2d at 812. In Jones, the court analyzed both the sufficiency of the evidence and the sufficiency of the instructions. As to the sufficiency of the instructions, the court found that the standard instructions permitted the jury to impose the death penalty, even for felony murder where the intent was to commit the felony but not the murder. These instructions were unconstitutional.

> Jones also contends that Enmund's other prong was violated because the jury was never required to make a finding wheter Jones killed or intended to kill. . . . Although the instructions given at the guilt phase of Jones' 1977 trial are not in the record, the State does not argue that they differed materially from Mississippi's statutory definition of capital murder, which does not require proof that the accused killed or intended to kill. [citation omitted]. We do have an instruction given at the sentencing hearing, but nowhere did it require the jury to find that Jones killed or intended to kill before imposing the death penalty. Cf. Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983) (instruction at sentencing phase cured Enmund flaw). We therefore agree with the district court that the jury instructions in this case were insufficient to support a death sentence.
>
> Jones's death sentence constitutes cruel and unusual punishment under Enmund . . . because the jury instructions did not require a finding consistent with Enmund before the death penalty was imposed.

741 F.2d at 814.

Here, the jury was told that it could find guilt based on felony murder without

intent to kill. The jury instructions allowed the jury to impose the death penalty on that same basis. The lack of proper jury instructions renders the death penalty constitutionally infirm.

c. The penalty phase instructions compounded the problem because they told the jury to consider a felony murder finding only in mitigation when it should have told the jury that such a finding absolutely precluded imposition of the death penalty.

The trial court gave the jury instructions which, although standard at the time, have since become improper. The instructions allowed the jury to consider as a mitigating circumstance, the fact that TAFERO did not pull the trigger. However this instruction assumed that the death penalty could be imposed constitutionally on one who did not pull the trigger. The instruction was misleading because by stating that this was a mitigating circumstance, the instruction necessarily implied that the death penalty could still be appropriate for felony murder.

> The mitigating circumstances which you may consider, if established by the evidence, are these: . . .
>
> D, that the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor;

(SR. 56-57). The jury was then told to weigh the mitigating circumstances, including this circumstance, against the aggravating circumstances.

This instruction was wrong. Enmund mandates an instruction that the death penalty cannot be imposed at all if the jury finds that the defendant did not pull the trigger or intend the murder. The standard jury instruction which allowed jury consideration of this matter as a mitigating factor only but not a bar is simply unconstitutional. It permitted imposition of the death penalty in violation of Enmund.

d. The ambiguity in the general verdict which could have been based on an unconstitutional ground mandates a new sentencing.

The jury returned a general verdict on first degree murder. A general verdict must

be set aside if the jury was instructed that it could rely on a number of grounds, one or more of which were insufficient and unconstitutional. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931), cited in Zant v. Stephens, 103 S.Ct. 2733 (1983).

In Stromberg, the jury returned a general verdict. It did not specify the ground on which it was based. One of the potential grounds for the verdict was unconstitutional. The Supreme Court held that the verdict had to set aside because of that possibility. The Court in Zant v. Stephens explained its holding in Stromberg.

> One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have [emphasis added] rested exclusively on the insufficient ground.
>
> * * *
>
> The second rule derived from the Stromberg case is illustrated by Thomas v. Collins, 323 U.S. 516, 528-529, 65 S.Ct. 315, 321-322, 89 L.Ed. 430 (1945) and Street v. New York, 394 U.S. 576, 586-590, 89 S.Ct. 1354, 1362-1364, 22 L.Ed.2d 572 (1969). In those cases we made clear that the reasoning of Stromberg encompasses a situation in which the general verdict on a single-count indictment or information rested on both [emphasis by court] a constitutional and an unconstitutional ground.

103 S.Ct. at 2733. The Court then noted that it had held in Street:

> "[U]nless the record negates the possibility that the conviction was based on both alleged violations," the judgment could not be affirmed unless both were valid.

Zant v. Stephens, 103 S.Ct. at 2745, quoting Street v. New York, 394 U.S. 576, 588, 89 S.Ct. 1354, 1363.

> If, under the instructions to the jury, one way of committing the offense charged is to perform an act protected by the Constitution, the rule of these cases requires that a general verdict of guilt be set aside even if the defendant's unprotected conduct, considered separately, would support the verdict.

Zant v. Stephens, 103 S.Ct. at 2746.

Here, the verdict here could have been based on a finding of felony murder with-

out a finding of personal intent to kill, an unconstitutional basis for the death penalty. Alternatively, if Rhodes' testimony was believed, it could have been based on a finding that TAFERO participated in the killing, a constitutional basis. The death penalty thus could be based on either constitutional or unconstitutional grounds. Under these circumstances, Zant v. Stephens mandates that the death penalty must be vacated.[19/]

II. TAFERO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY STAGE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I OF THE FLORIDA CONSTITUTION.

a. McCain's conduct in penalty phase was ineffective.

1. Introduction. Many cases have considered an attorney's failure to introduce certain items of mitigating evidence in the penalty phase of a capital case. Although McCain failed to introduce any such evidence, this case goes much further. First, McCain failed to perform any pretrial investigation into mitigating evidence, and thus was never in a position to make a strategic decision whether such evidence should be introduced. Second, McCain made no argument which suggested to the jury that they should not impose the death penalty. Finally, the argument McCain made to the jury in substance requested the jury to impose the death penalty. McCain's abandonment of his client at this crucial stage of the proceeding cannot be condoned.[20/]

As outlined below, McCain's two-pronged explanation for this "strategy" cannot stand. First, he stated that he wanted to "tone down" the sentencing proceeding. Al-

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19/ Zant v. Stephens rejected the Stromberg argument because the jury in that case returned an interrogatory verdict in the penalty phase and found three separate grounds for recommending death. Therefore the constitutional invalidity of one of the grounds for the verdict did not require vacating the death penalty because the jury had specifically shown an alternative ground for upholding the penalty. No such specific statement is shown here where the jury merely returned an ambiguous general verdict.

20/ As outlined in section c below, instead of abandoning his client, McCain could have introduced substantial evidence in mitigation and presented a strong argument against imposition of the death penalty.

though this might adequately explain why some of the mitigating evidence was not introduced, it does not adequately explain why he made no investigation into mitigating evidence and does not explain why absolutely no evidence was introduced. It offers no rational basis for his closing argument which effectively asked the jury to recommend death. Second, he stated that "this was what TAFERO wanted him to do". However, faced with this suggestion, he told TAFERO that this obviously suicidal strategy was reasonable and made no attempt to convince TAFERO that he should do anything different. TAFERO was denied effective assistance of counsel as a result of McCain's complete abdication of his role as defense counsel.

In sum, two issues face this Court. First, was the combination of McCain's complete failure to investigate mitigating evidence, his failure to introduce any mitigating evidence and his closing "argument" which invited the death penalty ineffective? Second, if it was ineffective, is that ineffectiveness justified by McCain's assertion that he and TAFERO jointly agreed on that course of action, i.e., did TAFERO waive his right to effective assistance of counsel.

2. Failure to investigate. As McCain admitted in the evidentiary hearing, he failed to perform any pretrial investigation as to possible evidence in mitigation of the death penalty. (H. 60-61). His failure to perform any investigation must be measured against the standard enunciated in Strickland v. Washington, 104 S.Ct. 2052 (1984). The Supreme Court adopted the standard outlined by the en banc Fifth Circuit regarding an attorney's duty to investigate. 104 S.Ct. at 2066. Pursuant to that standard, a complete failure to investigate can never be justified:

> If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary.

104 S.Ct. at 2061.

Here, McCain admitted that he performed no investigation of possible mitigating

evidence prior to trial. Since no such investigation was performed, neither he nor TAFERO was ever in a position to determine intelligently what course of action would be best. TAFERO was simply never given a reasonable alternative. McCain's complete failure to investigate was ineffective.

Although McCain would not admit that the death penalty was a foregone conclusion in this case, he did state that it was the likely outcome. (H. 58). However, "an attorney cannot excuse his total failure to investigate simply because he assumes that there is no way to defend his client." Washington v. Strickland, 693 F.2d 1243, 1255, n.20 (5th Cir. 1982)(en banc). The Supreme Court has reached the same conclusion.

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. . . .

Powell v. Alabama, 287 U.S. 45, 58, 53 S.Ct. 55, 60. McCain did exactly that with respect to the penalty phase in this case. His complete failure to investigate and prepare for the penalty phase of the trial was ineffective.

3. Failure to introduce any evidence in mitigation. Most cases dealing with claims based on an attorney's failure to introduce certain evidence in mitigation involve situations where the attorney introduced some evidence and the client later claimed that he should have done more. This is not such a case. Here, the attorney, who was in no position to introduce any evidence in mitigation because he failed to perform any pretrial investigation, did nothing.

The failure to introduce evidence in mitigation, like the failure to perform any pretrial investigation to discover mitigating evidence, may be upheld only if it is the product of a reasonable strategic choice:

> [A] showing that counsel's decision to forego evidence was not based on a reasoned tactical judgment will give rise to an ineffective assistance claim. This is as true of character evidence as it is of any other sort of evidence [in the penalty phase]. Were trial counsel for a capital defendant to testify that he had no strategy whatever for the sentencing phase and that he failed to consider or develop possible mitigating evi-

> dence, then such counsel must be deemed ineffective. [citations omitted]. Similarly, such a claim can be made out, even if trial counsel does not testify, where the circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy.

Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983).

Here, the evidence shows that McCain's failure to do anything in penalty phase was not based on reasonable strategy. He claimed his strategy was to "tone down" the penalty phase of the trial. Although this might support a decision to exclude certain pieces of mitigating evidence, it does not support a decision to completely abandon the penalty phase of the trial.

4. Argument to jury contrary to client's interest. McCain's "argument" to the jury in penalty phase distinguishes this case from every other case which involves just the failure to introduce certain evidence in mitigation. Here, McCain's "argument" asked the jury to impose the death penalty:

> May it please the Court, and the ladies and gentlemen of the jury. I will be very brief here today, in that I have consulted with Jessie Tafero, and he feels very strongly that he did not receive a fair trial.
>
> He feels very strongly that this verdict was not fair, and he feels that to participate in the sentencing argument in any way, would be a charade.
>
> He will not beg for his life, nor mercy.

As outlined above, counsel cannot excuse his failure to act on his client's behalf "simply because he assumes that there is no way to defend his client". See supra at 33. In light of this rule, courts have consistently found ineffective penalty phase closing arguments where the attorney does not act as an advocate for his client and makes an argument which does more harm than good. King v. Strickland, 714 F.2d 1481 (11th Cir. 1983); Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983).

In King, defense counsel introduced some evidence in mitigation, but failed to

introduce other mitigating evidence. He also made a brief "argument" which was fundamentally negative. The Court concluded that counsel was ineffective:

> Although Cole presented some mitigating evidence, it is clear that counsel neglected to present other available evidence. The record also suggests this failure cannot be deemed a strategic decision taken after a reasonable investigation into the alternatives. This Court has emphasized the importance of pretrial preparation and investigation. [citations omitted]. Here, counsel admitted he was unprepared for the penalty stage of the trial, because he had not adequately discussed sentencing with his client nor had he carefully searched for mitigating evidence.
>
> These errors occurred at a particularly critical point in the trial.
>
> > The sentencing stage of any case, regardless of the potential punishment, is "the time at which for many defendants the most important services of the entire proceeding can be performed". . . . The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial.
>
> Stanley v. Zant, 697 F.2d at 963. Although this Court apparently has never held counsel ineffective in a capital case solely because of failure to present mitigating evidence, see id. at 964, it has on a number of occasions cited this failure as one factor suggesting ineffectiveness. [citations omitted].
>
> As in those cases, counsel here did not merely neglect to present available mitigating evidence. He made a closing argument that may have done more harm than good. In his argument, the main thrust of which was that the defendant if given life would be secured in prison for many years, King's attorney unnecessarily stressed the horror of the crime and counsel's status as an appointed representative.
>
> * * *
>
> In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. . . . Rather than attempting to humanize King, counsel in closing argument stressed the inhumanity of the crime.
>
> We hold that this argument in combination with counsel's failure to present available mitigating evidence denied King effective assistance of counsel at the penalty stage of the trial.

714 F.2d at 1491-92.

McCain's "argument" was significantly more detrimental to the client. As outlined in the expert testimony at the evidentiary hearing, it compelled the jury to return a recommendation of death.

In Douglas, the defendant claimed that counsel had been ineffective in the penalty phase of his trial. At the commencement of the penalty phase, the state indicated it would rely on the guilt phase evidence to demonstrate aggravating circumstances. The defense then began a jury argument for mercy. The state objected on the ground that the penalty phase was for the presentation of evidence, not argument. The court told defense counsel to present evidence. Counsel responded in front of the jury: "I have no evidence to submit to the Court at this time." 714 F.2d at 1555. The court called counsel into chambers. Counsel explained that he had no idea what evidence he could obtain. When the court suggested that counsel call the defendant's mother to state that the defendant had been "a good boy", counsel stated: "But he hasn't been a good boy." Finally the court asked counsel if he had discussed with the defendant the possibility of his testifying on his own behalf. The defendant stated that he did not want to testify. Counsel argued to the jury which recommended life imprisonment. The court, who had heard all of counsel's remarks about how there was no evidence in mitigation, imposed the death penalty.

The Eleventh Circuit held that the defendant was denied effective assistance of counsel at the penalty phase.[21/] It found that "Counsel's ineffectiveness cries out from a reading of the transcript." 714 F.2d at 1557. It further found that counsel was ineffective "even if we assume for these purposes that there was no mitigating evidence that

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21/ The United States Supreme Court vacated and remanded this decision for reconsideration in light of Strickland v. Washington. On remand, the Eleventh Circuit reaffirmed its prior decision because it held that counsel's behavior was prejudicial under any standard.

could have been produced." The court emphasized the "vital difference . . . between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence."

The Eleventh Circuit reached a similar conclusion in House v. Balkcom, 725 F.2d 608 (11th Cir. 1984). In that case, counsel had not read the death penalty statute at the time of the separate sentencing stage of the trial. They presented no evidence or argument. The only argument was as follows:

> May it please the Court, ladies and gentlemen of the jury, any lawyer who finds himself in this position cannot help but feel somewhere along the way there must be something that he could have done to have brought about a different decision, he always does. I must admit I have never been in this position before.
>
> I think there has been enough dramatics already, and all I would like to leave with you for your own sake is, "Vengeance is mine, saith the Lord." Thank you.

725 F.2d at 613, n.4. The court found that defense counsel was ineffective as a result of this argument.

Finally, in Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), defense counsel made a brief argument in penalty phase:

> May it please the Court. Ladies and gentlemen, this is the last time we will be before you. The most trying circumstances, the fact that will be sent back to you will be cumulative of what you have already decided, that the defendant is guilty. Now, with little help except from you—and you are not here to help me, you are here to do the right thing—I have to ask that you take into consideration all of the things that have been said, all of the things that have been admitted into evidence. In particular, consideration should be given to the statement of Dr. Kaplan pertaining to Mr. Smith.
>
> Weigh those, because they weigh heavily upn everybody in this room. Add them up. If they indicate to you that this man, who has made a statement that you can take or leave—because you have taken and left some of this statements—that he would spend the rest of his life in a penitentiary. Whether this man should live or die or be given the right to live until, God willing, someday this state will provide a place for him.

741 F.2d at 1255. The Court condemned this argument, noting that it "evidenced no

reasonable strategy". Id.

The evidence of ineffective assistance here is even stronger than that presented in Douglas, House, King or Smith. McCain told the jury, and the judge, that TAFERO would not bother to present any evidence or argument to them and would not ask for mercy. In effect, he insulted them and directed them to recommend the death penalty. His argument was not just neutral and ineffective, instead it was directly antagonistic to his client's interest. McCain acted against, not for, TAFERO's interest.

In sum, McCain did nothing prior to trial with respect to mitigating evidence and then did worse than nothing once he got to the penalty phase: he "emphasiz[ed] to the . . . sentencer that the defendant is a bad person [and] that there is no mitigating evidence." Here, as in the cases outlined above, this Court should find that TAFERO was denied effective assistance of counsel in the sentencing phase.

b. McCain could and should have introduced substantial evidence and presented substantial argument against the death penalty.

As outlined at the evidentiary hearing, competent defense counsel, whose goal was to save TAFERO from the death penalty, could have introduced substantial mitigating evidence and made a substantial positive argument on TAFERO's behalf.

A primary aggravating factor introduced by the State in the penalty phase was TAFERO's 1967 convictions. As outlined in the statement of facts, another individual, Robert Sheley, confessed to these crimes. McCain was fully aware of Sheley's confession prior to trial, but did nothing to investigate. A reasonable investigation would have uncovered Sheley's testimony, Leiser's supporting testimony, and the supporting testimony of a lie detector analyst that Sheley was telling the truth. All this could and should have been introduced by McCain in mitigation.

In denying coram nobis relief to TAFERO, the Third District recognized the impact of Sheley's testimony:

The most that can be said about this new evidence is that, if

> believed, it would probably have changed the verdict of the jury.

406 So.2d at 93. The court also recognized that this testimony was critically important with respect to TAFERO's death penalty:

> It is apparent that this "significant history of prior criminal activity" [one of the aggravating factors] was critical, if not essential, in affirming Tafero's death sentences.

406 So.2d at 94, n.12. The court concluded that Sheley's testimony would have been admissible in the penalty phase of TAFERO's capital case:

> We do, however, emphasize that we decide only that Tafero's coram nobis petition must fail because not within the discrete reach of that writ. Whether this same evidence should be considered in mitigation of the aggravating factors used to justify imposition of the death penalty is a question not before us and one which must be directed to the courts which imposed and affirmed that penalty. Had Tafero sought to present evidence of this nature at his death penalty hearing, its admission would have been required. [numerous citations omitted].

406 So.2d at 95.[22/]

Other mitigating evidence could have been introduced as well. An important consideration for the jury in imposing the death penalty would be whether TAFERO could serve any useful function to society if imprisoned for life. Abundant positive evidence, not typical of most defendants, could have been introduced in this regard. See statement of fact, particularly the deposition of Esther Cauliflower, Defendant's Exhibit 3.

Finally, defense counsel could and should have made a substantial positive argument to the jury with respect to imposition of the death penalty. Instead, McCain argued against his client in the penalty phase. A positive argument was necessary and crucial under the particular facts of this case. McCain should have argued that the evidence created at least some doubt in the juror's minds as to whether TAFERO pulled the trigger

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[22/] The Third District denied coram nobis relief with respect to TAFERO's 1967 convictions because Sheley's testimony would not "conclusively have . . . prevented the entry" of the convictions, the required standard for coram nobis relief. Tafero v. State, 406 So.2d 89, 92 (Fla. 3d DCA 1981).

or merely participated in the felony. He should have argued that the death penalty should not be imposed in light of this lingering doubt.

The Eleventh Circuit has emphasized the importance of counsel's obligation to create this kind of continuing doubt in a capital case.

> As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt".

Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt—doubt based upon reason—and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981).

Here, an effective defense argument could have produced much more. The evidence in this case was sharply conflicting as to whether TAFERO himself shot anyone. Only Rhodes placed a gun in TAFERO's hands. The truck drivers, disinterested witnesses, testified to the contrary. TAFERO was charged with both felony murder (allowing him to be convicted of first degree murder even if he did not participate in the shooting) and with premediated first degree murder based on his direct participation in the shooting. The jury was never asked to resolve who did the shooting. The prosecutor argued, and the court charged the jury, that it could find TAFERO guilty of first degree murder regardless of who did the shooting — TAFERO, Linder or Rhodes. The prosecutor argued:

> The felony murder rule, as his Honor, Judge Futch, is going to instruct you, is that when there is a felony being committed, or attempting to be committed, all parties involved in that felony are guilty of murder, even if an innocent bystander, or an innocent person, is killed during the commission of that felony.
>
> So, if a person is killed during the commission of a felony, or one of the eight numerated felonies — of which robbery is one — all parties are guilty of first degree murder, no matter whether they pull the trigger, or stood there.

(T-VIII. 390). He concluded: "It doesn't matter who fired the weapon, they are both responsible". (T-X. 419). The court instructed the jury just as the prosecutor outlined:

> I instruct you that Murder in the First Degree is the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being; or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of eighteen years, when such drug is proven to be the proximate cause of death of the user.

(SR. 14-15).

> As to first degree, if the defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or was engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of eighteen years, when such drug is proven to be the proximate cause of the death of the user, he should be found guilty of Murder in the First Degree.

(SR. 15). Based on this argument and direction from the court, the jury found TAFERO guilty of first degree murder in the guilt phase of the trial. But the jury made no determination of who did the shooting. The jury could well have believed the independent witnesses who stated that TAFERO did not pull the trigger, but still returned its guilty verdict based on felony murder.

A jury determination of who did the shooting was immaterial to the guilt phase. But it was crucial to whether the jury would recommend life or death, because, as recog-

nized by the Supreme Court, "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's [felony murder]." Enmund v. Florida, 102 S.Ct. 3368, 3375 (1982).[23/]

It was thus essential for McCain to argue to the jury that TAFERO should not receive the death penalty because the jury could not determine beyond a reasonable doubt that he did the shooting. McCain's failure to present any such argument falls below the standard of reasonably competent counsel.[24/]

The State responsed in the trial court by arguing that McCain was not ineffective for failing to make such an argument on TAFERO's behalf because "[c]onsidering that the trial of this case took place in 1976, six years before the United States Supreme Court decision in Enmund v. Florida, . . . it cannot be said that counsel was ineffective for failing to foresee the decision in Enmund." The State's analysis is simply wrong. The issue is obviously not whether counsel could foresee the Enmund decision. The issue is whether counsel trying a death penalty case should know enough to argue that the death penalty is excessive, cruel and unusual punishment for someone who does not kill or intend to kill.

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23/ As noted by the Enmund court:

> [A] search of all reported appellate court decisions since 1954 in cases where a defendant was executed for homicide shows that of the 362 executions, in 339 the person executed personally committed a homicidal assault. In 2 cases the person executed had another person commit the homicide for him, and in 16 cases the facts were not reported in sufficient detail to determine whether the person executed committed the homicide. The survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed.

102 S.Ct. at 3375.

24/ As outlined in the statement of fact, when asked whether the fact that TAFERO might not have been the triggerman had any significance to him with respect to whether TAFERO might receive a recommendation of death, McCain replied, "I can't recall". (H. 54).

c. TAFERO was prejudiced by McCain's failure to investigate and introduce mitigating evidence and his "argument" to the jury which in substance asked them to return the death penalty.

TAFERO recognizes that he must show that he was prejudiced by McCain's ineffectiveness. This does not mean that the defendant must show the result would have been different:

> [W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.

Strickland v. Washington, 104 S.Ct. 2052, 2068 (1984). Instead, the defendant need only establish a "reasonable probability" which is "a probability sufficient to undermine confidence in the outcome". Id. at 2068.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. As recognized by the Supreme Court, the ultimate focus of the prejudice analysis is fundamental fairness:

> Although these principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In very case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 2069.

Here, for all the reasons set out above, McCain's failure to present any evidence or argument in mitigation of the death penalty, and his argument which effectively asked the jury to return a recommendation of death, was a substantial and serious deficiency measurably below that of competent counsel. There is a reasonable probability that the jury would not have recommended imposition of the death penalty if these omissions had not occurred. TAFERO was prejudiced as a result of those omissions. See House v.

Balkcom, 725 F.2d 608 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded 104 S.Ct. 3575 (1984), reaff'd 739 F.2d 531 (11th Cir. 1984) (reaffirming original panel opinion after Strickland); Young v. Zant, 677 F.2d 792 (11th Cir. 1982). See generally Strickland v. Washington, 104 S.Ct. 2052 (1984); United States v. Cronic, 104 S.Ct. 2039 (1984).

In United States v. Cronic, 104 S.Ct. 2039, 2047 (1984), the Supreme Court recognized:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Here, McCain entirely failed to subject the prosecution's case to meaningful adversarial testing in the penalty phase. He simply gave up and, in substance, asked the jury to impose the death penalty. The penalty phase of TAFERO's trial cannot be deemed reliable.

d. TAFERO did not waive his right to effective assistance of counsel.

TAFERO submits that McCain's penalty phase conduct, especially his closing argument which invited the death penalty, was ineffective. No legitimate explanation supports a closing which is contrary to the interests of a defendant facing the death penalty. The real issue in this case, as outlined by the State in the evidentiary hearing below, is whether TAFERO waived his right to effective assistance of counsel by his alleged acquiescence to that conduct. This waiver issue should be resolved adversely to the State, both as a matter of fact and as a matter of law.

The law regarding a defendant's waiver of his right to effective assistance of counsel was recently stated in Ross v. Wainwright, 738 F.2d 1217 (11th Cir. 1984). There, the State of Florida conceded what is necessary to find a waiver:

> Each party here makes reasonable concessions with respect to the determination of the waiver issue. Appellant concedes, as he must, that a constitutional right to effective counsel can be waived if "competently and intelligently" made. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The State, on the other hand, concedes that special care must be exercised by the trial judge in such a situation. In its brief, it says:
>
> > The Fifth Circuit has ruled that in situations involving the right to competent counsel, a trial court's duty is to explain the significance of the issue or objection being waived, and the risks involved in such waiver. Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1977). In a decision most clearly on point, the First Circuit has mandated that a trial court's obligation in such situations is to directly address the criminal defendant, explain the defendant's choices, warn the defendant of the consequences of his choice, and then obtain a clear answer from the defendant, as to the course of action the defendant will pursue. United States v. Lespier, 558 F.2d 624, 630 (1st Cir. 1977).

738 F.2d at 1221. The Bonds decision, relied on by the State as quoted above, is even clearer:

> But such a waiver [of effective assistance of counsel] should be no more readily found than any other waiver of the right to counsel. Hence waiver must be an intelligent, understanding and voluntary decision. A valid waiver of the right to effective assistance of counsel therefore would have to be preceded by an explanation to the client of what he was waiving. This explanation should make clear to the client the significance of what he is waiving and the risks he runs.

564 F.2d at 1132.

As these decisions indicate, and as the State admitted in Ross, the obligation to ascertain that such a waiver existed properly rests with the trial court at the time of trial. No such inquiry was conducted by the trial court. Even more significantly, the evidence adduced at the hearing below from McCain shows no such waiver.

The evidence which shows no waiver is fully detailed in the statement of facts. McCain admitted that the ineffectual course of conduct was "both of our ideas". (H. 83). There was no effort on his part to dissuade TAFERO from that course because, as stated by McCain, he thought it was "the right way". (H. 89). Finally he did not inform

TAFERO that a recommendation of death was the likely result of that course. (H. 66). In short, it was never made "clear to the client the significance of what he is waiving and the risks he runs". Bond, supra. TAFERO did not knowingly and intelligently waive his right to effective assistance of counsel.

In sum, this case does not involve a situation where a defendant wishes to engage in a detrimental course of conduct, defense counsel attempts to persuade him to do otherwise, but the defendant persists. Instead, it involves a situation where, according to defense counsel himself, he did not advise the defendant that the course of conduct was detrimental, but instead told the defendant that it was the right thing to do. The facts do not support the conclusion that TAFERO waived his right to complain about McCain's ineffectiveness.

## II. TAFERO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT OTHER STAGES OF THE PROCEEDINGS AS WELL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I OF THE FLORIDA CONSTITUTION.

### a. McCain failed to object to the insufficiency of the jury instructions.

The jury instructions given during the sentencing phase of the trial were deficient because they failed to tell the jury that it could consider non-statutory mitigating circumstances in the balancing of factors and failed to instruct the jury that aggravating and mitigating factors had to be proven beyond a reasonable doubt. In Proffitt v. Florida, 685 F.2d 1227 (11th Cir. 1982), the court held that counsel who did not raise the issue of non-statutory mitigating evidence in 1974 was not ineffective because he had no reason to believe, based on existing law, that non-statutory mitigating evidence could be considered. But this is not such a case. Here, McCain admitted that he believed non-statutory mitigating evidence could be considered. (H. 60). There is thus no excuse for his failure to object to the jury instructions in this case. And see argument VI, infra (the instructions were in fact constitutionally infirm because they limited the jury's con-

sideration of mitigating factors) and argument VII, infra (the sentencing judge himself thought that he was limited to consideration of statutory mitigating factors only).[25/]

b. McCain failed to move for the judge's recusal.

TAFERO filed a pro se motion for recusal. The trial judge denied the motion. This Court held on direct appeal that the allegations of the pro se motion were insufficient to show personal bias or prejudice. The State claims that this concludes the issue of whether McCain was effective. Not at all. The issue is whether competent counsel, as opposed to a pro se defendant who is sitting in jail without access to an investigator, should have been able to marshall evidence of bias and prejudice and submit a legally sufficient recusal motion under the circumstances.[26/]

c. McCain failed to object to the exclusion of veniremen on the ground that they object to capital punishment.

At the outset of jury selection, a problem arose. Mrs. Garretson informed the court:

> Judge, I don't think I can wrestle with the capital punishment thing.

(T-VII. 24). Without further ado, the court announced that it was excluding Mrs. Garretson. Defense counsel did not object. In fact, he agreed. The excusal of Mrs. Garretson violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). See also Davis v. Georgia, 429 U.S. 123, 97 S.Ct. 399 (1976). It denied TAFERO his due process right to an impartial jury on the sentence issue. McCain missed that fact. He was ineffective. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982).

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25/ The State's response in the trial court addressed only the adequacy of the instructions. It does not address counsel's failings on this point. The State's approach is interesting because the federal decisions on which it relies analyze the sufficiency of the jury instructions under the cause and prejudice standard of Wainwright v. Sikes 433 U.S. 72, 97 S.Ct. 2497 (1977) because counsel failed to object to the instructions at trial.

26/ The State does not claim, however, that no prejudice flowed from this failure of counsel. Nor could it. If the judge should have recused himself then TAFERO was obviously prejudiced when he was sentenced by such a judge.

At the hearing on the motion to vacate, McCain admitted that he did not know what Witherspoon was. In response to counsel's question, he said, "No, you'll have to explain it to me." McCain had no recollection of voir dire and no specific recollection of Mrs. Garretson. (H. 55). He also had no recollection that TAFERO was involved in excusal of this juror.

Goodwin held that the failure of counsel to raise a Witherspoon objection is ineffective.

> [O]ur concern focuses on trial counsel's ignorance of the right to question a venireman, particularly where the venireman has stated nothing. Trial counsel simply failed to notice that Malcom never stated her unalterable opposition to the death penalty. Had he realized this, he could have questioned her further without depending upon the trial court's erroneous conclusion that Malcom had said she was unalterably opposed to the death penalty.

684 F.2d at 816.

The transcript here shows a far greater failure on the part of counsel. Mrs. Garretson never indicated any specific feelings on the death penalty. She simply said she thought she would have trouble "wrestling" with "the capital punishment thing." Rather than question her and determine whether she was unalterably opposed to it, as Witherspoon requires, McCain agreed that she be excused. Here, as in Goodwin, counsel was ineffective in the manner in which he dealt with the Witherspoon juror.

The State claims that this is not a Witherspoon situation because "she was excused with everyone's consent because she felt uncomfortable sitting on a capital murder case."[27/] It also claims that the court's self serving comments after excusing the juror are adequate to explain the reason for the juror's statement. That is no response. Mrs.

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27/ The State also claims that counsel's failure to object may have been a "tactical choice" to save a peremptory challenge. State's response at 8. If Mrs. Garretson had feelings about capital punishment which worked in favor of TAFERO it is impossible to understand how the failure to object to her excusal was a tactical choice to save a peremptory challenge.

Garretson is the type of juror to whom Witherspoon was addressed. At the least, competent counsel would have found out instead of allowing the judge to speak for the juror. See Goodwin.

McCain fell below the standard of competent counsel when he failed to object, and in fact agreed, to Mrs. Garretson's excusal from the jury. His failure prejudiced TAFERO because it interfered with TAFERO's due process rights. This failure requires a new trial.

d. McCain failed to move for a change of venue.

Defendant proffered below a composite exhibit of voluminous newspaper articles that appeared locally with respect to this case. Although McCain admitted that this case was "well-publicized" in both the newspapers and on TV (H. 47), he made no attempt to file a pretrial motion for change of venue or to investigate to create a record which would warrant consideration of such a motion. (H. 47). His failure to even consider such a motion is ineffective.

e. McCain was ineffective for the other reasons outlined by TAFERO in his testimony.

TAFERO testified below to other trial failings of McCain. (H. 129-195). The totality of those failings, together with those outlined above, warrant the conclusion that McCain was ineffective.

## IV. THE DEATH PENALTY SHOULD BE VACATED AND TAFERO RESENTENCED BECAUSE SOMEONE ELSE CONFESSED TO THE CRIMES ON WHICH THIS COURT AND THE JURY RELIED IN DETERMINING AGGRAVATING FACTORS.

Virtually the only source of aggravating factors in determining the sentence was an incident for which TAFERO was convicted in 1967. TAFERO was convicted of three crimes arising out of this episode. The trial court therefore found as an aggravating factor that TAFERO had a significant history of prior criminal activity involving the use or threat of violence to another.

From 1975 on, Robert Paul Sheley repeatedly confessed to these 1967 crimes. This evidence is critical to sentencing.

TAFERO had recited this evidence in his motion for leave to file petition for writ of error coram nobis, which he had filed in this Court. This Court denied the motion without opinion. After that order, this Court issued its decision in Zeigler v. State, 452 So.2d 537 (Fla. 1984). In Zeigler, the Court apparently clarified the reason for denying leave to file the coram nobis petition here. The Court there held that newly discovered evidence which relates to sentencing is properly raised in a motion to vacate under rule 3.850, not by coram nobis petition.

> We also hold that, although the allegation of bias is based on a fact newly discovered by the defense, it is an issue properly considered in the rule 3.850 motion in this instance. Generally, an appellant may not raise "newly discovered evidence" under the rule 3.850 motion. See Smith v. State, 400 So.2d 956 (Fla. 1981); Hallman v. State, 371 So.2d 482 (Fla. 1979). The proper remedy is usually an application for a writ of error coram nobis to the appellate court. The writ may only be granted when, among other requirements, the newly discovered fact was unknown by the trial court, by the party, or by counsel at the time of the trial. [citation omitted]. These newly discovered facts have in prior cases gone to the actual substance of the trial and could possibly support a reversal of the conviction in question. In the instant case, however, we have a statement which, if true, would possibly support resentence, not reversal, of conviction. The statement reflects only on the sentencing attitude of the judge. In addition, if the statement was made, it was certainly within the knowledge of the trial court at the time of the trial and Zeigler would therefore be denied a writ of error coram nobis if we treated this appeal as such. This would have the unfortunate result of leaving an appellant with no remedy . . . . The law does not intend such unjust results, particularly in the case of a death-sentenced individual.

452 So.2d at 540. This Court reversed the trial court's order denying the defendant's motion to vacate under rule 3.850. It remanded for a prompt evidentiary hearing on the issue of the newly discovered evidence.

Here, as in Zeigler, there is evidence which relates to sentencing. It may well be that this Court denied TAFERO leave to file a coram nobis petition because it found that this evidence was insufficient to change the conviction. However the evidence indis-

putably affects the sentence. If TAFERO did not commit the felonies which constituted the primary aggravating factor, then he should not be sentenced to death constitutionally. And such testimony would have a substantial effect on the jury which considers the sentencing recommendation, since aggravating factors must be proven beyond a reasonable doubt. Such an effect is critical since a jury recommendation of life weighs strongly in the ultimate determination by the court.[28/] Finally, this evidence should have a critical effect on the court's determination of the sentence because it is an important mitigating factor. This Court previously found no mitigating factors to weigh against the aggravating factors.[29/]

In response, the State has incorporated its previously filed response to TAFERO's motion for leave to file petition for writ of error coram nobis. That response claimed: (1) TAFERO fully litigated this issue in attempting to vacate the 1967 convictions where the Third District denied leave to apply for coram nobis, i.e., the Third District's decision was res judicata; and (2) this evidence would not have conclusively prevented the conviction. That response is irrelevant. The Third District's decision on whether TAFERO could obtain coram nobis relief from the 1967 conviction is not res judicata on whether the evidence he presented in that case was admissible evidence in this case relevant to the existence of an aggravating circumstance. And whether this proposed evidence "would have conclusively prevented" TAFERO's 1976 conviction is irrelevant to the standard of review on this motion for post conviction relief which is addressed primarily to the penalty, not the conviction.

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28/ For this reason, the State's incorporation of its response to the coram nobis petition as its response to the motion to vacate makes no sense. The standard of analysis in each case is different. The State's argument in opposition to coram nobis was based on the issue of whether TAFERO could conclusively demonstrate a different result. The standard here is different.

29/ This Court specifically noted that any error in considering certain aggravating factors was harmless because TAFERO introduced no evidence to the contrary. 403 So.2d at 362.

Finally, this Court should look at the precise ruling of the Third District in TAFERO's coram nobis appeal there because that court reached conclusions which support TAFERO's position here.

> We do, however, emphasize that we decide only that Tafero's coram nobis petition must fail because not within the discrete reach of that writ. Whether this same evidence should be considered in mitigation of the aggravating factors used to justify the imposition of the death penalty is a question not before us and one which must be directed to the courts which imposed and affirmed that penalty. Had Tafero sought to present evidence of this nature at his death penalty hearing, it admission would have been required. [numerous citations omitted]. . . . [T]he question to be answered another day by another court is whether Tafero can have this evidence considered in mitigation of the death penalty, . . .

406 So.2d at 95.

In light of Sheley's confession, TAFERO is entitled to resentencing. The balance of aggravating and mitigating factors would be drastically altered if the jury was allowed to consider that TAFERO might not have committed those 1967 crimes.

## VI. THE DEATH PENALTY IN FLORIDA IS UNCONSTITUTIONAL BECAUSE THE STANDARD JURY INSTRUCTIONS LIMIT JURY CONSIDERATION OF MITIGATING FACTORS.

The manner in which the death penalty statute is written, and particularly the manner in which the jury was instructed on the mitigating factors, is unconstitutional because it limited the jury's consideration of mitigating factors. The jury is never told that it can consider factors other than those listed. The statute and jury instructions are therefore unconstitutional.[30/]

If capital sentencing instructions do not adequately inform the jury of how to consider mitigating circumstances, resentencing is constitutionally required. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Morgan v. Zant, 743 F.2d 775 (5th Cir. 1984)

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30/ The instructions were also unconstitutional because they did not instruct the jury that aggravating and mitigating factors had to be proven beyond a reasonable doubt.

(jury instructions constitutionally flawed because failed to adequately guide jury in understanding meaning and function of mitigating circumstances); Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981)(instructions constitutionally flawed because precluded jury from properly considering mitigating circumstances); Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A Sept. 1981)(jury instructions precluded jurors from considering nonstatutory mitigating factors). But see Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)(en banc); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)(jury instruction did not unconstitutionally limit consideration of non-statutory mitigating in violation of Lockett under the circumstances).

Admittedly the courts have specifically upheld Florida's standard instructions on this issue. Ford v. Strickland, supra. However the circumstances under which these instructions were upheld in Ford, compared to the particular facts of this case, require the conclusion that TAFERO has met his burden of demonstrating that the jury instruction was unconstitutionally limiting.

Ford relied on four grounds for upholding the jury instructions. First, it found that the trial court had read the statute as written, with the complete list of mitigating circumstances. It then noted that the United States Supreme Court "has recognized the Florida statute does not limit a jury's consideration of mitigating circumstances". 696 F.2d at 812, citing Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).[31/] Second, the court found that the precise wording of the jury instructions in Florida was distinguishable from the wording of the instructions which had been held unconstitutional in Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A 1981). It found that in Florida the jury was not confined to the "preceding elements of mitigation". The Eleventh Circuit's analysis of the United States Supreme Court's understanding may have been true for the

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31/ Profitt was decided in July 1976, two months after TAFERO was convicted and sentenced.

justices of that Court, but it was not true of the trial judge in this case. See argument VII, supra. And if it was not true of the trial judge, then it is certainly reasonable to conclude that the jury had the same problem. Lawyers and judges had problems understanding the scope of the mitigating factors in this statute. Compare Cooper v. State 336 So.2d 1133 (Fla. 1976) with Songer v. State, 365 So.2d 696 (Fla. 1978). It took some years to straighten out the question of whether the statute, as written, limited consideration of mitigating factors to those listed in the statute. Only after this Court realized that the statute might well be declared unconstitutional did it decide to "reinterpret" the statute so that it would not be so limited. This type of legal machination cannot be imputed to a jury of lay persons to whom a judge reads this statute on one occasion and expects them to apply it. Lawyers may know to consider non-statutory circumstances; jurors must be told.

Finally, the Ford court pointed to the sentencing judge's order which indicated that he had considered the possibility of both statutory and non-statutory mitigating circumstances. That is a far cry from the sentencing order here and a far cry from the attitude of this trial judge. This judge said nothing about non-statutory mitigating circumstances. More importantly, this particular judge stated, when he subsequently sentenced the codefendant Linder, he believed he simply could not consider non-statutory mitigating factors. This Court reversed his ruling.

> The trial judge held the mistaken belief that he could not consider nonstatutory mitigating circumstances.

Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). The Eleventh Circuit found the trial judge's perceptions in Ford to be an important consideration. It stated:

> It is reasonable to conclude that the state judge's perception of what could be considered was conveyed to the jury.

Id. at 813. That reliance is equally as applicable where the judge indicates a misperception of the law. The jury instructions in this case unconstitutionally limited consideration of non-statutory mitigating factors. This case does not suffer from the deficiencies

found in Ford. This Court should require a new sentencing hearing with proper jury instructions.[32/]

## VII. TAFERO'S DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT WAS IMPOSED BY A JUDGE WHO BELIEVED THAT HE COULD NOT CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

The death penalty was unconstitutionally recommended by the jury. It was also unconstitutionally imposed by the sentencing judge for the same reason. He, like the jury, thought that he could only consider statutory mitigating circumstances. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), the Supreme Court held that a death penalty is unconstitutional if imposed by a sentencer who is not free to consider all mitigating evidence, whether specifically enumerated in the death penalty statute or not:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604, 98 S.Ct. at 1964-65 (emphasis by court).

This Court had indicated in 1976 that the sentencer was limited to consideration of statutory mitigating factors. In Cooper v. State, 336 So.2d 1133 (Fla. 1976), this Court stated:

> In any event, the Legislature chose to list the mitigating

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32/ For similar reasons, this case is distinguishable from Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983), on which the State also relied below. In addition, the defendant in that case "himself asked the jury to show no mercy and to sentence him to death." 715 F.2d at 1457.

The State also relied on Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) and Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984) Straight contains no analysis or facts. 422 So.2d at 831. Alvord, like Ford, specifically noted that counsel was permitted to introduce evidence of non-statutory mitigating factors.

The simple fact is that in none of these cases did the trial judge feel, like this judge, that the mitigating factors were limited. One cannot presume a contrary understanding from the jury under these circumstances.

> circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.

336 So.2d at 1139. This Court did not state in specific terms that the sentencer may consider nonstatutory mitigating factors until its opinon on rehearing in Songer v. State, 365 So.2d 696 (Fla. 1978), more than two years after the trial in this case.

This Court has explicitly recognized that the trial court held the mistaken belief that it was limited to consideration of statutory mitigating factors when it presided over codefendant Linder's trial. This Court stated:

> The trial judge held the mistaken belief that he could not consider nonstatutory mitigating circumstances.

Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). The trial court must have held the same mistaken belief when it presided over TAFERO's trial, a trial which occurred before Linder's.

TAFERO was therefore sentenced by a trial judge who believed that he was limited to consideration of statutory mitigating factors. As the United States Supreme Court recognized in Lockett, and as this Court recognized in Jacobs, such sentencing is unconstitutional.

## VIII. TAFERO'S DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND CAPRICIOUS UNDER THE UNIQUE FACTS OF THIS CASE. THERE IS NO RATIONAL BASIS FOR SENTENCING TAFERO TO DEATH WHEN LINDER AND RHODES RECEIVED LIFE SENTENCES.

Three primary witnesses testified at TAFERO's trial concerning the shooting. Two of those eyewitnesses were disinterested and independent. Each of them testified that the Canadian officer was holding TAFERO up against the trooper's car with his arm

pinned behind his back at the time the shots were fired. According to one of the eyewitnesses, the shots came from inside the Camaro, where Linder was located. Only Rhodes, the codefendant who testified in return for the State's agreement not to seek the death penalty, contradicted this evidence. He testified that Linder fired a series of shots from the rear seat of the Camaro. TAFERO then ran over to her, took the gun and fired the remaining shots.

The conflict in the evidence creates two possibilities. If the disinterested eyewitnesses' trial testimony is believed, TAFERO fired no shots; all the shots came from Linder inside the Camaro. If Rhodes' trial testimony is believed and the disinterested eyewitnesses are ignored, Linder fired the first round of shots which struck the trooper and TAFERO fired the second round.

Linder's culpability far outweighs TAFERO's under either set of facts. If the disinterested eyewitnesses are believed, Linder fired all the shots and TAFERO was responsible only because of the felony-murder rule. If Rhodes is believed, Linder, not TAFERO, started the shooting and struck the trooper. The entire incident might never have occurred if she had not fired the first shots.

On direct appeal, the State admitted that the culpability of Linder and TAFERO could not be distinguished:

> The State's evidence demonstrated, through the testimony of many witnesses, that Appellant and Linder committed the reprehensible acts.

State's brief at 26.

> The trial testimony points to Linder as the person initially firing the shots, with Tafero then taking over to finish off the victims.

State's brief at 28.[32/]

The trial court, in sentencing Linder to death, reached the same conclusion —

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32/ The State ignored these statements in its response to the motion to vacate at 16-17.

Linder's culpability could not be distinguished from TAFERO's. As stated by the trial court: "The evidence indicates that the Defendant [Linder] fired at least two shots from the back seat of the Camaro, thereby initiating the crime". (P. 389-92).

This Court reversed the trial court's imposition of the death sentence on Linder and ordered that she be sentenced to life imprisonment. Jacobs v. State, 396 So.2d 713 (Fla. 1981).

As recognized in Pulley v. Harris, 104 S.Ct. 871, 881 (1984):

> Any capital sentencing scheme may occasionally produce aberrational outcomes.

The judicial process is designed to correct such aberrations. The Supreme Court itself recognizes that its review process must "ensure rationality and consistency in the imposition of the death penalty". Sullivan v. State, 441 So.2d 609, 613 (Fla. 1983). The trial court's imposition of the death penalty on both Linder and TAFERO indicated an intent that they both receive the same sentence. But now that her sentence has been reversed, similar considerations should be given to his sentence.

There is simply no rational basis by which a reasonable person could reach the conclusion that Linder should live and TAFERO should die. This arbitrary and capricious distinction between Linder's sentence and TAFERO's sentence constitutes a denial of due process.

## IX. THE DEATH PENALTY IN FLORIDA IS UNCONSTITUTIONAL BECAUSE IT DISCRIMINATES BASED ON THE RACE OF THE VICTIM AND BECAUSE IT DISCRIMINATES BASED ON THE SEX OF THE OFFENDER.

As pointed out by the State below, this issue has been rejected by this Court when faced with the statistics adopted by TAFERO in his petition. TAFERO acknowledged this below. However, it appears that the issue might still be pending in federal appellate courts. See, e.g., Adams v. Wainwright, 734 F.2d 511 (11th Cir. 1984). TAFERO has therefore raised this issue simply to show his reliance on those pending cases.

## CONCLUSION

For these reasons, Defendant JESSIE JOSEPH TAFERO requests the Court to reverse the order denying his motion for post conviction relief and to remand with directions to the trial court to grant him a new trial. In the alternative, he requests this Court to determine that the death penalty is unconstitutional in this case and sentence him to life. At the least, he requests this Court to remand with directions to order a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of November, 1984 to: Michael Satz, Esquire, State Attorney, 600 Broward County Courthouse, 201 Southeast Sixth Street, Fort Lauderdale, Florida 33301 and Joy B. Shearer, Esquire, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

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