IN THE SUPREME COURT OF FLORIDA

SAM WILSON, JR.

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

Case No. 67190

CAPITAL CASE
Execution is Imminent, Scheduled for Monday, May 24, 1985, 7:00 a.m.

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PETITION FOR WRIT OF HABEAS CORPUS
AND FOR OTHER RELIEF

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DEP
ETC/oral argument

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Petitioner, Sam Wilson, Jr., an indigent proceeding in forma pauperis, by his undersigned counsel petitions this Court to issue its writ of habeas corpus pursuant to Fla. R. App. P. 9.030 (a) (3) and Fla. R. App. P. 9.100.

Sam Wilson, Jr., states that he was sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and under the Constitution and laws of the State of Florida because he was denied the effective assistance of counsel in the preparation, briefing and argument of the direct appeal from his convictions and sentences of death.

In support of this petition, in accordance with Fla. R. App. P. 9.100 (e), Sam Wilson, Jr., states as follows:

## I.

## JURISDICTION

This is an original action under Fla. R. App. P. 9.100 (a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030 (a) (3), and Article V, Section 3 (b) (9), Fla. Const.

As described more fully below, Mr. Wilson was denied the effective assistance of appellate counsel in all proceedings before this Court at the time of his direct appeal. Since the

claim of ineffective assistance of counsel stems from acts and omissions before this Court, this Court has jurisdiction. Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

The extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substituted appeal. Nevertheless, this and other Florida Courts have consistently recognized that the Writ must issue where the constitutional right of appeal is completely thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., McCrae v. Wainwright, 439 So.2d 768 (Fla. 1983); State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); Ross v. State, 287 So.2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So.2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So.2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for a writ of habeas corpus. Baggett, supra, 287 So.2d at 374-75; Powe v. State, 216 So.2d 446, 448 (Fla. 1968). Petitioner demonstrates below that the inadequate performance of Mr. Wilson's appointed appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

## II.

## FACTS UPON WHICH PETITIONER RELIES

The direct appellate record before this court reveals that appointed appellate counsel, Mr. R. E. Conner, was responsible for specific omissions or overt acts in his preparation and performance which were a "substantial and serious deficiency measurably below that of competent counsel." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). As will be shown, Mr. Conner oddly and utterly failed to perform as an advocate, and in fact Mr. Conner informed this Court in oral argument that his client was rightfully convicted of premeditated murder, and that the death sentence was appropriate. (Transcript of oral argument,

attached as App. 1, pp. 4, 5, 8). The impropriety of this attorney conduct was not lost on members of this Court: during oral argument, several Justices of this Court appropriately expressed surprise and dismay upon experiencing Mr. Conner's sub-standard performance, and upon realizing that Mr. Conner was arguing that his client should be executed.

The prejudice arising from Mr. Conner's performance before this Court is real -- 1.) substantial and credible issues about the Petitioner's innocence, or guilt of a lesser offense, were never briefed or argued (Overton, J., and McDonald, J., dissenting, found, sua sponte, insufficiency of the evidence on premeditation), and 2.) the substantial and credible issues about inappropriateness of the death penalty in this case were not briefed or argued, until it was too late, and then too little was done. (The "too little/too late" brief was contained in a supplement this Court literally ordered appellate counsel to provide.). Petitioner will demonstrate that competent counsel would likely have made a difference before this Court, and will request issuance of the writ to allow Petitioner a constitutionally adequate advocate-laden appeal before this Court.

The procedural history of this case is complicated in terms of this Court's dealings with appellate counsel. These problems will be discussed in Section IIB, infra. Otherwise, the procedural history is as follows.

Petitioner, Sam Wilson, Jr., was charged by an indictment of the Broward County Grand Jury on the 23rd day of October, 1981, with the premeditated murder of his father (Count I), his cousin (Count II), and the attempted first degree murder of his "common-law stepmother" (Count III). At arraignment, Appellant stood mute, whereupon the court entered a plea of not guilty. Trial was held before a jury, and Petitioner was found guilty of all three counts.

A jury trial on sentencing was held, and the jury

recommended the death penalty on Counts I and II. At sentencing the court found three aggravating circumstances: that Defendant had been previously convicted of a felony involving the use of violence; that the crime was especially heinous, atrocious and cruel; and that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court stated that no statutory mitigating circumstances applied, and sentenced Petitioner to death on Counts I and II.

A motion for new trial was timely filed, and denied by the court, whereupon, a timely Notice of Appeal was filed as to Counts I and II. Notice of Appeal as to Count III was filed, and the court ordered the record on appeal prepared.

Mr. Conner was appointed to represent Petitioner on appeal. He did not challenge the death sentence until ordered to by this Court, and then failed to effectively present the issue. At oral argument, he stated there was sufficient evidence for the jury to find premeditation on Counts I and II.

This Court was divided as to the appropriateness of death, and the degree of the offense. Two dissenters found no premeditation as to Count II, and one of the two dissenters also found no premeditation as to Count I. Both dissenters viewed both death penalties to be improper.

The majority did not specifically address premeditation, and affirmed the convictions in Counts I and II. The majority found one of the aggravating circumstances invalid on Count I (cold and calculated), and two of the aggravating circumstances invalid on Count II (heinous, atrocious, and cruel; cold and calculating). Nevertheless the majority affirmed the sentences of death.

A petition for rehearing was filed and denied.

## A. Facts Upon Which Convictions and Sentences Were Based

The following unbiased outline of the State's proof at trial demonstrates that there was no physical or testimonial evidence, much less evidence beyond a reasonable doubt, demonstrating that Petitioner premeditatedly murdered his father, Sam Wilson, Sr., and his cousin, 5 year old Jerome Hueghley. Further, the only evidence on the issue of premeditation at trial was Petitioner's post-arrest statements, which negated premeditation.

### 1. Uncontroverted Facts

#### a. Petitioner Taken Into Custody

On October 8, 1980, at about 9:30 p.m., Petitioner visited his friend Jimmie Wilson (unrelated) at J. Wilson's home in Fort Lauderdale. (R. 349). Petitioner was the godfather of J. Wilson's two month old child, often visited at J. Wilson's home, and on October 8th came to see about J. Wilson because J. Wilson had been hurt on the job at Morrison's cafeteria, where he and Petitioner worked. (R. 349, 356). After talking with J. Wilson, J. Wilson's girlfriend, and J. Wilson's son for about an hour and a half, Petitioner left to spend the night at his father's house (R. 349) five or six blocks away (R. 359) where J. Wilson testified Petitioner frequently stayed (R. 357). Petitioner was not nervous, unhappy, or upset, and appeared normal (R. 357), and he did not have a pistol or other weapon with him. (R. 357).

After Petitioner left, J. Wilson walked his girlfriend to her house, then came home and went to bed. (R. 358). He awakened to Petitioner banging hard on the door (R. 359) at about 2:00 a.m. (R. 350). Petitioner was standing outside J. Wilson's house wearing only a pair of underwear, and Petitioner told J. Wilson to call the police. (R. 360). J. Wilson had no phone and no change for a pay phone.

Petitioner was upset and nervous and said somebody had been shot. (R. 359, 362). Petitioner was not real clear in his nervous explanation of what had happened, and J. Wilson could not

recall whether Petitioner said it was Petitioner's father who had been shot. (R. 359-60). Petitioner had a pistol, and he had some blood on him. (R. 351).

J. Wilson told Petitioner to go to Petitioner's brother Bobby's house, not far away, and J. Wilson gave Petitioner some clothing to wear so he would not have to run ten blocks through the streets semi-nude. (R. 351, 362). Petitioner went into J. Wilson's house, leaving the pistol outside, and J. Wilson heard water running inside. (R. 360-61). J. Wilson did not have an automobile, and Petitioner left on foot headed for his brother's house. (R. 364).

At 2:32 a.m. on October 8, 1980, Michael Moniz, a City of Fort Lauderdale Police Officer, was dispatched to 400 N.W. 18th Avenue, Fort Lauderdale, to investigate a "sick or injured person." (R. 311-12). Petitioner and his brother Bobby Lee Wilson were outside the residence when Moniz arrived.[1] Officer Moniz testified that Petitioner told him some shots had been fired and there was an injured person inside the house. (R. 312-13). Bobby Wilson said he had called the police from inside the house. Moniz entered the house through the open front door, and Sam Wilson, Sr., was seated on the floor, leaning against a recliner chair. (R. 313). After Moniz looked at Sam Wilson, Sr., Petitioner told him that "Earline, my mother, is still here," and Moniz started looking for her but was unable to find her immediately. (R. 316). Moniz described the house as having three bedrooms off the hall leading from the living room. He left the living room, and saw Jerome Hueghley on the bed in the

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[1] Bobby Lee Wilson did not testify, but his deposition was taken pre-trial. Trial counsel's failure to use Bobby Wilson as a witness is the subject of a 3.850 claim now pending or to be filed immediately in the trial court. In Bobby Wilson's deposition, included in the record on appeal, he testified that shortly before 2:00 a.m. on October 8, 1980, Petitioner came to the house where Bobby was staying, and told him over and over "Pop's been shot." "Pop's been hurt." (R. 958). Bobby hurriedly dressed, and they ran eight blocks to their father's house. (R. 957). Bobby Wilson's car was not operating. Id.

middle bedroom. (R. 316-17). He noticed that another bedroom, the "master bedroom," was in "total disarray." (R. 324). Furniture was thrown all over the place, closet doors were torn out, and a large amount of blood was on the walls and floor. (R. 324-25). The middle bedroom, where Jerome was found, was not in disarray. The living room was. Blood was in the hall. Moniz testified that at some point when he was in the house, Petitioner said there had been a black male in the house, shots had been fired, and the black male left through the back door. (R. 318).

After back-up units arrived, Moniz and other law enforcement personnel were in the front portion of the house, and heard a disturbance to the rear of the house. They went around to the back, and according to Moniz, saw Earline Wilson come out of a utility room, injured, and fall into the arms of an officer. (R. 318-19). She was very nervous and upset, and according to Moniz, a supervisor asked her "Who did this?" and she said "Junior, Sam, Jr.," and she pointed at Petitioner. (R. 320).[2] According to Moniz, Petitioner was then taken into custody. (R. 321). Moniz recalled that a hammer with what appeared to be blood on it was found in the hallway.

b. "Evidence" Recovered

The real evidence offered by the State at trial was a pair of scissors (Ex. 69), a hammer (Ex. 72), a twenty-two caliber revolver with six (6) empty shell casings (Ex. 74), three "slugs" or projectiles (Exs. 75, 76, 77), a derringer and two bullets (Ex. 79), some ammunition (Ex. 79), a bent knife (Ex. 78), defendant's clothing (Ex. 81) and the victims' clothing (Exs. 82-85), and sixty-seven photographs. Testimony explained the

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[2] According to Bobby Wilson's deposition, at this point Petitioner kneeled down beside Earline Wilson and said "are you sure of what you are saying?" (R. 963). Bobby Wilson also stated that when Petitioner was informed that his father and Jerome were dead, "[h]e went into shock and started crying and the police tried to hold him from going back in the house." (R. 963).

condition of the physical evidence when found, and explained scientific tests conducted on the evidence.

The pair of scissors, found laying on the ground below a window at the residence (R. 378), had blood stains, but the state serologist could neither type the blood nor say it was human or animal blood (R. 1047, deposition, p. 5). The state introduced no evidence regarding fingerprints on the scissors. The hammer was found in the hallway of the residence (R. 321, 389), and it had blood on it consistent with the Petitioner's, Jerome's, Earline's, and Sam Wilson, Sr.'s. (R. 1071). The twenty-two caliber revolver was recovered when Petitioner took police to where he had left it. (R. 399). It had six spent cartridges in it (R. 399). No fingerprints were recovered from the .22. (R. 417). The three fired projectiles were found in the closet in the master bedroom (R. 388), and they may have been fired from the .22. (R. 558). The derringer was found on a table outside the residence (R. 379) with two live rounds in the derringer and 4 live rounds on the table. There were no fingerprints lifted from the derringer. (R. 419). The bent knife was found in the kitchen (R. 381) at the sink, and had human blood on it. (R. 1055).

c. Medical Testimony

Sam Wilson, Sr., died as a result of brain damage caused by a bullet wound. (R. 537). There were abrasions below the gunshot wound, which could have been caused by anything hitting the skin hard enough to break the skin, including furniture or the floor. While a hammer would be consistent with the abrasions, it merely "might inflict a similar abrasion." (R. 551). This was true of other abrasions and lacerations on Mr. Wilson Sr.'s head, shoulders, and hands. (R. 544). Abrasions to the back of his hands were called "defense" wounds (R. 545-46) simply because they were on the back of the hands. The gunshot wound reflected no tatooing or powder burns, and there was

evidence by way of opinion that the weapon which caused the wound was fired from a distance of at least three feet. (R. 550, 557).

Earline Wilson died of pneumonia, secondary to her having undergone surgery for cancer. (R. 432). Before surgery, she had recovered from any injuries she had received on October 8, 1980. Her autopsy revealed that at some earlier time she had suffered blunt head trauma and multiple gunshot wounds. (R. 435). The blunt head trauma might have been caused by a hammer; it might not have. (R. 437). At some point she had been shot five or six times. (R. 439).

Jerome Hueghley was found lying in bed at the residence. He died from a stab wound to the chest. (R. 531). The wound was consistent with having been caused by a knife or scissors. (R. 535). Jerome had one tiny abrasion on his abdomen. (R. 552).

d. Description of the Scene

The residence was "completely ransacked or -- it looked like there had been a fight there, quite a fight." (R. 508, Detective Moody). Furniture was turned over, blood was all over several rooms, and doors were torn off their hinges. (R. 508).

2. Petitioner's Post-Arrest Statements

Earline Wilson and Sam Wilson, Jr., survived the "fight, quite a fight," at the residence October 8, 1980. Sam Wilson, Sr., was shot, Jerome was stabbed, and Earline Wilson was shot. She said Sam Jr. "did it." Assuming, without accepting, that she was telling the truth, the "it" that Petitioner "did" was the killing, but how the killing occurred still went unanswered. The only answer came from Sam Wilson, Jr., and there was no evidence of premeditation in his statements.

The day after he was arrested for murder, and after he had been appointed an attorney (R. 1077), Petitioner voluntarily[3]

[3] The trial court ruled that the statements were voluntarily given. (R. 468).

spoke to two police officers about what had happened at the residence in the early morning hours of October 8, 1980. He had given a statement to the officers the day before, shortly after he was arrested, and just before he voluntarily took the officers to where he had left a .22 caliber pistol. The statements were tape recorded, and played for the jury. (R. 471, 498).

In both statements, Petitioner emphasized that the two deaths were accidents, which happened during a family dispute at his father's house. In the statement recorded the morning of October 8, 1980, the officers told Petitioner "[y]ou told us that you've had fights before with your mother [sic] and father and stepmother . . ." and said "[Y]ou fought with her quite a bit?", which Petitioner acknowledged. (R. 484). Petitioner stated that his "stepmother" (unmarried to, but living with, Petitioner's father) was hostile to him because he would not refer to her as his stepmother, (R. 490), and she would do things to make him feel unwelcome in his father's house. (Id., R. 484).

The detectives told Petitioner during the statement that it was their understanding that the incident all started on October 8th because of an argument between Petitioner and his stepmother. (R. 475). Petitioner went to his father's house that night, took a shower, and started to make a phone call. (R. 474). While he was making the phone call, he looked into the refrigerator for something to eat. (R. 474). Earline (stepmother) came into the kitchen and told him not to eat any of the food in the refrigerator. Id.

In his statement, defendant said that Earline made a smart remark, and went into the bedroom. Petitioner picked up a hammer that was beside the stove, and started into the bedroom, and then Earline hollered for Petitioner's father to come. Petitioner asked Earline what she had said, she mumbled something, "and at that time I didn't even think or anything, I just hit her. (R. 476). Petitioner said he hit Earline on the shoulder and then in the head with the hammer. (R. 476).

Then Petitioner's father came into the bedroom:

> Q. Okay. So your father came to where you and your stepmother were?
> A. Yes, Sir.
> Q. Okay. And then you and your father got into an argument?
> A. There wasn't an argument. It was spontaneous. He just came after me. Just, just fighting.

(R. 477).

They fought, and "tussl[ed] in the bedroom. We [Petitioner and his father] fought from the hallway back into the bedroom, back in the bedroom, back through the hallway, and at that time he [the father] was telling Earline to get the gun and shoot you know." (R. 483).

While they were fighting, Petitioner somehow got a knife. The father reached to pick the hammer up off the floor. Petitioner got the hammer away from his father and hit him in the head and somewhere else on the body. (R. 477-78). Then his father grabbed a lamp. (R. 479).

"We was fighting and some kind of way, Jerome got in the way. . . . Evidentally he was trying to stop me and my father from fighting." (R. 479). Jerome was "right between us," and

> The knife was in both our hands cause he had my hand and I had his hand. And his hand was on the knife, well, on my arm, really, and I had the knife in my hand.
> Q. Okay, let me -- let me just get this straight so I know that I am sure of what I am hearing. The knife was in your hand, and your father had hold of your arm and this is when the boy got knifed?
> A. Yes, Sir.

(R. 480). Petitioner said he then "wanted to go help [Jerome], but my father didn't want to tear loose of me. So I believe Earline had put him to bed." (R. 480).

Earline came in with a gun in a paper bag, and Petitioner took it from her. Petitioner's father grabbed the gun, and "some kind of way the gun went off -- I don't know, once or twice, but it did go off. I probably hit him in the chest some kind of way, in the stomach." (R. 478).

During the first statement, Petitioner told the detectives

that after his father was shot, Petitioner ran to Jimmie Wilson's, then to his brother Bobby's house, and then back to his father's house. (R. 480). He also told them where he had left the .22, and took them to it, (R. 488), and admitted that the "black man running out the back of the house" version he had related at the scene was false. (R. 483).

In his first taped statement, Petitioner said that his father said "I am going to kill you" when he grabbed the gun. (R. 478). In the statement recorded the next day, Petitioner volunteered that his father had not in fact said that. (R. 493). Also, in the first statement, Petitioner denied that Earline had been shot, (R. 487), and he admitted in the second statement that he did shoot at her after his cousin was hurt and "his father had got shot and was hurt very badly, [and] that he was [then] trying to get at Earline." (R. 495). Appellant also said in his second taped statement that it "had to be the scissors [not the knife] on the floor that me and my father was tussling to get away from one another and Jerome had got in the way of the scissors and got stabbed." (R. 302).[4]

There were other minor inconsistencies between the two tape recorded statements.[5] The changes in the second statement were, according to the detectives, because "since the other day when we took that statement you have remembered certain things and you have other things you want to tell us . . ." (R. 500). The second statement was taken after the detectives "asked if he would be willing to give us a taped statement like he did the first day and he readily stated he would." (R. 496).

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[4] Between the taking of the two taped statements, the police spoke with the forensic pathologist who said Jerome's wound was more consistent with scissors than with a knife. (R. 495). When the police told him it had to be the scissors, Petitioner changed his explanation to "it had to be the scissors."

[5] For instance, there was confusion at the first of his first statement, and that somehow a derringer was involved. All parties agreed they had been talking about the .22 the entire time, even if the word derringer was occasionally used.

In the first taped statement, Petitioner said "it was an accident." (R. 483). In his second taped statement, he said the .22 was the gun with which he "accidentally shot my father." (R. 506).

**B. Counsel's Actions Before This Court**

Petitioner must allege specific omissions of counsel. In this section, Petitioner outlines appellate counsel's actions before this Court, with an asterisk beside those actions or omissions which constitute deficient representation. In succeeding sections, Petitioner more fully outlines and argues particularly disturbing and prejudicial actions by appellate counsel.

1. Before Oral Argument -- Original Briefing

Upon conviction, Petitioner was declared indigent for purposes of appeal, and on October 26, 1981, the Public Defender was appointed to prosecute the appeal. (R. 1272). Trial counsel thereupon prepared the Statement of Judicial Acts to Be Reviewed and Designation to the Court Reporter (R. 1273, 1276), after which Mr. Conner was appointed counsel on appeal.

On or about February 12, 1982, Mr. Conner filed Appellant's brief in this Court. See Appendix B. He had had no communication with Petitioner, and so had not discussed Petitioner's ideas about appeal.* He did not provide Petitioner a copy of Appellant's brief.* On or about March 24, 1982, the State filed Appellee's brief. (See App. D). Mr. Conner did not supply appellant a copy*, or ask or tell Petitioner about Appellee's brief.* On or about April 23rd, 1982, Mr. Conner filed Appellant's reply brief in this Court. (See App. E). He did not discuss the reply with Petitioner.*

After all briefs were submitted, Mr. Conner first contacted Petitioner on June 18, 1982*, whose letter to the PD (who Petitioner thought was his attorney on appeal) had been forwarded

to Conner. Conner wrote to Petitioner on June 18, informed him that the briefs had been filed, sent him copies, and informed him that oral argument was scheduled in this Court August 31, 1982. (See App. P., June 18, 1982 letter). Conner told Petitioner that only the matters raised in Appellant's brief would be raised at oral argument, and he refused to send a copy of the transcript to Petitioner. (Id.)

By letter of July 22, 1982, Conner again refused to send a copy of the transcript to Petitioner. (See App. P). He also refused to visit Petitioner, but told Petitioner to write him with anything he wished to discuss.

In Appellant's Brief, Mr. Conner did not mention the Eighth Amendment. No death penalty decisions from this Court, the United States Supreme Court, or federal courts were mentioned, for their Eighth Amendment principles. No discussion of the death penalty, as written or applied in Florida and to Appellant, was mentioned.

In Appellant's Brief, Mr. Conner inadequately inaccurately, and prejudicially described the case in the statement of facts, p. 4-13. Conner listed those facts which supported the conviction and sentence rather than the more evident facts which did not support the convictions and sentence. (Compare statement of facts at pages 5-12, supra, with statement in Appellant's brief.) The claims briefed and raised by Mr. Conner were inadequately researched, briefed improperly, and in several circumstances frivolous. Written argument in this capital brief was 18 pages long. Mr. Conner did not raise many of the legitimate claims preserved at trial, including: the verdict was contrary to the law and the weight of the evidence (R. 1244), and the court erred in denying defendant's motions for judgment of acquittal (R. 1244). The State responded to the claims raised by Conner, and additionally claimed in Argument VI that the death penalty was appropriate in the case. (App. D, pp. 21-23). In his reply brief, Mr. Conner did not respond to State's Argument

VI. (See App. E).

Mr. Conner, due to gross neglect was unfamiliar with the law regarding: 1.) standards relating to insufficiency of the evidence claims, and 2.) capital sentencing. Before oral argument, he made no attempt to learn the law.

2. At Oral Argument

Present counsel late last week obtained a copy of this Court's recording of oral argument held herein August 31, 1982. Undersigned counsel did not know that such recordings existed and were available until last week. Counsel then had a transcript of the oral argument prepared, which is attached as Appendix A.

The transcript is as accurate as possible, but is not certified. It was prepared under the close supervision of an attorney, and any questions about the accuracy of the transcript should be resolved by listening to the tape maintained by and available to this Court.

Petitioner believes that Mr. Conner was totally unprepared to argue his appeal in an effective manner before this Court. Mr. Conner's argument is riddled with inaccurate statements, and is devoid of any persuasive oral advocacy. While the following excerpts are illustrations of counsel's ineffectiveness, the entire argument is challenged:

> THE COURT: Counsel
> CONNER: Yes, sir.
> THE COURT: I've read your brief and I understand the points you've urged but what I am concerned about is what you didn't talk about in your brief. You didn't address anything on the sentencing phase and that disturbs me.
> CONNER: Uh- In which respect sir?
> THE COURT: Well, did you talk about the sentencing phase at all in your brief?
> THE COURT (another member): The appropriateness of the death sentence in this case.
> (Long unanswered pause)
> THE COURT: The State brought it up in its brief and you didn't reply to it.
> CONNER: Yes sir. In point six of their brief. That is true.
> THE COURT: Yes. <u>You don't consider that with any materiality or relevance in a case</u>

where a man to whom the death penalty has been imposed sir?

CONNER: Uh, those particular points about the aggravating and mitigating circumstances, uh, I felt the prior decisions of this court were clear that with the aggravating circumstances as found by the court, that and with no mitigating circumstances that it was, uh, in an area where the court had already decided, unless something has changed in the interim.'

THE COURT: Are you still of the opinion that there is nothing to be said in behalf of the appellant with respect to the imposition of the death penalty?

CONNER: Only insofar as it relates to the fact that the judge found as a matter of law, one of the aggravating circumstances were the uh, especially cold, cruel and heinous; which he ruled as a matter of law.

THE COURT: Do you take issue of that, sir?

CONNER: Well . . . (pause)

THE COURT: Have you read, are you familiar with this court's case of Combs v. State?

CONNER: Yes sir.

THE COURT: Do you feel that your facts fit within the ruling in that case sir?

CONNER: Uh, I just, I don't know . . .

THE COURT: What I'm concerned about sir is that somewhere down the course, that someone will, may very well take the position that your not having discussed that facet might be some dereliction on your duty.

CONNER: That's always possible . . .

THE COURT: And that there might be ineffective assistance of counsel and I'm concerned about the vacuum in your brief when there's no discussion of it.

THE COURT: If you want to supplement it orally, that's why I'm asking. Its not in your brief, if you want to talk about it orally . . .

CONNER: Frankly, your honor, I felt that the other points were much more important. Uh, I did not intentionally overlook it. I did consider it. Um . . .

THE COURT: Well let me ask a question. Do you feel that death is the appropriate punishment if he is guilty?

CONNER: It's, it's quite possible, yes sir. Uh, there was sufficient evidence in this case for the jury to find premeditation and they did find premeditation. Notwithstanding that the incident arose out of an altercation. There was enough evidence there I felt that, from an Appellant point of view, that they could and did find premeditation, especially insofar as when he followed Earlene around the house and fired through the closet doors at her. Now, I don't know whether there was premeditation with the little boy or not but certainly insofar as Sam Wilson Jr. was concerned. Uh and the testimony of the pathologist that the weapon was apparently held more than three feet away from him when he was shot, uh, appeared to me

that there was, and the jury so found, some premeditation.

THE COURT: I think the point that Justice Ehrlich was making that in Combs, what this Court said on the aggravating and mitigating as far as this particular aggravating circumstance was concerned, that it added another element to the matter of premeditation and that the cold and calculating went to the matter of a situation such as execution or contract type of killing. You're not saying that this is an execution or contract type of killing.

CONNER: No sir.

THE COURT: And I think the point that Justice Ehrlich was making was the fact that under Combs, that it could be argued that that aggravating circumstance was not properly used in this case.

CONNER: That is true. I think that's right - a correct statement, yes sir. Well, he also had the prior record of violent - he had robbed somebody at knifepoint prior to that. There was another aggravating circumstance of the cold, cruel and heinous . . .

THE COURT: I think we're putting you in a position by your failure to discuss that, of arguing something that you perhaps you ought not to. You're in a position now where to explain the absence of the sentence part of your brief, you've got to show that your client should be sent to the electric chair. That's a rather odd situation for you to be in.

CONNER: It is.

THE COURT: Well, let's go back.

THE COURT: Would you like to supplement your brief if the court will let you?

CONNER: It would be helpful. If the court feels that it's that important, I would be more than glad to do it.

THE COURT: It's not a question of what we feel.

CONNER: I would welcome the opportunity, certainly.

. . . .

THE COURT: Would you agree that the evidence concerning the fact of his committing first degree murder in this instance was pretty overwhelming?

CONNER: I would say that it was overwhelming, but for the statements that he made, uh, those statements, I don't believe, that the, the jury heard sufficient evidence of voluntariness under that Jackson v. Denno case, uh, wherein the United States Supreme Court uh, set aside a uh, New York case which is similar to our Florida procedure. The uh . . . There wasn't . . .

THE COURT: Was there any evidence now you have a victim here that lived and was able to testify. But - and who later died- but there was no real denial by the defendant that he committed this act in this record or evidence to show that he did not commit this act.

CONNER: Not that I could see, no sir.
THE COURT: The evidence that's in this are his statements which are admissions and confessions, are they not?
CONNER: Extrajudicial confessions, yes sir.
THE COURT: So doesn't your argument concerning the photographs go to prejudice as to the imposition of the death sentence in this case?
CONNER: I guess indirectly, yes sir. (Pause) Now . . .
THE COURT: May I ask you this please sir. Now, on the one hand, if I'm reading it correctly, you're saying that there is no question about the guilt and then your statement of the guilt there that the death penalty is appropriate. Am I misunderstanding you?
CONNER: No, I don't - I don't think I meant to say that if that's the way it came out.

After being led by the court, counsel began to discuss evidence which might show lack of premeditation, an issue never briefed.*

The state argued next, and Mr. Conner responded ineffectively. The argument concluded:

Uh, if the, if the court, uh, feels that a uh, short brief on count 6 raised in the, uh, Appellee's brief will be appropriate, I would be willing to submit it as soon as practical.
THE COURT: We'll let you know if we want one.
CONNER: All right sir. Thank you.

3. After Oral Argument

On September 3, 1982, Mr. Conner wrote to Petitioner, and told him "the case was taken under advisement" by this Court. (App. P).* No mention was made of this Court's invitation to brief sentencing.*

This Court entered an Order September 7, 1982, directing Petitioner's counsel to file a brief directed to the penalty phase by September 16, 1982. (App. F). Mr. Conner did not file a supplemental brief on that date, because he said, in a late motion to this Court, "he had been out of the country between September 11th and September 18th, 1982." (App. G). However, he wrote a letter to Petitioner September 13, 1982 (a date on which he told this Court he was out of the country) in which he stated emphatically that "there is nothing further required of your

appellate counsel." (App. P).

The Appellant's Supplemental Brief Penalty Phase - Trial was ultimately filed September 30, 1982. That "brief" was poorly written, inadequately researched, and largely unintelligible. It contains no theme, recites no United States Supreme Court controlling law, and does not mention the Eighth Amendment. Counsel spent a page in the Supplemental Brief confessing that an aggravating circumstance had been proven, and stressing that that was sufficient to affirm a death sentence. Counsel's legal analysis was "Appellant does not believe sufficient aggravating circumstances have been proven to sustain a death sentence."

Petitioner was not informed that the supplemental brief was filed. On December 28, 1982, Mr. Conner wrote and told Petitioner that upon this Court's action, Conner would file a petition to rehear, and then "my representation of you will be at an end." (App. P). He told Petitioner that it was not possible to obtain a transcript of the oral argument before this Court.

This Court issued an opinion herein July 21, 1983. There were two dissents, Overton, J. disagreeing with a finding of premeditated murder of Jerome (Count I), and MacDonald, J., dissenting on the finding of premeditation in both Counts. Wilson v. State, 436 So.2d 909 (Fla. 1983).

On August 4, 1983, Mr. Conner informed this Court that he did not have a copy of the Court's decision, and that he needed an extension of time to file a Motion for Rehearing (App. K). He then filed an Amended Motion for Extension of Time to File for Rehearing August 8, 1983. The Motion for Rehearing was filed August 19, 1983, and set out an argument not previously raised by Mr. Conner -- that the trial judge restricted himself to consideration of only statutory mitigating circumstances, and ignored non-statutory circumstances. The State responded that since the claim had not been raised previously, Petitioner was precluded from raising it on rehearing. The Motion for Rehearing was denied September 26, 1983.

Mr. Conner did not apply to the United States Supreme Court for a Writ of Certiorari.

4. Client Contact

Despite Petitioner's continual and repeated requests for accurate and complete information from Mr. Conner concerning his appeal, Mr. Conner failed to inform Petitioner: 1.) that he represented him, 2.) that he raised no sentencing issues in his initial brief, 3.) that this Court ordered supplemental briefing on the death penalty.* He also refused to supply a transcript to petitioner, a copy of the supplemental brief, or a transcript of oral argument.* At no time did Mr. Conner discuss with Petitioner which issues should be raised.

**C. Counsel's Actions Before this Court in a Similar Case: State v. Maxwell**

Four months before filing Petitioner's Appellant Brief herein, Mr. Conner filed the Appellant Brief for Chester Maxwell, another death row inmate. (App. Q(1)). He later filed a Reply Brief. (App. Q(2)).

Mr. Conner's performance in that case was challenged by writ of habeas corpus, filed November 4, 1984. (App. Q(3)). This Court stayed Mr. Maxwell's execution, and no opinion has yet issued. In Mr. Maxwell's petition, he noted that he "is under a sentence of death that was not even challenged by his appellate attorney [Conner]. In a 27-page brief filed with this Court, appointed counsel raised no challenges to the trial court's finding of five aggravating circumstances, three of which were found to be invalid, anyway." (App. Q(3), p. 5). Mr. Maxwell also challenged Mr. Conner's "fail[ure] to identify major issues involving restriction of consideration of mitigating circumstances [and the] failure of the trial court to consider nonstatutory mitigating circumstances . . . ." Id.

Attached to Mr. Maxwell's petition was a proffered affidavit

from the attorney who handled Mr. Maxwell's co-defendant's appeal. According to that attorney, she discussed the appeals with Mr. Conner, and "further mentioned to Mr. Conner the strong probability that several of the aggravating circumstances cited by the trial judge could not properly support Mr. Maxwell's death sentence. Mr. Conner did not appear to be fully familiar with the legal principles I briefly referred to with respect to the death penalty and, in any event, informed me that he had determined for whatever reason, not to challenge the propriety of the death penalty imposed against his client." (App. Q(3)).

## III.

## NATURE OF RELIEF SOUGHT

Petitioner seeks a stay of execution so that he can pursue a new appeal. If necessary to prove his claim of ineffective assistance of appellate counsel, he also requests an evidentiary hearing by special magistrate or otherwise, to resolve any disputes as to issues of fact. Finally, Petitioner seeks the vacation of his convictions of first degree murder and his death sentences.

## IV.

## BASIS FOR WRIT

### A. Standard for Effective Assistance of Counsel on Appeal

#### 1. General

The appellate-level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, ___ U.S. ___, 1055 S.Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S.Ct. 830, n. 6. An indigent, as well as "the rich

man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1985) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S.Ct. at 835 (quoting Strickland v. Washington, 104 S.Ct. 2052 (1984)). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae". Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657, 664 (1984). Counsel is crucial, not just to spew the legalese unavailable to the lay person, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835, n.6. Unless counsel requires the "prosecution's case to survive the crucible of meaningful adversarial testing," Cronic, 80 L.Ed. at 666, this Court cannot easily perform its assigned function, as the leader of Florida's judiciary, to ensure "that the guilty be convicted and the innocent go free." Lucey, 105 S.Ct. 830, 835 (citations omitted). "'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" Cronic, 80 L.Ed. at 657 (citing the quote from Kaufman, Does the Judge Have a Right to Qualified Counsel, 61 ABAJ 569, 569 (1975)).

Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S.Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not

only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also, Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

"The mere fact that [this Court is] obligated to review the record for errors cannot be considered a substitute for the legal reasoning and authority typically provided by counsel." Id., at 1302. In addition, the advocacy of counsel must be timely, not after oral arguments or on rehearing. "An appellate court conducts its most in-depth and complete review of a case during the direct appeal. A petition for rehearing typically receives a more summary consideration. . . . Accordingly, the duties of an 'active advocate' mandate that appellate counsel assert his [or her] client's position at the most opportune time." Id.

This Court has long protected the right of indigents to effective appellate representation. More recently, in Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation on appeal fell below an acceptable standard." Two weeks ago, upon Mr. Barclay's new appellate record, briefing, and argument, this Court reversed Barclay's death sentence, and ordered that a life sentence be imposed. Even more recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . ." Harris v. Wainwright, ___ So.2d ___ (Fla. No. 66,523, June 13, 1985, slip at 3).

Appellant neither can be denied appellate counsel as "a sacrifice of [an] unarmed prisoner[] to gladiators," Williams v. Twomey, 510 F.2d 634, 640 (7th Cr. 1975), cert. denied 423 U.S. 876 (1975), nor can he be provided an attorney whose

ineffectiveness makes it "difficult to distinguish [the appellant's] . . . situation from that of someone who had no counsel at all." Lucey, 105 S.Ct. 830, 855, n. 6. Nominal representation on an appeal as of right . . . does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." Id. at 836. Counsel may not waive his client's defense, Id. at n. 6, and be considered effective.

2. Effective Appellate Representation in Capital Cases

While there is no federal constitutional right to an appeal generally, Jones v. Barnes, 103 S.Ct. 3308 (1983), the Eighth Amendment demands meaningful appellate review in capital cases. To ensure that death sentences are imposed in an evenhanded, rational, and consistent manner, as opposed to wantonly and freakishly, prompt and automatic appellate review is required. Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. 242 (1976). If effective assistance of appellate counsel is a constitutional imperative in cases in which the constitution does not even require an appeal, it follows a fortiori that enhanced effectiveness is required when the appeal is required by the Eighth Amendment.

Counsel must not only perform adequately in a Sixth and Fourteenth Amendment sense. In a capital case, counsel, to be effective, must provide assistance to the client on the issue that distinguishes capital cases from all others -- death of the appellant.

This Court has stressed the axiomatic importance of addressing death penalty issues when reviewing death sentences, Williams v. State, 437 So.2d 133 (Fla. 1983), Adams v. State, 412 So.2d 850 (Fla. 1982), and has demanded that appellate counsel in capital cases be familiar with and effectively present capital

sentencing issues upon appeal to this Court. Barclay, 444 So.2d at 959 ("[T]he brief argues neither the inapplicability of the aggravating circumstances found by the trial court nor the possibility that the court erred in finding no applicable mitigating circumstances. . . . [T]he most recent case cited in the original brief is Furman v. Georgia, 408 U.S. 238 (1972)." Barclay was decided in 1984.). As such, the Court has acknowledged that death is different, in all senses, including a constitutional sense, and that counsel must accordingly act differently.

### B. Appellate Counsel Was Prejudicially Ineffective for Failing to Challenge the Insufficiency of the Evidence of First-Degree Murder

#### 1. The Legal Standard: Jackson v. Virginia

The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 443 U.S. 307, 324 (1979):

> [T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

This Court must view the evidence in the light most favorable to the prosecution. "If the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty then the evidence is not sufficient for conviction." Cosby v. Jones, 682 F.2d 1373, 1379 (11th Cir. 1982). See also, Ulster County Court v. Allen, 442 U.S. 140 (1979); Hunt v. State, 394 So.2d 520 (3rd D.C.A. 1981); Henzel v. State, 390 So.2d 397 (3rd D.C.A. 1980). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." Cosby, 682 F.2d at 1383.

## 2. The Element of Premeditation

"Premeditation is the one essential element which distinguishes first-degree murder from second-degree murder." Tien Wang v. State, 426 So.2d 1004, 1005 (3rd D.C.A. 1983) (citations omitted). A premeditated design to effect the death of a human being is more than simply an intent to commit homicide, Littles v. State, 384 So.2d 744 (Fla. 1st D.C.A. 1980), and "more than an intention to kill must be proved to sustain a first-degree murder conviction." Tien Wang, 426 So.2d at 1005:

> it must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well defined purpose and intention to kill another human being.

State v. Wilson, 436 So.2d 908, 913 (Fla. 1983) (McDonald, J., dissenting, quoting Snipes v. State, 17 So.2d 93, 97(1944)).

## 3. Appellate Counsel's Omission

Petitioner's two convictions for first-degree murder and two death sentences are singly predicated on one crucial fact requiring proof beyond a reasonable doubt: that the murder of Sam Wilson, Sr., resulted from a settled and well defined purpose and intention to kill him. Petitioner was convicted of Jerome's death (Count II) purely on the theory of transfered intent: that he accidently killed Jerome while premeditatedly trying to kill his father. The trial court, upon motion for judgment of acquittal, recognized there was no evidence "that would indicate that he set out with an intention to kill this boy, but I think the law is . . . attempted homicide of one person and killing another, that is still first-degree murder." (R. 571). Thus, two convictions and two death sentences depend on whether and when Petitioner formed the intent to kill his father, and whether the killing, even if intentional and premeditated, was justifiable and/or excusable.

Trial counsel preserved the Jackson v. Virginia claim. (R.

567, 576). Appellant counsel unreasonably conceded premeditation, but two justices of this Court either partially or totally disagreed with this concession. The majority apparently accepted Appellant counsel's concession. While the majority did not directly address the premeditation issue (inasmuch as no one had made it an issue), the following was written: "Having carefully studied the record, we see no other errors in these two convictions and thus affirm." Wilson, 436 So.2d at 911. To whatever degree this constitutes a finding of premeditation, the majority would most certainly have benefited from an advocate's explication of the issue.

## 4. A New Appeal is Warranted

Petitioner is entitled to an adversarial determination of this issue on appeal. He has not received that Sixth and Fourteenth Amendment guarantee.

The only direct testimony as to the events on the night of the offense were the statements given by Sam Wilson Jr. to the police on the following morning and afternoon, tapes of which were produced by the state and admitted into evidence. Mr. Wilson, in giving these statements, never denied his involvement in the conflict that led to the deaths, but rather painted a picture of a pitched battle which ultimately resulted in the death of his father and young cousin, but which could just have easily ended in Sam's own death. Nothing in the evidence introduced by the state contradicts Mr. Wilson's statements; to the contrary, the physical and circumstantial evidence introduced at trial uniformly supports his description of the passion inflamed struggle which resluted in the accidental deaths of his father and young cousin.

As Mr. Wilson related, after the original altercation between he and Earline had begun, his father spontaneously leapt into the fray when he heard Earline cry out. (R. 477). The struggle between he and his father which then ensued carried them

throughout the house, pursuing their deadly combat through the hallway, back into the bedroom, back through the hallway and back into the living room. (R. 483). The condition of the house after the fight bears silent testimony in support of Petitioner's description of the violent nature of the fight. The only conclusion to be drawn from the cumulative impact of the evidence as to the state of total disarray in which the house was found is that the deaths occurred as the result of a sudden, spontaneous, and violent domestic quarrel.

Petitioner consistently referred to the deaths as accidents. He certainly did not have to discuss the case with police, but he voluntarily did so, describing a history of bad blood between himself and Earline, erupting finally over very little, and tragically, but not premeditatedly, escalating into a household fracas with unintended consequences.

The physical, as opposed to verbal and psychological, battle between Earline and Petitioner was initiated by Petitioner, who said "at that time I didn't even think or anything, I just hit her." (R. 476). His father came in and "[i]t was spontaneous. He just came after me. Just fighting." (R. 477). They fought all over the house. While they were fighting, and before Petitioner's father was shot, Jerome was accidentally stabbed with a pair of scissors. The state has <u>never</u> argued that Jerome's death resulted from premeditation. After Jerome was hurt, Petitioner "wanted to go help him, but my father didn't want to tear loose of me." (R. 478).

After that, Earline brought in a gun the father had been hollering for. Petitioner took it from her, his father grabbed it, and "some kind of way the gun went off . . ." (R. 478).

Immediately after the occurence of the events in question, Mr. Wilson, in an obvious state of shock, ran through the streets in his underwear to his best friend's house in an attempt to get help. When his friend Jimmy Wilson refused to get involved by calling the police, as Sam had asked that he do, Sam borrowed

some clothes and ran to his brother's house, still seeking help for his injured father and cousin. They then returned to the house, where, at the bequest of Sam, his brother finally called the police. At no point during this frantic and unsettled episodic attempt to get help did Mr. Wilson attempt to hide his identity or to conceal the fact that deaths had occurred at the house.

This is not a case where evidence, when viewed in the light most favorable to the state, gives equal or nearly equal circumstantial support to a theory of premeditation and a theory of absence of premeditation, though such a case would clearly require a reversal under Jackson. This case is not only empty of evidence of premeditation, but also the state's own evidence -- Petitioner's statements -- affirmatively establishes the lack of premeditation.

Without Petitioner's statement, the jury would be left with nothing but conjecture as to what occurred. The statement explains what happened, and it was not premeditation.

Florida case law, not presented on direct appeal, supports Petitioner's position. The evidence in this case is simply "not legally sufficient to exclude a reasonable doubt as to the existence of a premeditated design of the accused" to take his father's life. Forehand v. State, 171 So.2d 241, 244 (Fla. 1936). It is much more likely that Petitioner's father died when he and Petitioner were struggling over the gun the father introduced into the fray, than that "[a]ppellant then procured a gun and shot his father in the head," as this Court's majority opinion describes the action in the statement of facts. 436 So.2d at 909. Under Jackson, even if it is more likely that the killing was premeditated, a conviction cannot stand unless premeditation is shown by a preponderance of the evidence, not just "more likely than not."

This Court, and other Florida courts, carefully review findings of premeditation, particularly when the homicide is the

result of a struggle or fight between family members. For instance, in Forehand, a case very similar to Petitioner's, this Court found that the killing of a law enforcement officer who intervened in a fracas between two brothers, was second, not first degree murder. That case shows much more premeditation than Petitioner's. In Forehand, a deputy sheriff entered "a violent altercation involving the defendant, his brother, and a number of of other persons. The murder occurred when the sheriff attempted to remove one of the brothers from the area. Defendant struck the officer in the face, the officer returned the blow with a blackjack, and the brother and officer fell to the ground. Defendant grabbed the officer's pistol and shot him. This Court held that, even though it was clear that defendant intended to kill the officer, the evidence was "not legally sufficient to exclude a reasonable doubt as to the existence of a premeditated design of the accused to take the life of" the officer. Id. at 244.

Here, Petitioner was fighting with his step-mother, when a third party, like the sheriff in Forehand, intervened. The intervenor, Petitioner's father, began fighting with Petitioner. Petitioner stated that the pistol went off accidentally. The jury apparently disbelieved this explanation and it is Petitioner's position that there is a reasonable doubt regarding whether the gun accidentally discharged. Even if it was constitutionally acceptable for the trial jury to disregard the "accident" statement, and acceptable for the jury to find Petitioner intended to kill his father, there is no more evidence of premeditation in Petitioner's case than in Forehand.

The instant discussion assumes (without accepting) that it was permissible under Jackson v. Virginia for the jury to find on unlawful killing greater than manslaughter based upon the evidence at trial. The next step, from intentional to premeditated killing, will not survive Jackson analysis:

> [T]he evidence in this case, although not

> necessarily establishing that defendant acted 'in the heat of passion,' is as consistent with that hypothesis as it is with the hypothesis that the defendant acted with premeditated design.

Tien Wang v. State, 426 So.2d 1004, 1007 (Fla. App. 3 Dist. 1983); see also, Whidden v. State, 64 Fla. 165, 59 So. 561 (1912). The standard quoted above from Tien Wang, under which Petitioner should win, places a greater burden on Petitioner than does Jackson: under Jackson, the evidence must establish premeditation by a preponderance, and if it is simply more likely than not (i.e., Tien Wang), it is not first-degree murder.

Even should this Court decide upon a new appeal that Jackson is satisfied as to the father, that only means there was premeditation at the time the gun went off. This is no answer to the question of Petitioner's intent earlier when the scissors were involved: this Court, to affirm the conviction as to the cousin (Count II), must conclude that the jury rationally decided, beyond a reasonable doubt, that premeditation occurred before the stabbing. There is no evidence of such an intent.

Finally, even if premeditation existed as to the cousin, Petitioner's desire and intent upon that accident was to go and help the child. To then find premeditated murder of the father, the jury would have to conclude that premeditation arose again before the gun discharged. These multiple possibilities merely demonstrate the mental gymnastics inherent in resolving the premeditation issue in order to find guilt, and underline the need for this Court's careful examination of the issue upon full briefing.

Petitioner asks only that this Court pause for the period of time necessary to afford him a meaningful appeal with constitutionally adequate representation. Without any advocacy on the issue, two dissents arose. The possibility that two more members of the Court could be informed and convinced by able counsel is certainly substantial enough to delay the execution of Petitioner long enough for the constitution to be first

satisfied.

### C. Appellate Counsel Was Prejudicially Ineffective for Failing to Effectively Address Defendant's Sentence of Death

#### 1. Failure to File Anders Brief

Appellant counsel essentially submitted an Anders brief with regard to the sentencing proceeding conducted at trial, but counsel failed to follow the dictates of Anders upon declining to raise sentencing issues on appeal. In every indigent felony appeal, Anders applies when counsel declines to raise any issues on appeal. A sentencing hearing is in most ways constitutionally indistinguishable from a felony trial, and the Eighth Amendment requires that trial protections and sentencing protections thus be similar. In fact, many more protections are involved in a sentencing hearing, because "death is different," and heightened reliability requirements attach to the proceeding. Accordingly, Anders must apply to the appeal of sentencing determinations.

Anders requires that an appellate counsel effectively pursue an appeal, but holds that

> if counsel finds [Appellant's] case to be wholly frivolous, after a conscientous examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses.

Anders, 386 U.S. at 744. First, Mr. Conner did not conscientously examine the case to determine whether sentencing issues existed which were non-frivolous. Even if he had, he would not have recognized sentencing issues, due to his failure to do adequate research and be sufficiently knowledgable about Eighth Amendment law. Second, Mr. Conner did not inform this Court (except through omission) that he did not intend to file a brief on sentencing issues -- this Court informed Mr. Conner that he had not filed one. Third, Mr. Conner did not file a

sentencing brief referring to anything in the record that might arguably support the appeal. Finally, Mr. Conner did not even tell Petitioner he represented him, much less supply Petitioner with the Appellant's brief, until two months after the briefs were in, and then he did send the briefs to Petitioner. However, Mr. Conner did not inform Petitioner that he should raise any sentencing issues he wished. In fact, Mr. Conner inaccurately informed petitioner that he "was doing all he could to get his sentence reduced." (App. P, July 22nd letter).

In short, Petitioner was never informed that he had to "shift entirely for himself" with regard to a sentencing appeal, Anders, 386 U.S. at 738, and accordingly, a new and full appeal must be ordered. State v. Wooden, 246 So.2d 755, 758 (Fla. 1971).

This Court's ultimate order to counsel to submit a sentencing brief is disarmingly and transparently corrective. To be sure, this Court did what it could at the time to assist Petitioner, but the result -- Appellant's Supplemental Brief on Sentencing -- simply brought into the open that which was foreshadowed by oral argument: Mr. Conner was totally incapable of providing effective assistance on appeal with regard to sentencing. To whatever extent the Supplemental Brief was an "advocate's" document, it was not submitted "at the most opportune time," and was probably more harmful than helpful. Myer v. Alabama, 671 F.2d 1299, 1302 (11th Cir. 1982). As was noted in the Chester Maxwell case, also "pursued" on appeal by Mr. Conner, Mr. Conner lacked knowledge and ability to handle a sentencing appeal.

### 2. Failure to Discuss Non-Statutory Mitigating Circumstances, and the Trial Court's Unconstitutional Actions Regarding Non-Statutory Mitigating Circumstances

Appellant counsel did not want to address sentencing at all: he did not respond to State's Argument VI that the death penalty was appropriate, and would not voluntarily brief the issue even

upon urging from this Court at oral argument. At oral argument, he actually argued that the death penalty was appropriate:

> I felt the prior decisions of this court were clear that with the aggravating circumstances as found by the court, that and with no mitigating circumstances that it was, uh, in an area where the court had already decided. . . .
>
> Frankly, your honor, I felt that the other points were more important.
>
> THE COURT: And I think the point Justice Ehrlich was making was the fact that under Combs, that it could be argued that that aggravating circumstance was not properly used in this case.
>
> CONNER: That is true. I think that's right - a correct statement, yes sir. Well, he also had the prior record of violent - he had robbed somebody at knifepoint prior to that. There was another aggravating circumstance of the cold, cruel and heinous . . .
>
> THE COURT: I think we're putting you in a position by your failure to discuss that, of arguing something that you perhaps you ought not to. You're in a position now where to explain the absence of the sentence part of your brief, you've got to show that your client should be sent to the electric chair. That's a rather odd situation for you to be in.

(App. 1, p. 2, p. 5). No mention was made by counsel of non-statutory mitigating circumstances which appear of record.

The record was replete with non-statutory mitigating circumstances:

> a.) the cousin's death was not intentional, but happened accidentally as a result of the struggle between defendant and his father;
> b.) Defendant cooperated with police, giving them three (3) tape-recorded statements;
> c.) Defendant voluntarily directed police to a .22 caliber pistol involved in the incident;
> d.) the deaths resulted from a domestic disturbance that did not involve any other underlying felonies;
> e.) the Defendant wished to help his cousin after he was hurt, but he could not get away from his father;
> f.) the Defendant attempted to contact police, and had his brother do so, after the incident;
> g.) the Defendant expressed concern for his father's well being by going to get his brother, while in a state of shock, and asking his brother to help;

> h.) the Defendant was remorseful about the incident, as reflected by his continuous sobbing and upset condition throughout his first tape-recorded statement;
> i.) Defendant was not normally a violent person;
> j.) Defendant actually loved and cared for children, and had no ill-feelings for his cousin;
> k.) Defendant was normally a nice, respectful, and kindhearted individual;

These were lost on appellate counsel, who, even in the court ordered Supplemental Brief Penalty Phase - Trial, did not discuss any mitigation other than what was termed "a supported, but disregarded, mitigating circumstance (that the victim SAM, SR. participated in the fight). . . ." (App. I, p. 16). This is a weak reference to a statutory mitigating circumstance, to which appellate counsel at that time apparently believed he was restricted.

His failure to discuss non-statutory mitigating circumstances perhaps explains why he failed to challenge the trial court's unconstitutional limitation on the jury's consideration of them, and the judge's refusal to consider them. The trial court instructed the jury several times that the statute restricted their consideration of evidence in mitigation. During voir dire, the trial judge instructed the potential jurors that "[w]hen I give you the second set of legal instructions, I am going to read to you nine aggravating circumstances and seven mitigating circumstances. . . . You are going to be properly instructed as to what you should take into account before you make a recommendation." (R. 216-17).

Before sentencing, the trial judge instructed the jury that "you will be instructed on the factors in aggravation and mitigation." (R. 684).

The trial judge instructed the jury after evidence was introduced at sentencing:

> The mitigating circumstances which you may consider, if established by the evidence, are these: (a) That the defendant has no significant history of prior criminal activity; (b) that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence

> of extreme mental or emotional disturbance; (c) that the victim was a participant in the defendant's conduct or consented to the act; (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 defndant's participation was relatively minor; (e) that the defendant acted under extreme duress or under the substantial domination of another person; (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (g) the age of the defendant at the time of the crime.

The trial judge himself also failed to consider non-statutory mitigating circumstances. In his findings, the trial judge said:

> As to any mitigating circumstances:
> A. That the defendant has no significant history of prior criminal activity, I find that this circumstance does not apply in this case as to either count, Mr. Wilson having had an extensive record of criminal activity.
> B. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. I find that it does not apply.
> C. That the victim was a participant in the defendant's conduct or consented to the act, this mitigating circumstance does not apply.
> 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, that mitigating circumstance does not apply.
> E. That the defendant acted under extreme duress or under the substantial domination of another person, this mitigating circumstance does not apply.
> F. That the capacity for the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired does not apply.
> G. The age of the defendant at the time of the offense, this mitigating circumstance does not apply.
> In summary, the Court finds that as of the nine aggravating circumstances, three were applicable in this case. As to the mitigating circumstances, none applied in this case as to Count I or Count II.

Trial counsel had informed the trial court that it was error to restrict the consideration of mitigating circumstances to those enumerated in the statute: "Judge, as to the mitigating circumstances, I would just call the court's attention that as to mitigating circumstances, that the Court can consider any other

aspect of the defendant's character and any other aspect of the record, and its not restricted just to look at the list of circumstances contained within the jury instructions." (R. 743-44).

Despite trial counsel's flagging of the issue, the trial court and appellate counsel ignored the constitutional imperative that sentencers not be precluded from considering any aspect of the defendant's background and character proffered by the defendant "as a basis for a sentence less that death." Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion). The sentencer may neither be precluded from considering, nor refuse to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982).

The Eighth Amendment demands "reliability in the determination that death is the appropriate punishment in a specific case." Wodsen v. North Carolina, 428 U.S. 280, 305 (1976). Reliability is approached by requiring a "unique individualized judgment regarding the punishment that a particular person deserves" based on the "literally countless factors" a defendant may proffer. Zant v. Stephens, 462 U.S. 862, 900-01 (1983) (Rehnquist, J., concurring in the judgment).

This Court has recognized that the same trial judge as in this case, Thomas M. Coker, Jr., J., had, in a case proceeding at the same time Petitioner's was, erred by failing to consider nonstatutory mitigating circumstances. In Herzog v. State, 439 So.2d 1372 (Fla. 1983), a case with other startling parallels to Petitioner's, this Court observed

> however, there is no indication in the sentencing order that the court considered nonstatutory mitigating circumstances. We find evidence in the record that the jury could have considered in finding nonstatutory circumstances (E.g., 1) the heated argument between the victim and defendant which culminated in defendant's decision to kill the victim, 2) the domestic relationship that existed prior to the murder. . . .

These non-statutory mitigating circumstances are present (and were ignored) in Petitioner's case. Petitioner has included as

Appendix R the transcript from sentencing in Herzog. This Court reversed there, and with the same judge and same error in Petitioner's case, it is certainly reasonable to believe that at least four members of this Court would react similarly and consistently in Petitioner's case upon a proper advocate delineation of the issue. Two Justices already believe that the death sentences were invalid on this record. Petitioner asks only that he be provided with an effective attorney, and a forum to pursue his rights, a new appeal. Mr. Conner completely failed to raise the issue, until it was too late, and then be raised it in an ineffective manner.

In Appellant's Motion for Rehearing, Appendix M, Mr. Conner noticed that Justice Overton dissented herein in part because of an erroneous jury instruction. Mr. Conner guessed that the instruction Justice Overton referred to was "the instruction by which the trial judge instructed the jury to consider only statutory mitigating factors," and argued that such an instruction was unconstitutional, and violated "Lockwood [sic] v. Ohio, 438 U.S. 586 (1978)."

But Mr. Conner never let this Court know what non-statutory mitigating circumstances were apparent from the record, saying only that "nonstatutory mitigating evidence was presented." This "friend of the court" stance is at most nominal representation, falling below the standards expected of appellate attorneys. Anders. Counsel is obligated in Motion for Rehearing to "state with particularity the points of . . . fact which the court has overlooked." 9.330, F.R.App.P.

Even had Mr. Conner presented this issue in an effective manner, he presented it too late. The state emphasized counsel's ineffectiveness in its two sentence response to the claim: "appellant has raised a new issue that he did not address in his briefs filed with this Court. Therefore, the appellant is precluded from raising said issues." App. H. This Court denied the Motion.

Mr. Conner filed too little too late with this Court. Petitioner wishes to have this issue heard in a meaningful appellate setting, with an advocate. The state last Thursday filed a response to Petitioner's 28 U.S.C. Section 2254 action now pending in federal district court, and in that response, the state argued that Petitioner waived this and other claims. The state is seeking to deny relief, based on appellate counsel's omissions before this Court.

This Court and the state are thus, to an extent, in agreement with Petitioner -- appellate counsel's performance was substandard. A belated appeal is appropriate.

3. Ineffective Challenge to Aggravating Circumstances

The trial court found three aggravating circumstances applicable to both counts: prior conviction of a felony involving violence, heinous atrocious and cruel, and cold calculating. This Court asked

> THE COURT: Well, did you talk about the sentencing phase at all in your brief?
> THE COURT (another member): The appropriateness of the death sentence in this case.
> (Long unanswered pause)
> THE COURT: The State brought it up in its brief and you didn't reply to it.
> CONNER: Yes sir. In point six of their brief. That is true.
> THE COURT: Yes. You don't consider that with any materiality or relevance in a case where a man to who the death penalty has been imposed sir?
> CONNER: Uh, those particular points about the aggravating and mitigating circumstances, uh, I felt the prior decisions of this court were clear that with the aggravating circumstances as found by the court, that and with no mitigating circumstances that it was, uh, in an area where the court had already decided, unless something has changed in the interim.
> THE COURT: Are you still of the opinion that there is nothing to be said in behalf of the appellant with respect to the imposition of the death penalty?
> CONNER: Only insofar as it relates to the fact that the judge found as a matter of law, one of the aggravating circumstances were the uh, especially cold, cruel and heinous; which he ruled as a matter of law.
> THE COURT: Do you take issue of that,

sir?
CONNER: Well . . . (pause)
THE COURT: Have you read, are you familiar with this court's case of Combs v. State?
CONNER: Yes sir.
THE COURT: Do you feel that your facts fit within the ruling in that case sir?
CONNER: Uh, I just, I don't know . . .

This Court ultimately ruled, essentially sua sponte, that cold calculating did not apply.

HEINOUS ATROCIOUS AND CRUEL

The Court found heinous, atrocious and cruel inapplicable to the cousin's death, but applicable to the father's. This is again a function of appellate counsel's ineffective assistance. This Court believes the facts to be: "this victim had been beaten with a hammer. . . . Appellant then procured a gun and shot his father in the head." 436 So.2d 912, 909. Appellant counsel simply failed to provide this Court with the correct context of the father's death.

There was a mutual struggle between Petitioner and his father. The house was a shambles from the struggle. Petitioner hit his father as a result of the battle, but did not "beat him" as that term is commonly interpreted. He also did not procure a gun and shoot him -- the firearm discharged accidentally after the father grabbed it from Earline.

The Court's finding of this factor, like the silent finding of premeditation, is based on an unfocused view of the events surrounding the offense, largely as a result of appellant's counsel's deficiencies. The evidence is simply insufficient to support a finding of heinous, atrocious and cruel.

Case law on heinous, atrocious and cruel shows few, if any, findings of that aggravating circumstance where, as here, the victim and the defendant were engaged in mutual combat at the time of the killing. This is true because such cases rarely, if ever, result in a first-degree murder conviction.

It is generally true that where a vicous beating proceeds the death of a victim, heinous atrocious and cruel is supported.

Thus, in Ross v. State, 386 So.2d 1191, 1194 (Fla. 1980), when the victim sustained a "severe beating to her head and face" and was "stamped to death," the circumstance was sustained. It was affirmed in Adams v. State, 341 So.2d 765, 769 (Fla. 1976), where the victim was beaten "past the point of submission and until his body was grossly mangled." See also, O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); Stano v. State, 378 So.2d 765 (Fla. 1980). In all those cases, the beatings were severe and not "mutual combat," and the aggravating circumstance was proper.

In this case, the Court found the factor proper, despite death being caused by a single shot, because this Court noted that the victim "had numerous abrasions on his body, including the head region, which were consistent with hammer blows." The Court believed that the trial court "could properly believe" the circumstance applied. Petitioner's position is that the circumstance does not apply, that the Court's standard of review for affirming it was constitutionally incorrect, and that if heinous atrocious and cruel does encompass this case, it is an unconstitutionally vague and overbroad aggravating circumstance, and is unconstitutional as written and applied.

The reason the standard should not apply is that the "heinousness" does not rise to the level of any of the other Florida beating cases, See, e.g., Ross, O'Callaghan, and Stano, and is significantly less than that found insufficient in other cases. See, Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) (defendant beat victim's skull with 19 inch breaker bar, fracturing skull, then bruising and cutting, literally beating victim to death -- not applicable); Rembert v. State, 445 So.2d 337 (fla. 1984) (beating elderly victim on head with club insufficient). If this aggravating circumstance is to be genuinely and thus constitutionally consistent, then the finding here must be reversed.

In any event, the inquiry is not whether the trial court could "properly believe" facts which would make the circumstance

applicable. The inquiry is whether the state has proven the circumstance beyond a reasonable doubt, Jackson v. Virginia, and the above analysis indicates it was not so proven.

Finally, if this aggravating circumstance applies in this case, then it does not "genuinely narrow the class of persons eligible for the death penalty," and it is unconstitutional as applied to defendant. Zant v. Stephens, 103 S.Ct. 2733, 2743 (1983); see Mello, "Florida's 'Heinous, Atrocious, or Cruel' Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller," 13 Stetson Law Review 523 (1984). This very claim was raised and preserved pre-trial and appellate counsel was ineffective for failing to raise the question on appeal.

PRIOR FELONY INVOLVING VIOLENCE

The other aggravating circumstance, applied and affirmed on both Counts, was that the Petitioner had been convicted of a prior violent felony. No argument on this finding was advanced by appellate counsel.

This circumstance is essentially a "status" circumstance: all people who have a prior conviction for a violent felony are eligible for death immediately upon a conviction for first-degree murder. There is no narrowing of a class at all, in violation of the Eighth Amendment. See Collins v. Lockhart, 745 F.2d 258 (11th Cir. 1985).

## 4. Ineffective Presentation of the Inappropriateness of Death Under All the Circumstances

The majority of this Court found the two death sentences appropriate, even though as to Petitioner's cousin the Court found two of three aggravating circumstances to be improper, and as to Petitioner's father the Court found one of two aggravating circumstances to be improper. Two justices in dissent found the death sentences improper. The majority reasons for nevertheless upholding the sentences are intimately connected with Petitioner's claim of ineffective assistance of appellate

counsel.

As to the Petitioner's cousin, regardless of the manner in which his death occurred, Petitioner inherently suffered from one aggravating circumstance: prior violent felony. The circumstance of the offense thus had nothing to do with the appropriateness of this death sentence -- it was an accidental stabbing, "not set apart from the norm of capital felonies. 436 So.2d at 912. It was Petitioner's background that was aggravating -- his status as a prior felon -- and, "since there were no mitigating factors at all," the Court found the sentence proper. Id.

With effective counsel on appeal, this Court would be presented with a host of non-statutory mitigating circumstances which applied, some involving Petitioner's background, and some involving the offense. Appellant counsel offered no mitigating circumstances to this Court, and in fact stated there were none, thereby contributing to and urging this Court's finding of no mitigation. The trial judge failed to consider any non-statutory mitigating circumstances.

This Court is faced with a trial court finding of three aggravating circumstances, a trial judge who instructed the jury not to consider non-statutory mitigating circumstances, and who himself did not consider any. While it is true that where there is one aggravating and no mitigating factors, a death sentence may be affirmed, the capital sentencing procedure

> is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Had the trial jury and court looked at the non-statutory mitigating circumstances and balanced them against one rather than three aggravating circumstances, the result could reasonably have been different. "We cannot know whether [the trial court's] reasoned judgment

would have been different if the trial judge had considered only one instead of three aggravating circumstances. . . ." Randolph v. State, 463 So.2d 186 (Fla. 1984).

Appellant counsel's errors also infect this Court's decision that the death of his father called for the death penalty. First, again, the prior felony conviction provided an automatic aggravating circumstance, regardless of the manner of death. This Court invalidated the cold calculating aggravating circumstance. Thus, the critical factor was heinous, atrocious, and cruel, and how it balanced with the mitigating circumstances.

Unfortunately, this Court's finding that "there were no mitigating factors at all," the result of appellate counsel's ineffectiveness, crippled Petitioner's hope for life. The Court found the only mitigating circumstance proffered by counsel on appeal -- "that the victim Sam Wilson, Sr. participated in the incident" (a statutory mitigating circumstance) -- to have been considered and rejected by the trial court. However, no consideration by the trial jury, the trial court, or this Court, was given to the plethora of non-statutory mitigating circumstances.

Considering the questionable basis for the heinous, atrocious, and cruel aggravating circumstance (see pp. ___, supra), the automatic aggravating circumstance on the prior felony, the extent of non-statutory aggravating circumstances, and the limitations placed on their consideration, the death sentence is simply unreliable in this case, and violates the Eighth Amendment.

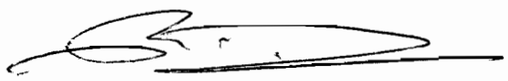
## CONCLUSION

Obviously, this Court cannot search every record on appeal in every capital case for error. It is the responsibility of effective appellate counsel to present all issues of arguable merit to the appellate court. In this case, counsel failed to fulfill that responsibility. Where the points omitted or

improperly and inadequately presented are of indisputable merit -- such as those set forth herein -- and where the difference is between life and death, a case cries out for judicial intervention.

Petitioner therefore requests this Court to issue its writ of habeas corpus, and to direct that Petitioner receive a new trial; alternatively, that this Court allow full briefing of the issues presented herein, and grant Petitioner belated appellate review from his conviction and sentence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Joy Shearer, Assistant Attorney General, West Palm Beach, Florida, this _____ of June, 1985.

Ronald A. Dion