IN THE SUPREME COURT OF FLORIDA

JOHNNY PAUL WITT, :

Petitioner/Appellant, :

vs. : Case No. 66626

STATE OF FLORIDA, :

Respondent/Appellee. :

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This appeal is proceeding on an expedited basis. Consequently, this brief was prepared before the record on appeal was compiled and numbered and contains no page number references to the record of the post-conviction proceedings in the trial court. References to documentary portions of the original record on appeal will be designated by an "R" followed by the page number. References to the trial transcript portion of the original record on appeal will be designated by a "T" followed by the page number.

STATEMENT OF THE CASE

On November 8, 1973, Johnny Paul Witt was indicted by a Hillsborough County grand jury for the first degree murder of Jonathan Kushner. (R9) A change of venue was granted (R23), and Witt was tried by a jury in Deland on February 18, 1974 through February 21, 1974, with the Honorable Herboth S. Ryder presiding. (T225 - 1008) The jury found Witt guilty as charged. (R132, T854 - 855) At the penalty phase a majority of the jury recommended that the death penalty be imposed upon Witt (R152, T1002), and Judge Ryder sentenced him to death. (R153 - 155, T1007 - 1008)

This Court affirmed Petitioner's judgment and sentence in an opinion dated February 3, 1977, and reported at 342 So.2d 497. The United States Supreme Court denied certiorari on October 31, 1977.

Petitioner, on November 2, 1979, filed a motion to vacate judgment and sentence in the Circuit Court for the Thirteenth Judicial Circuit for Hillsborough County, Florida. The motion was denied without a hearing on December 7, 1979.

Petitioner appealed the denial of his motion to vacate judgment and sentence to this Court, where the decision of the trial court was affirmed in an opinion filed on July 24, 1980 (rehearing denied October 13, 1980) and reported at 387 So.2d 922. The United States Supreme Court denied certiorari on December 15, 1980.

Petitioner, on September 29, 1980, along with 122 other death-sentenced Florida inmates, filed an original petition for writ of habeas corpus in the Supreme Court of Florida. The

petition challenged this Court's practice of ex parte solicitation and receipt of prison-generated psychological reports and similar evaluations of death-sentenced inmates who had appeals pending in the Court. This Court dismissed the petition for failure to state a claim, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court denied certiorari, 454 U.S. 1000 (1981).

On May 5, 1980, Petitioner filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida (80-545-Civ-T-GC). Action on the petition was stayed pending exhaustion of state remedies. An evidentiary hearing was held on April 23, 1981. On May 14, 1981, the petition was denied. Petitioner filed a motion to alter or amend judgment on May 22, 1981, and an additional evidentiary hearing was conducted. On June 17, 1981, the motion was denied.

Petitioner appealed the denial of the petition for writ of habeas corpus to the United States Court of Appeals for the Eleventh Circuit (81-5750). That Court reversed the portion of the order of the district court denying relief on Petitioner's claim that jurors were excused for cause based solely on their general reservations about the death penalty. Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983).

The State of Florida filed a petition for writ of certiorari in the United States Supreme Court asking for review of the decision of the Court of Appeals. Certiorari was granted, and on January 21, 1985, the Supreme Court of the United States reversed the decision of the United States Court of Appeals. Wainwright v. Witt, ___ U.S. ___ (1985).

On February 8, 1985, the Governor of the State of Florida signed a Death Warrant directing Petitioner's execution on some day of the week beginning noon, Thursday, February 28, 1985, and ending noon, Thursday, March 7, 1985.

On February 22, 1985, Petitioner filed a petition for post-conviction relief in circuit court in Hillsborough County. (A1-20) He alleged that his trial court was ineffective in failing adequately to investigate and develop evidence concerning his severe mental and emotional problems, which resulted from organic brain damage, and that the jury which convicted and sentenced him was unconstitutionally composed and prone to convict because potential jurors who opposed the death penalty were excluded. The motion and an application for stay were heard on February 25, 1985, and denied by Judge Guy W. Spicola. Judge Spicola denied the motion on the ground that it was a second, successive petition in violation of Florida Rule of Criminal Procedure 3.850. The court denied Petitioner's requests for an evidentiary hearing on the question of whether such a second petition was an abuse of the procedures. (See, Petitioner's Motion for Evidentiary Hearing with attached Memorandum.)

Petitioner takes this appeal from the denial of his petition for post conviction relief.

Petitioner's execution is scheduled for March 6, 1985 at 7:00 a.m. No stay of execution has been ordered.

STATEMENT OF THE FACTS

Petitioner was arrested on November 5, 1973. (T604 - 607) The arresting officials took Petitioner to the county jail where he was interrogated by deputies, an FBI agent and an assistant prosecuting attorney. (T128) On November 6, 1973, Petitioner appeared before a county judge for his first appearance. On November 7, 1973, Petitioner was again interrogated. (T172 - 173) Petitioner made several oral and written incriminating statements. (T644, 734, 867) Petitioner, along with his co-defendant, Gary Tillman, was arraigned on November 8, 1973, and the Office of the Public Defender was appointed to represent both Petitioner and Tillman. (R11, 14) Because of a conflict of interest, the Public Defender withdrew as Petitioner's counsel (R18) and a private attorney, Peter Behuniak, was appointed. (R20)

Petitioner's trial counsel filed a suggestion of insanity and motion to appoint expert witnesses to conduct psychiatric examination. (R36) Hearings to determine Petitioner's competency to stand trial were held on January 4 and 15, 1974. (T35, 68) Two psychiatrists examined Petitioner and testified at the hearings. Both Dr. Arturo Gonzalez and Dr. Daniel Sprehe concluded that Petitioner was competent to stand trial and sane at the time of the offense. (T68 - 79) Petitioner was adjudged competent to stand trial. (R74)

Petitioner's trial began on February 18, 1974. (T225) The jury that was to serve in both the guilt-innocence and penalty phases of the trial was selected. During voir dire, at least seven prospective jurors were excluded from the jury because of

their beliefs in opposition to the death penalty. (T266 - 267, 296 - 297, 341, 351 - 353, 356 - 357, 370 - 373, 408 - 409)

The evidence introduced against Petitioner at trial consisted of his confessions and physical evidence obtained from his trailer and car. This evidence tended to show that Petitioner and Gary Tillman were in a wooded area hunting on the morning of October 28, 1973. (T644) Tillman saw the victim, Jonathan Kushner, riding his bicycle along a path through the area. (T647) Tillman hit the boy on the head with a star bit. (T648) Petitioner, upon seeing what had occurred, became frightened and told Tillman to gag Kushner so he would not draw attention. (T648) Tillman placed the victim in the trunk of Petitioner's car, and they drove away. (T648) They arrived at a grove about fifteen minutes later. Petitioner opened the trunk and discovered that Kushner was dead. (T649) The medical examiner testified that the cause of death was suffocation caused by the gag. (T501) Unconsciousness would have occurred within three minutes and death within five. (T510) Additional evidence was admitted, over objection, of acts of violence and sexual perversion committed after the victim's death. (T555, 493, 502, 507)

During the penalty phase of the trial, the State introduced the testimony of Dr. Gonzalez and Dr. Sprehe, the two psychiatrists who had examined Petitioner to determine his competency to stand trial and his sanity at the time of the offense.

Dr. Gonzalez testified that he examined Petitioner on December 26, 1973, in this office for 2½ hours and also administered some tests which required another 2½ hours. (T881, 886) He

concluded that Petitioner was not suffering from any psychosis then or at the time of the crime. (T887) He also concluded that Petitioner did not suffer any neurosis. (T887) Gonzalez further testified that Petitioner was sane and in control of his mental faculties. (T889) Petitioner could appreciate the criminality of his conduct. (T901) Gonzalez did not detect the presence of any organic brain disease or damage. (T892) Gonzalez did conclude that Petitioner suffered from a severe anti-social personality disorder (T897, 899 - 901) and that he had violent propensity. (T902) On cross-examination, Gonzalez testified that Petitioner suffered a mental or emotional disturbance in the form of a severe personality disorder. (T903 - 904) Furthermore, Petitioner's disorder made him an impulsive person; one who would not think through the consequences of his actions. (T906 - 907) Petitioner was capable of being dominated by another (T905 - 906) and could come under duress. (T905) Gonzalez also examined Petitioner's co-defendant, Gary Tillman and concluded that Tillman was a paranoid schizophrenic and insane. (T914) He stated that Petitioner and Tillman had a symbiotic relationship; each depended on the other to certain degrees at certain times. (T915) Finally, Gonzalez said that at the precise moment of the crime, Tillman was the more dominant, and that Petitioner was dragged into an action that he perhaps would not have done at that time. (T916 - 922) If Petitioner had been alone, the crime, in Gonzalez' opinion, probably would not have occurred. (T924)

Dr. Sprehe also testified during the penalty phase of the trial. (T925) He examined Petitioner for 3½ hours on January

3, 1974. (T927) Sprehe concluded that Petitioner did know right from wrong at the time of the crime. (T929 - 930) However, Petitioner suffered from a long-standing, severe personality disorder. (T931) Sprehe found no indications of organic brain disease or damage after testing Petitioner with the Minnesota Multiphasic Personality Inventory. (T932) Furthermore, Sprehe concluded that Petitioner was in control of his mental faculties at the time of the crime. (T935 - 937) Sprehe was of the opinion that Petitioner had the propensity for violence and was not treatable. (T937) Sprehe also recognized that Petitioner and Tillman had a symbiotic relationship. (T944)

Petitioner presented the testimony of his father, John H. Witt, during the penalty phase of the trial. (T953) He testified that Petitioner first showed signs of mental or emotional disturbance when he was six or seven years old. (T953 - 954) Petitioner was placed under a psychiatrist's care. (T953 - 954) He was nervous, disturbed and confused. (T954) Later, when Petitioner was about eighteen or nineteen years old, he was in an automobile accident and received a head injury. (T955) After the accident, Petitioner was harder to control. (T955) Approximately five years before Petitioner's trial, he and his father had been in the refrigerator repair business together. (T955 - 956) At times, when a somewhat pressured situation would occur in the business, Petitioner would run away. (T956) This occurred three different times as the result of normal and expected situations that would not produce such a reaction in a normal person. (T956) Finally, Petitioner's father testified to one occasion where

Petitioner turned over the dining table, throwing plates and food all over the kitchen and dining room. (T957 - 958) He said Petitioner left the house, and when he returned, he acted as if he did not remember what he had done. (T958)

Gordon Parker, Petitioner's neighbor, also testified. (T959) He indicated that he had become acquainted with Petitioner as a neighbor. (T961) Parker related several instances of unusual behavior indicating Petitioner was suffering from a mental or emotional disturbance. (T961) Parker noticed times when Petitioner appeared not to recognize Parker's existence when Parker spoke to him and other times when Petitioner became distraught or disturbed over minor occurrences. (T963 - 965) Parker also noted a substantial difference in Petitioner's behavior after Gary Tillman moved in with Petitioner and his family. (T966) Petitioner became more withdrawn and preoccupied. (T966) Also, Petitioner appeared to be afraid of Tillman. (T967 - 968)

In his written findings in support of the death sentence, the judge found the following aggravating circumstances:

> (A) That the Defendant, Johnny Paul Witt, murdered Jonathan Mark Kushner from a premeditated design and while engaged in the commission of a felony, to-wit: kidnapping,
> (B) That the Defendant, Johnny Paul Witt, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and thus his continued existence [sic] presents a great risk of death to many persons.
> (C) The murder, kidnapping of Jonathan Mark Kushner by the Defendant, Johnny Paul Witt, was especially heinous, atrocious and cruel.
> (D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created

> a great risk of serious bodily harm and death to many persons.

(R153) The court found that the statutory mitigating factors were "primarily negated" with the exception of the age of the Petitioner. (R154) The court placed great emphasis on the psychiatric testimony of the State's expert witnesses:

> Therefore, it is the Opinion and Determination of the Court, and the Court so finds, that the aggravating circumstances far outweigh the mitigating circumstances in this cause, and the testimony of the psychiatrists indicate [sic] that the Defendant, Johnny Paul Witt, is a menace to society as his past actions have indicated beyond doubt. In addition, the psychiatrists could give no promise of rehabilitation for the Defendant. Thus the Court finds the Jury's recommendation of the death penalty to be appropriate in the case of the Defendant, Johnny Paul Witt and it is so Ordered.

(R154 - 155)

On February 20, 1985, Petitioner was examined by a psychologist, Dr. Harry Krop, who conducted a clinical neuropsychological evaluation. His test included the Wechsler Adult Intelligence Scale-Revised; The Bender-Gestalt; Wechsler Memory Scale; Rey Auditory Verbal Learning; Facial Recognition Test; Aphasia Screening and selected tests from the Reitan Neuropsychological Test Battery. Contrary to Drs. Gonzalez and Sprehe, Dr. Krop found Petitioner to be suffering from Organic Brain Syndrome. This organic brain impairment manifested as both short and long term memory deficits, perceptual motor deficits, and constructional aphasia. Krop also found Petitioner to be suffering from a severe personality disorder and he exhibited some symptoms of

schizophrenia. Petitioner's organic brain damage renders him unable to exercise good judgment when highly stressed; he lacks the cognitive ability to do so. Furthermore, Petitioner has inadequate coping skills, and when frustrated, he becomes confused and disorganized. Krop found it to be significant that Petitioner suffered from extreme stress for a two year period immediately prior to the homicide. Petitioner's step-son had been maimed in an automobile accident and was left brain damaged. His wife suffered a miscarriage which had a profound emotional effect on him. And, as a result, Petitioner was burdened with astronomical medical bills. This prolonged stress coupled with Petitioner's history of emotional instability, organic brain damage, and inadequate coping skills would substantially impair his capacity to act responsibly and to understand the consequences of his acts.

SUMMARY OF ARGUMENTS

The decision of the trial court to deny Petitioner's post-conviction relief on the ground that the claims were raised in a successive petition in violation of Florida Rules of Criminal Procedure 3.850 was incorrect. Petitioner raised two meritorious new grounds for relief which were unavailable to Petitioner at the time he filed his original petition. An ineffective assistance of trial counsel claim was not known to Petitioner at the time of the prior petition and was not investigated or raised by his post-conviction counsel because of a Public Defender office policy prohibiting the raising of ineffective assistance issues. The claim that jury selection techniques violated the Sixth Amendment and resulted in a jury that was conviction-prone and unrepresentative of a cross-section of the community was only recently made available by a fundamental change in the law announced in Grisby v. Mabry, No. 83-2113 (8th Cir. Jan. 30, 1085). Petitioner did not abuse the post-conviction rule procedures in filing his successive petition on these claims for relief. At the very least, the trial court should have afforded him an evidentiary hearing on the question of abuse of the petition.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN DENYING PETITIONER'S PETITION FOR POST-CONVICTION RELIEF WITHOUT ADDRESSING THE MERITS OF THE CLAIMS PRESENTED, AND WITHOUT AN EVIDENTIARY HEARING ON ANY MATTER, ON THE GROUND THAT THE PETITION WAS A SUCCESSIVE ONE IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.850.

Contrary to the trial court's ruling, Petitioner presented meritorious new claims for post-conviction relief which should have been considered on the merits, even though raised in a second petition. In this argument, Petitioner will first discuss the merits of the two new grounds for relief raised in his petition for post-conviction relief. Second Petitioner will discuss the justifiable reasons why the claims were not previously raised, and why, at the very least, Petitioner was entitled to an evidentiary hearing to more fully explicate this justification.

A.

Petitioner Witt Was Deprived of Effective Assistance Of Counsel During The Penalty Phase Of His Trial Due To His Counsel's Failure To Fully Investigate And Adequately Present The Scope And Intensity Of Petitioner's Mental Impairments.

Petitioner Witt was deprived of effective assistance of counsel in the penalty phase of his trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Counsel failed to adequately investigate, prepare and present evidence of Petitioner's mental and emotional impairment which was

the primary mitigating circumstance in his case. These deficiencies in Counsel's preparation and presentation materially affected the penalty phase of Petitioner's trial. The judge and jury were deprived of critical information regarding Petitioner's mental condition. With only the State's psychiatrists testifying, the judge and jury were left with a skewed impression of Petitioner's true mental state.

The omissions of Counsel included the failure to have Petitioner psychologically examined and tested for organic brain damage or disease. Counsel was aware that Petitioner had been involved in a serious automobile accident and sustained a head injury. Petitioner's father, John Witt, testified to this fact. (T955) However, Counsel did not seek to have Petitioner examined for permanent injuries. Instead, even knowing that mental impairment was the key mitigation element, Counsel relied on the psychiatrist's office evaluations which indicated no organic impairment. Counsel should not have relied solely upon such cursory examinations. Drs. Gonzalez and Sprehe were appointed by the Court solely to determine competency at the time of the crime and sanity at the time of the offense. As a result, their evaluations were not aimed at disclosing the mental incapacities which constitute mitigating circumstances. Their evaluations identified symptoms but not causes.

Had Counsel obtained adequate psychological evaluations for Petitioner, information such as that found by Dr. Harry Krop would have been available. Dr. Krop conducted a clinical neuropsychological evaluation. His test included the Wechsler

Adult Intelligence Scale-Revised; the Bender-Gestalt; Wechsler Memory Scale; Rey Auditory Verbal Learning; Facial Recognition Test; Aphasia Screening and selected tests from the Reitan Neuropsychological Test Battery. Contrary to Drs. Gonzalez and Sprehe, Dr. Krop found Petitioner to be suffering from Organic Brain Syndrome. This organic brain impairment manifested as both short and long term memory deficits, perceptual motor deficits, and constructional aphasia. Krop also found Petitioner to be suffering from a severe personality disorder, and he exhibited some symptoms of schizophrenia. Petitioner's organic brain damage renders him unable to exercise good judgment when highly stressed; he lacks the cognitive ability to do so. Furthermore, Petitioner has inadequate coping skills, and when frustrated, he becomes confused and disorganized. Krop found it to be significant that Petitioner suffered from extreme stress for a two year period immediately prior to the homicide. Petitioner's step-son had been maimed in an automobile accident and was left brain damaged. His wife suffered a miscarriage which had a profound emotional effect on him. And, as a result, Petitioner was burdened with astronomical medical bills. This prolonged stress coupled with Petitioner's history of emotional instability, organic brain damage, and inadequate coping skills would substantially impair his capacity to act responsibly and to understand the consequences of his acts.

Presentation of such psychological information about Petitioner at the penalty phase of his trial would have established the mitigating circumstances provided for in Section

921.141(6)(b) and (f), Florida Statutes. Furthermore, its presentation would have negated the damaging, and improper, psychological evidence presented by the State, i.e. that Petitioner premeditated the homicide and had a propensity to violence. (T902, 937)

The United States Supreme Court in Strickland v. Washington, ___ U.S. ___, 80 L.Ed. 674 (1984), established the standard to be employed in evaluating effective assistance of counsel. That standard has two elements: (1) a showing that counsel's performance was deficient; and (2) that counsel's deficient performance prejudiced the defense. Ibid., at 693. This same standard applies to the guilt-innocence phase of the trial as well as the penalty phase of the trial. Ibid. Counsel's omissions and deficiencies in performance meet this test.

First, counsel's failure to adequately investigate, prepare and present evidence of Petitioner's psychological condition was a serious deficiency. The Eleventh Circuit Court of Appeals recently made clear that if evidence such as counsel in this case failed to investigate and present had been offered but excluded in a state trial court, the exclusion would violate due process. Boykins v. Wainwright, 737 F.2d 1539, 1543-1545 (11th Cir. 1984). Where a defendant's sole defense at trial is a psychiatric defense, "'[i]n resolving the complex issue of criminal responsibility it is of critical importance that the defendant's entire relevant symptomatology by brought before the jury and explained.'" Id., at 1545 (emphasis in original)(citing Gordon v. United States, 438 F.2d 858, 883 (5th Cir.), cert.

denied, 404 U.S. 828 (1971)). Where evidence of the "entire relevant symptomatology" is excluded, fundamental fairness is denied because such evidence "clearly meets the constitutional standard of materiality in the sense of a 'crucial, critical, highly significant factor.'" 737 F.2d at 1545 (citing Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983)). Given that the exclusion of such evidence would deny a defendant a fair trial, counsel who "decides" not to investigate such evidence even though he is presenting a psychological defense, cannot be deemed effective. If such evidence cannot persuade a jury of a psychiatric defense, no evidence can, for a psychiatric defense turns, most importantly, on presentation "in meaningful terms [of] all relevant psychological and other scientific considerations so that the jury may decide whether a mental disease or defect existed at any critical time, and, if so, whether it was sufficient to negate criminal responsibility." Gordon v. United States, 438 F.2d at 883.

Having shown that Counsel's performance was deficient, Petitioner must also show "that the deficient performance prejudiced the defense." Strickland v. Washington, 80 L.Ed.2d at 693. Specifically, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid., at 698. In this context, a "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." Ibid. As the Court framed the inquiry in Washington,

> [w]hen a defendant challenges a death sentence such as the one at issue in this case, the

> question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Ibid., at 698.

Prejudice due to the failure to investigate must of necessity focus upon the omission of evidence from the judicial proceeding at issue. If no investigation is undertaken, evidence that would have been discovered cannot be presented at trial. Accordingly prejudice in Petitioner's case must be gauged by whether, had the uninvestigated evidence instead been investigated and presented at trial, there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Had the trial jury and judge had complete knowledge of Petitioner's mental condition, there is a reasonable probability that Petitioner would not have been sentenced to death. Had Counsel adequately investigated, prepared and presented the full scope of Petitioner's mental illness, such evidence would have negated the improper aggravating circumstances the trial judge fashioned from the State's psychiatric testimony: (1) that Petitioner premeditated the murder; (2) that Petitioner had a propensity for violence; (3) that Petitioner shows no promise of rehabilitation. (R154 - 155) The quality of the psychological evidence developed by Dr. Krop is such that the judge would have been required to find the statutory mental mitigating factors. §921.141(6)(b) and (f). Furthermore, based upon this

evidence, this Court would not have sustained the death sentence as proportionate. Petitioner's circumstances would have been comparable to that of his co-defendant, Gary Tillman, who was allowed to plead guilty to second degree murder primarily because of his mental impairment. With Petitioner's circumstances substantially the same as his co-defendant's, his death sentence would not have been sustained in this Court. See, e.g., Slater v. State, 316 So.2d 539 (Fla. 1975).

The standards governing the proof of the statutory mental mitigating circumstances are well developed, having been applied by this Court in more than fifty cases. Pursuant to these standards, the judge, had he been aware of Petitioner's complete mental condition, would have been compelled to find and give substantial weight to the statutory mitigating factors.

Under Florida law, unless the evidence rises to a certain level, "[s]o long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984). The finding that there is no mental mitigating circumstance will amount to an abuse of discretion where the following conditions are met: When there is "overwhelming evidence," Quince v. State, 414 So.2d 185, 187 n.3 (Fla. 1982), that the defendant suffers from a mental illness. See, also Mines v. State, 390 So.2d 332, 337 (Fla. 1980). (2) When the mental condition was a "controlling influence" Huckaby, 343 So.2d 29, 33 (Fla. 1977), on the defendant at the time of the crime. Ibid.; Mines v. State, 390 So.2d at 337; Miller v. State,

373 So.2d 882 (Fla. 1979). (3) When the mental illness is a form of psychosis or its equivalent. There is a settled opinion in the medical community concerning the substantial impairment of criminal capacity by such illnesses. The presence of psychosis or brain damage compels the finding of mitigating circumstances, despite contrary finding by the trial judge. Huckaby v. State, 343 So.2d 29 (Fla. 1977) (schizophrenia; brain damage causing violent behavior); Mines v. State, 390 So.2d 332 (Fla. 1980) (paranoid schizophrenia); Mann v. State, 420 So.2d 578 (Fla. 1982) (psychotic depression; paranoid feelings of rage).

Accordingly, when the evidence tendered in support of mental mitigating circumstances satisfies these three conditions, mental mitigation must be found and given substantial weight, cf. Quince v. State, 414 So.2d at 186-187 ("great weight" need not be given to mental mitigation unless the trial judge was compelled to find it), in the balancing process of sentence determination. A trial judge's finding that there is no mental mitigating circumstances under such conditions will be set aside as a "palpable abuse of discretion." Pope v. State, 441 So.2d at 1076. Evidence of Petitioner's mental condition, which we now know, falls into that category

Had this evidence been presented, therefore, there would have been unequivocal, weighty evidence that Petitioner fit into that special category of persons whom the Florida Legislature has determined should not be sentenced to death: those whose mental illness rather than their bad character, has caused them to commit violent acts. Indeed, because

> a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse,

Miller v. State, 373 So.2d 882, 885 (Fla. 1979), this Court has not yet sustained a death sentence where the mental mitigating evidence was so strong as to compel a finding of the mental mitigating circumstances. See, e.g., Huckaby v. State, supra; Mines v. State, supra; Mann v. State, supra. Accordingly, there is at least a reasonable probability that, had counsel not been ineffective, the advisory jury, the sentencing judge, or this Court "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984).

In Slater v. State, 316 So.2d 539 (Fla. 1975), this Court stated:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Ibid., at 542. The court reversed Slater's death sentence because he was no more culpable than his co-defendant who had received a life sentence upon a nolo contendere plea. The psychological evidence which Counsel should have presented to the judge and jury would have demonstrated that Petitioner was no more culpable than Gary Tillman who pleaded guilty to second degree murder. The evidence presented at trial established that Tillman was the dominant person at the moment of the crime. (T916 - 922) Further-

more, it was Tillman who struck the boy with the star bit. (T647, 648) The only distinguishable characteristic was that Tillman's mental impairment was more substantial than Petitioner's. (T914) However, had Counsel adequately investigated, prepared and presented the entire scope and intensity of Petitioner's mental illness, that distinguishing variable would not have existed. Petitioner's death sentence would have been reversed under the rule announced in Slater.

B.

The Exclusion From Petitioner's Trial, Upon Collective Voir Dire, Of Prospective Jurors Who Opposed Capital Punishment Violated His Right To Trial By Jury As Guaranteed By The Sixth Amendment To The Constitution Of The United States.

During the voir dire portion of Petitioner Johnny Paul Witt's trial, prospective jurors were questioned collectively about their views on the death penalty (T226 - 440), and several jurors were excused when they expressed opposition thereto. (T267, 297, 341, 353, 357, 373, 409) This method of selecting a jury denied Petitioner a trial by a jury representative of a cross-section of the community and created a jury that was conviction-prone.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) the Supreme Court of the United States failed to resolve the question of whether or not a jury which excludes persons opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. The Court rejected Witherspoon's arguments that such a jury was

unconstitutional, because the data adduced was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U.S. at 517 (footnote omitted). The Court thus held open the possibility that, if presented with persuasive data, it would find a jury which excluded death-scrupled jurors to be violative of a defendant's rights.

Since Witherspoon was decided studies have been conducted which show beyond peradventure that death-qualified juries are not as representative of the community as they should be and cannot be considered fair and impartial with respect to the issue of guilt or innocence. This was the conclusion reached by the United States District Court for the Eastern District of Arkansas in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), and recently affirmed by the United States Court of Appeals for the Eighth Circuit in Grigsby v. Mabry, No. 83-2113, (8th Cir. Jan. 30, 1985).

Grigsby arose from petitions for writs of habeas corpus filed in federal district court by three state prisoners convicted of capital murder. Petitioner Grigsby was sentenced to life in prison without parole for his crime. In Grigsby v. Mabry, 483 F.Supp. 1372 (E.D. Ark. 1980) the federal district court agreed with Grigsby's contention that the trial court abused its discretion by denying him a continuance so that he could present evidence that exclusion from the jury of persons unalterably opposed to the death penalty might affect the jury's determination on the question of his guilt. The court ordered the case sent

back to state circuit court for an evidentiary hearing wherein Grigsby could supply proof of his legal premise. The court noted that the data concerning the conviction-proneness issue was "considerably less fragmentary and tentative" than it was when Witherspoon was decided. 483 F.Supp. at 1388. Both Grigsby and the state appealed, and in Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980) the federal appeals court modified the order of the district court to provide for the evidentiary hearing to be held not in state court, but in federal district court.

After the evidentiary hearing the federal district court issued its opinion in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983). The court reviewed at some length the studies and scholarly works with which it had been presented and concluded from the evidence that death-qualified juries are not sufficiently representative of the community and "are not only 'uncommonly', but also unconstitutionally, prone to convict." 569 F.Supp. at 1323.

Finally, in an opinion issued just a few weeks ago, a majority of the en banc United States Court of Appeals for the Eighth Circuit affirmed the holding of the district court. Grigsby v. Mabry, No. 83-2113 (8th Cir. Jan. 30, 1985). (The appellate court modified the lower court's requirement that a bifurcated trial with two juries was needed to remedy the constitutional problems identified in the opinion by permitting the state to formulate other alternatives that would safeguard defendants' Sixth Amendment rights.) The court recognized that its holding was in conflict with decisions of other circuits,

referring to Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858, cert.denied, 459 U.S. 882 (1982), Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), and Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), and expressed the hope that the United States Supreme Court would grant a writ of certiorari to resolve this "important issue." (The Eighth Circuit's opinion also conflicts with McCleskey v. Kemp, No. 84-8176 (11th Cir. Jan. 29, 1985), in which the en banc court summarily rejected petitioner's claim, which was based in part on Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), that exclusion of jurors adamantly opposed to capital punishment violated his right to be tried by an impartial and unbiased, community-representative jury).

The day after it decided Grigsby, the Eighth Circuit declared its holding therein to be retroactive. Woodard v. Sargent, No. 83-2168 (8th Cir. Jan. 31, 1985). Thus, Petitioner's judgment and sentence must be vacated as the product of a non-representative, unconstitutionally conviction-prone jury.

C.

The Court Below Erred In Dismissing The Petition For Post-Conviction Relief Filed By Petitioner On The Ground That It Constituted A Successive Petition Prohibited By Florida Rule Of Criminal Procedure 3.850.

The court below dismissed Johnny Paul Witt's petition for post conviction relief because it was found to be a successive or second motion of the type subject to dismissal under Rule 3.850 of the Florida Rules of Criminal Procedure. The Court erred in

this determination, as the petition presented two new and different grounds for relief from those presented in Witt's 1979 motion to vacate his judgment and sentence, grounds which could not have been presented in the previous motion.

The pertinent portion of Rule 3.850, which became effective January 1, 1985, provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

This new portion of the Florida rule is virtually identical to the federal counterpart, Rule 9(b) of the Rules Governing Section 2254 cases in the United States District Courts, which reads:

> (b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Because there is as yet no Florida case law construing the above-quoted portion of Rule 3.850, and because said portion conforms with the federal habeas provision on successive petitions, this Court should look to federal law in construing the Florida provision. This is particularly true in light of Witt v. State, 387 So.2d 922, 928 (Fla. 1980), in which this Court noted:

> We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart, at least where

> fundamental federal constitutional rights are not involved. [Footnote omitted--emphasis supplied.]

Petitioner Witt is raising issues which involve fundamental federal constitutional rights, to-wit: the right to counsel and the right to trial by jury as guaranteed by the Sixth Amendment to the Constitution of the United States. Therefore, it is appropriate to examine federal law to determine the proper application of Rule 3.850, and this examination follows.

1. The Governing Standards

The standards that should guide a federal district court in its treatment of claims asserted in a successive federal habeas corpus petition are set forth in federal statutes enacted by Congress. In its 1948 habeas amendments, Congress expressly provided that

> [when] after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. §2244(b) (emphasis added). The Supreme Court has consistently interpreted this provision according to equitable

principles integral to the habeas remedy, observing that since "[t]he primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned," Price v. Johnston, 334 U.S. 266, 291 (1948),

> if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Id.

In Sanders v. United States, 373 U.S. 1 (1963), the Court emphasized that successive claims, that had never been adjudicated on their merits by any federal court could be dismissed as an abuse of writ only if the petitioner had deliberately withheld or abandoned them in his initial habeas petition, or if his "only purpose is to vex, harass, or delay." Sanders v. United States, supra, 373 U.S. at 18. In determining whether a petitioner has deliberately withheld a claim or been inexcusably neglectful, the Court pointed to the standards set forth in Fay v. Noia, 372 U.S. 391, 438-440 (1963), and Townsend v. Sain, 372 U.S. 293, 317 (1963), which require a showing that the petitioner himself, "after consultation with competent counsel," Fay v. Noia, supra, 372 U.S. at 439, has intentionally relinquished or abandoned a known right or privilege. Id.

Congress subsequently endorsed the Sanders interpretation of 28 U.S.C. §2244(b) when it approved Rule 9(b) of the Rules Governing Section 2254 Cases, quoted above. As the Advisory Committee Note to Rule 9 emphasizes, "'full consideration of the merits of the new application can be avoided only if there has

been an abuse of the writ,'" quoting Sanders v. United States. 1/ The Advisory Committee explicitly states that "[s]ubdivision (b) has incorporated [the] principle [of Sanders] and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.... There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples." Federal courts within this Circuit have faithfully observed those Congressional provisions and Supreme Court precedents. See, e.g., Smith v. Kemp, 715 F.2d 1459, 1467-1468 (11th Cir.), cert.denied, ___ U.S. ___, 78 L.Ed.2d 699 (1983); Potts v. Zant, 638 F.2d 727, 739 (5th Cir. Unit B), cert.denied, 454 U.S. 877 (1981); Vaughan v. Estelle, 671 F.2d 152 (5th Cir. 1980); Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980); Paprskar v. Estelle, 612 F.2d 1003 (5th Cir.), cert.denied, 449 U.S. 885 (1980). Thus, the proper framework of analysis is the conceptual structure articulated in Sanders. That standard will now be applied to Petitioner's claims.

2. Applying the Sanders Rules

(a). "Category One" claims

Claims that were raised in a previous petition are referred to as "category one" claims under the Sanders analysis.

1/ In enacting Rule 9(b), Congress expressly rejected proposed language that would have permitted the dismissal of new claims if "not excusable," (rather than if an "abuse"), fearing that this "new and undefined term" gave judges too broad a discretion to dismiss a second or successive petition. H. Rep. No. 94-1471, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2478, 2480.

With respect to such claims a federal court may give "controlling weight ... to denial of a prior application for federal habeas corpus ... only if" the "prior determination was on the merits" and even then, only if "the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15.

In determining whether the ends of justice require the courts to readdress the merits of issues previously decided, the Sanders Court concluded that a petitioner is entitled to a redetermination if the initial hearing was not full and fair, or, where purely legal questions were involved in the original determination, "upon an intervening change in the law or some other justification for having failed to raise a crucial point or argument." 373 U.S. at 16-17. Neither of Petitioner's claims fall into this category.

(b). "Category Two" claims

Claims that were not raised in a previous petition are referred to as "category two" claims under a Sanders analysis. Both of Petitioner's claims fall into this category. With respect to such claims, "[f]ull consideration of the merits of the new application can be avoided only if there has been an abuse of the writ." 373 U.S. at 17 (emphasis in original). Whether a category two claim must be reviewed on the merits, thus depends upon what is meant by "abuse of the writ."

Abuse of the writ will be found only if "it can be shown that the petitioner either deliberately withheld a claim from a previous petition or was inexcusably neglectful." Haley v.

Estelle, 632 F.2d 1273, 1275 (5th Cir. 1980). The Sanders doctrine thus incorporated within its guidelines defining abuse of the writ the principles enunciated in Fay v. Noia, 372 U.S. 391, 438-440 (1963), and Townsend v. Sain, 372 U.S. 293, 317 (1963). Failure to present an issue will be an abuse of the writ only if due to "inexcusable neglect," Townsend, 372 U.S. at 317, or because of an "intentional relinquishment or an abandonment of a known right or privilege." Fay, 372 U.S. at 439, quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Townsend Court defined the inexcusable neglect standard in terms of Fay v. Noia deliberate bypass. The Court in Fay, in turn, keyed deliberate bypass to the standard for waiver of constitutional rights articulated in Johnson v. Zerbst: "an intentional relinquishment or abandonment of a known right or privilege." Thomas v. Zant, 697 F.2d 977, 981 (11th Cir. 1983). The central inquiry, therefore, is the deliberate bypass standard defined in Fay v. Noia:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits -- though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief.

Fay, 372 U.S. at 439.

Legal labels such as "deliberate bypass" cannot, of course, be applied talismanically. The "term deliberate bypass is not self-executing .... [It] encapsulates an equitable doctrine." Sosa v. United States, 550 F.2d 244, 247 (5th Cir. 1977). Indeed, Sanders was grounded on the principle that "habeas corpus has traditionally been regarded as governed by equitable principles," including the doctrine that a petitioner's "conduct in relation to the matter at hand may disentitle him to the relief he seeks." 373 U.S. at 17.

In light of these principles, the Eleventh Circuit and its predecessor have repeatedly stated that "the abuse of the writ doctrine is of rare and extraordinary application." Potts, 638 F.2d at 741; Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir. 1977). "The doctrine is applied narrowly because, under this rubric, full consideration of the merits of a new petition is not necessary if the filing is found to be abusive. Our reluctance to invoke the rule, save in rare and extraordinary instances, was dramatized in Haley v. Estelle, in which we noted that the 'principle behind Rule 9(b) is to dismiss those petitions that constitute needless piecemeal litigation or whose purpose is to vex, harass, or delay.'" Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982), quoting Haley v. Estelle, 632 F.2d 1273, 1275 (5th Cir. 1980). Accord Buckelew v. United States, 575 F.2d 515, 519 (5th Cir. 1978) ("proof of bypass typically involves a showing that the prisoner secured some tactical advantage by not pressing his claim earlier"); Montgomery v. Hopper, 488 F.2d 877, 879 (5th Cir. 1973) ("not even an outright failure to file an appeal would,

of itself, constitute a deliberate bypass in the absence of clear proof that the decision not to appeal was made knowingly and understandingly in order to secure some benefit to petitioner"); Winters v. Cook, 489 F.2d 174, 176 (5th Cir. 1973) ("where, as here, a competent attorney who is well versed in the defense of murder charges deliberately refrains from making a known constitutional objection for strategic purposes, there has been a deliberate bypass and waiver").

Consequently, "[i]f a petitioner is able to present some 'justifiable reason' explaining his actions, reasons which 'make it fair and just for the trial court to overlook' the allegedly abusive conduct, the trial court should address the successive petition." Potts, 638 F.2d at 741, quoting Price v. Johnston, 334 U.S. 266, 291 (1948). Thus, even a knowing and intelligent waiver pursuant to Johnson v. Zerbst will not necessarily render a successive petition an abuse of the writ; the court must still examine the reasons for the initial waiver. The former fifth circuit reasoned, in applying Sanders, that "a waiver or abandonment must not only be intentional, as tested under Johnson v. Zerbst, but must also be under such circumstances as to justify withholding federal habeas corpus relief. It must amount to 'conduct such as may disentitle him to the relief he seeks.' The reason for petitioner's default or abandonment must be one that "'... for strategic, tactical or any other reasons ... can fairly be described as the deliberate bypass of state procedures.'" Potts v. Zant, 638 F.2d at 743.

One of the clearest examples of a category two claim not usually found to be barred by abuse of the writ is a claim made possible by a change in the law.

> ... a petitioner can excuse his omission of a claim from an earlier writ if he proves he did not know of the 'new' claims when the earlier writ was filed. The inquiry is easily answered when the claim has been made possible by a change in the law since the last writ or a development in facts which was not reasonably knowable before.

Jones v. Estelle, 722 F.2d 159, 165 (5th Cir. 1983). Petitioner's second claim based upon the Eighth Circuit Court of Appeals decision in Grigsby v. Mabry, No. 83-2113 (8th Cir. January 30, 1985) is just such a claim. That decision marks a fundamental departure from the law as it existed at the time of Petitioner's original petition in 1980. The state of the law as it then existed may be seen in the opinion of the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The Court there rejected the claim which the Eighth Circuit accepted some 17 years later in Grigsby because at the time of Witherspoon data was not available to prove it. In the years after Witherspoon a number of studies and surveys were conducted which led the Eighth Circuit to conclude in Grigsby that exclusion of potential jurors who oppose the death penalty results in an unbalanced, conviction-prone jury in violation of the United States Constitution. Grigsby was the first case to analyze the data and arrive at this conclusion. It thus represents a fundamental change in existing law, which justifies Petitioner in raising the issue at this time. Furthermore, in Woodard v. Sargent, No. 83-2168, slip opinion (8th Cir. January

31, 1985) the court declared its holding in Grigsby to be retroactive, thus making it fully applicable to Petitioner. 2/

Petitioner's first claim alleging that he received ineffective assistance of counsel in the penalty phase of his trial is also excusable under Sanders v. United States. First, Petitioner did not know that such a claim was possible at the time of his initial petition. Second, Petitioner's post-conviction counsel did not advise him that such a claim was possibly available. Finally, Petitioner's post-conviction counsel, an assistant public defender, was barred by office policy against raising such a claim. As a result, the claim was never adequately investigated. It was never presented to Petitioner for his consideration. And, Petitioner was never advised of the inherent, internal conflict of interest, created by the Public Defender's office policy, which prevented his post-conviction counsel from pursuing the claim.

An abuse of the writ will be found "only if 'it can be shown that the petitioner either deliberately withheld a claim from a previous petition or was inexcusably neglectful'". McShane v. Estelle, 683 F.2d 867, 864-870 (5th Cir. 1982). The first aspect of deliberateness is knowledge. Since Sanders v. United States, 373 U.S. 1 (1963), the requisite level of knowledge in abuse of the writ cases has been defined by the waiver standard

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2/ The argument which prevailed in Grigsby had been rejected in the earlier case of Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858, cert.denied, 459 U.S. 882 (1982), Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.denied, 440 U.S. 976 (1979) and Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984).

announced in Johnson v. Zerbst, 304 U.S. 458 (1938): an "intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464. Petitioner did not know of the ineffective assistance claim in his case. He was not personally aware of his trial counsel's ineffectiveness. He was not aware that his post-conviction counsel did not adequately investigate such a claim. And, he was not aware of the office policy at the Public Defender's office which prohibited his post-conviction counsel from investigating and raising such a claim. Unlike counsel in In Re Shriner, 735 F.2d 1236 (11th Cir. 1984), Petitioner's post-conviction counsel never "fully informed [Petitioner] of his reasons for not raising the ineffective issue." 735 F.2d at 1241.

A second aspect of deliberateness is bad faith. The purpose of the abuse of the writ doctrine is to protect courts from "harassing and repetitive petitions." Shriner, 735 F.2d at 1239.

As previously explained, "[t]he intentional abandonment of a right does not, by itself, constitute an abuse of the writ." Potts v. Zant, 638 F.2d 727, 744 (5th Cir.), cert.denied, 454 U.S. 877 (1981). In addition to having made a knowing and intentional waiver, the petitioner must have engaged in "conduct ... [such as] may disentitle him to the relief he seeks." Id., at 743, quoting Fay v. Noia, 372 U.S. at 399. Examples of such conduct were provided in Sanders v. United States:

> [F]or example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being

> granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground .... Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18 (emphasis added). The Advisory Committee Note to Rule 9 sets forth another example:

> [A] successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts.

28 U.S.C. Foll. §2254. If, in contrast, a petitioner's actions "were justified," he did not abuse the writ. Potts v. Zant, 638 F.2d at 744-745.

Petitioner's actions were justified. He was never made aware of the claim by his counsel and was never apprised of the conflict which prevented his post-conviction counsel from investigating or presenting such a claim.

In conclusion, then, there were legitimate reasons why Petitioner did not and could not present either of the claims set forth in his present petition for post conviction relief at the time of his earlier prayer for relief. It cannot be said that he is in any way abusing the procedures set forth in Rule 3.850, and the Court therefore erred in dismissing his petition.

(3). The Right to an Evidentiary Hearing on the Issue of Abuse of the Writ

The State has the initial burden of pleading abuse of the writ. Price v. Johnston, 334 U.S. 266, 292 (1948); Potts, 638

F.2d at 747. Once the State meets this burden, "the petitioner must be afforded an opportunity to present evidence rebutting the government's pleading." 638 F.2d at 747. The burden "placed upon a petitioner to demonstrate that his action is excusable and does not amount to an abuse of the writ carries a concomitant obligation on the part of the court to afford a petitioner an opportunity to make his explanation, if he has one." Id. at 747-748. Petitioner had an explanation excusing the filing of his new claims in a successive petition. This explanation was offered to the trial court orally during argument and via affidavits from Petitioner's prior post-conviction lawyers who were also present and available to testify. Certainly, Petitioner was entitled to an evidentiary hearing before his claims were foreclosed as an abuse of the post-conviction rule procedures.

There is a narrow class of cases in which no hearing need be held. If the record clearly and conclusively demonstrates a deliberate bypass, no further evidentiary development may be needed. See Johnson v. Estelle, 548 F.2d 1238 (5th Cir. 1977). But because deliberate bypass and inexcusable neglect are extremely fact-specific inquiries, the Eleventh Circuit and its predecessor have often remanded cases to district courts for an evidentiary hearing on the issue of bypass. See, e.g., Thomas v. Zant, 697 F.2d 977, 988-989 (11th Cir. 1983) (remanded for hearing on deliberate bypass); Bass v. Wainwright, 675 F.2d at 1208 (same); Haley v. Estelle, 632 F.2d at 1276 (same); Mays v. Balkcom, 631 F.2d at 51 (same); Buckelew v. United States, 575

F.2d 515, 519 (5th Cir. 1978) ("in most cases, a deliberate bypass must itself be proved by an evidentiary hearing, unless it is clearly shown on the record, as when the trial transcript reveals an express waiver of the issue by defense counsel"); Coco v. United States, 569 F.2d 367, 370 (5th Cir. 1978) ("[n]ormally, where serious and fundamental rights are involved and the §2254 motion is denied on a deliberate bypass theory, the district court must base its decision on facts developed at an evidentiary hearing"); McKnight v. United States, 507 F.2d 1034, 1036 (5th Cir. 1975) (remand for hearing); Morris v. United States, 503 F.2d 457, 459 (5th Cir. 1974). See also Sockwell v. Maggio, 709 F.2d 341, 344 (5th Cir. 1983) (remanded for hearing); McShane v. Estelle, 683 F.2d 867, 879 (5th Cir. 1983) (same); Vaughan v. Estelle, 671 F.2d at 153 (same); United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981) (same); Developments in the Law -- Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1130 (1970) ("in many cases the [bypass] issue will require its own evidentiary hearing").

In no way can the record be read as clearly and conclusively demonstrating a deliberate bypass. At the very least, therefore, Petitioner was entitled to an evidentiary hearing on the abuse of the Petition issue.

CONCLUSION

Petitioner, Johnny Paul Witt, prays this Honorable Court to reverse the order of the court below and remand this cause with directions to vacate his judgment and sentence herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Robert J. Landry, Assistant Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 26th day of February, 1985.

for Paul C. Helm
W.C. McLAIN

WCM:rkm