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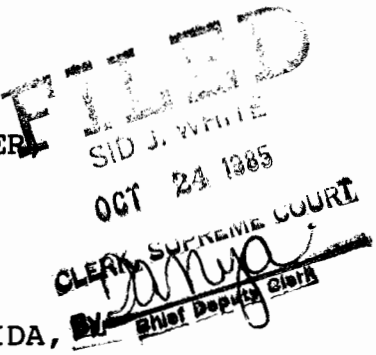
IN THE SUPREME COURT OF FLORIDA

CASE NO.



RALEIGH PORTER,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DENIAL OF MOTION TO VACATE BY THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Raleigh Porter was indicted and sentenced to death for the murder of Harry Walrath and Margaret Walrath.

Mr. Porter's conviction was affirmed by this Court on direct appeal. ***Porter v. State***, 400 So.2d 5 (Fla. 1981). This Court vacated Mr. Porter's sentence and remanded for resentencing. On remand Mr. Porter was again sentenced to death. That sentence was affirmed by this Court on January 27, 1983. ***Porter v. State***, 429 So.2d 293 (Fla. 1983).

On March 16, 1984, Mr. Porter appeared before the Board of Executive Clemency. On September 30, 1985, the Governor denied clemency and signed a death warrant. Mr. Porter then filed a motion pursuant to Rule 3.850, which was denied without an evidentiary hearing. This appeal followed.

STATEMENT OF RELEVANT FACTS

The present case involves the deaths of Harry Walrath and Margaret Walrath. The evidence was "sufficient to find that Porter caused the Walrath's deaths while he was engaged in the crime of robbery". ***Porter v. State,*** 400 So.2d at 6.

Mr. Porter was arrested for the Walrath homicides on August 22, 1978, the day after the crime.

(R.1).*/ Mr. Porter made no statements to the police. During the booking process, the police photographed Mr. Porter's hands, presumably for comparison with a fingernail found at the scene of the crime. The fingernail was sent to the police crime lab for comparison with a known fingernail sample of Mr. Porter, but the laboratory analysis was never conducted. (R. 639-41).

Three days after Mr. Porter's arrest, the police obtained a statement from one Matha Lee Thomas, then a prisoner in the Charlotte County Jail. (R. 646-47). Thomas testified that he was in the jail when Mr. Porter was brought in and that the two had talked. According to Thomas, Porter told him that he had killed the two victims. He first hit the old man and knocked him down. He then hit the old lady and knocked her down, according to Thomas' account of the conversation. (R. 645-46). Mr. Porter was then said to have told Thomas that he strangled the two victims with a cord. (R. 645).

At the time of Thomas' statement to the police, Mr. Porter's appointed counsel, Stephen B. Widmeyer,

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*/ The abbreviation "R" refers to the record on direct appeal to this court. The abbreviation "RP" refers to the rcord of the present postconviction proceeding brought present to ***Fla. R. Crim. P.*** 3.850.

also represented Thomas on an unrelated criminal action on charges of uttering a forged instrument. Widmeyer eventually withdrew his representation of Thomas, recognizing a conflict between Thomas and Porter. Widmeyer continued to represent Mr. Porter, however, and therefore cross-examined Thomas, Widmeyer's former client, at the capital trial of Mr. Porter.

The remaining evidence linking Mr. Porter to the crime came from accessories who therefore were interested witnesses. That evidence is summarized below.

Tammy Lloyd testified that she lived with Mr. Porter at Pelican Bay on August 21, 1978. (R. 558-560). She had been staying with another man who had beaten her baby, so she moved in with Mr. Porter after having known him about three weeks. Dinah Raymond also lived there. (R. 560-561).

Mr. Porter came home from work about 4:00 or 5:00 on August 21. (R. 560) Ms. Lloyd and Ms. Raymond took Mr. Porter to a stop sign somewhere in Port Charlotte where Mr. Porter got out of the car. He had told Ms. Lloyd that he was going to commit a burglary. (R. 561, 562). She and Ms. Raymond went to the Burger King for a couple of minutes, then returned to the apartment. (R. 562, 563).

Mr. Porter came home around 10:00 or 10:30. He said he got a car and some other things. Ms. Lloyd identified exhibit four, the photographs of the Walrath's car, as the car Mr. Porter brought back. (R. 565). They rode to the store in the car, then drove past the house Mr. Porter said he broke into. She saw the police at the house. (R. 564, 569). They returned home.

Ms. Lloyd identified exhibit five as jewelry Mr. Porter gave her. He said he got it from the house he broke into. She turned it over to the police on August 22. (R. 564-566). Mr. Porter also took a television and some silverware. (R. 566). Mr. Porter told her he killed two old people. (R. 567) The next morning Ms. Lloyd, Ms. Raymond, their babies and Mr. Porter went to Fort Myers to get rid of some coins. (R. 567).

On August 22, Ms. Lloyd denied that she knew Mr. Porter when she was approached by police at the apartment. Then she told the police that Mr. Porter was her cousin but did not live there. She gave another statement to the police because she was afraid of losing her baby and going to jail. (R. 569, 570) She told the detective Mr. Porter left the house alone.

Larry Schapp, Mr. Porter's former roommate, testified that he went to Mr. Porter's apartment around

6:00 p.m. on August 21 to do his laundry and take Mr. Porter some clothes. No one was there, so Schapp let himself in with a key. (R. 571-573) Mr. Porter, Ms. Raymond, and Ms. Lloyd were out shopping. They came back shortly after 6:00. (R. 574, 578) Shortly afterwards Mr. Porter left again with the two women. Ms. Raymond and Ms. Lloyd returned without Mr. Porter before Schapp left around 7:00. (R. 573, 574).

Schapp went to his own apartment, then to the Holiday Inn around 9:45. (R. 574) Someone came into the Holiday Inn and said that he had heard on the police band of his C.B. radio that there had been a double murder and an auto theft. Schapp had a feeling that "something might have happened with" Mr. Porter so he returned to Mr. Porter's apartment around 11:00 or 11:30. (R. 574-576) Mr. Porter was there with the women and a man named Shawn. Schapp asked whether Mr. Porter was involved in the murders. Appellant said he robbed them and killed them. (R. 576, 582).

Schapp and Shawn took a television, some silverware, and some other articles that had been taken from the house and put them in Shawn's car. They went up the road and dumped the television in the bushes. (R. 567, 577, 579) Schapp said he helped because he was afraid of Mr. Porter. (R. 580) Schapp realized

that he made an error in judgment. He returned to the apartment on August 22 and saw the police were there. He told the police about the television and showed him where it was. (R. 577, 578, 581).

Schapp had been convicted of DWI three times. (R. 578, 579) He denied committing the murders. (R. 581) Schapp did not testify that Mr. Porter had previously told him about a plan to steal a car and kill the victims. (R. 571-582)

The State granted Dinah Raymond immunity. (R. 584, 585) She testified that she lived with Mr. Porter and Ms. Lloyd at the Pelican Cove apartments on August 21.

Ms. Raymond then went to the store, the post office, and back to the apartment around 7:30. (R. 591) She got her son ready for bed, then she went to sleep. She did not see Mr. Porter again that evening. Ms. Raymond got up the next morning at 6:45 and drove her brother, Scott Raymond, and her former boyfriend, Jamie Carrington, to work. (R. 592)

Mr. Porter did not go to work that day. Ms. Raymond, Ms. Lloyd, Mr. Porter and the children drove to Fort Myers to see Ms. Raymond's father. (R. 593) On the way, they stopped at a coin and stamp shop in Cape Coral. Ms. Raymond stayed in the car while Mr.

Porter and Ms. Lloyd went in the shop. Mr. Porter did not say why he went there. (R. 594, 595) The spent most of the afternoon at the restaurant where Ms. Raymond's father lived. (R. 595) When they returned to Port Charlotte, they went to Larry's place, then back to the apartment. The police came as soon as they got back. (R. 596) Ms. Raymond told Detective Thurlin Runkle that Mr. Porter came home around 5:00 or 5:30 on Monday and left by himself about two hours later. (R. 597, 598)

She was afraid of Detective Thurlin Runkle. He threatened to take her son away and told her she could be prosecuted as an accessory. She then told him that she drove Mr. Porter. (R. 598, 599) She was told nothing would happen if she testified. (R. 599)

The press took an extraordinary interest in this case, a fact of concern to the defense which resulted in a change of venue. (R. 20-162, 175). Defense counsel was also concerned that the grand jury was tainted:

> There was a large amount of publicity surrounding this crime. Apprehensive of its effect on the grand jury (which had been empaneled prior to the commission of this crime), counsel for the defendant sought the right to voir dire the grand jury. His motion asked permission to question the

> individual jurors regarding their legal qualification, to inquire into the state of mind of the jurors to discover whether there were any facts that would prevent the grand jury from acting impartially and without prejudice to the rights of the defendant, and to determine whether the jurors knew that a sentence of death might be imposed if the defendant were convicted of the offense sought to be charged by indictment. The trial judge denied that motion. After an indictment was returned the appellant moved to quash the indictment on several grounds, one of which was the judge's refusal of the requested voir dire examination. This also was denied.

Porter v. State, 400 So.2d at 6.

The State's case at the guilt innocence trial was based both on theories of premeditation and felony murder. The jury returned a general verdict of first degree murder, not specifying which of the prosecutor's theories it had accepted and not making a finding that Mr. Porter intended the deaths of the Walrath's in advance of the felony murder. (R. 182-83).

The penalty phase of Mr. Porter's bifurcated trial commenced following the jury's verdict of guilty. In defense against the death penalty, Mr. Porter's attorney offered only the brief testimony of Mr. Porter; that testimony constitutes but one page in the transcript. (R. 744). Counsel presented no other

evidence of Mr. Porter's character or any other evidence in mitigation. After deliberating for approximately ten minutes, the jury recommended that Mr. Porter not be put to death. (R. 184-85).

Defense counsel presented no additional evidence following the jury's sentencing verdict, and the Court sentenced Mr. Porter to death. The Court found three aggravating circumstances:

(1) The capital felonies were committed while Mr. Porter was engaged in the commission of a robbery for pecuniary gain;

(2) The capital felonies were committed for the purpose of avoiding or preventing a lawful arrest in that Mr. Porter ***ab initio*** intended to kill the victims to allow him more time to abscond with their automobile (the prosecutor never discussed this aspect of aggravating circumstances);

(3) Each of the murders was especially heinous, atrocious and cruel. (R. 189-91).

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING AT LEAST THREE OF MR. PORTER'S CLAIMS WITHOUT HOLDING AN EVIDENTIARY HEARING.

A carefully delineated procedure has been established for consideration of motions pursuant to Rule 3.850. *See State v. Weeks*, 166 So.2d 892 (Fla. 1964). Under this procedure, the trial court must initially consider the motion to determine if it sets forth allegations sufficient to constitute a legal basis for relief. If the motion on its face states grounds for relief, the trial court must then look at the files and records in the case to ascertain whether they ***conclusively*** reveal that the movant is entitled to no relief. In making this determination the court may not look to matters outside the official court records.

When the files and records fail to refute conclusively the factual allegations in the motion, the trial court ***must*** hold a prompt hearing, determine the issues and make findings of fact and conclusions of law. *See, e.g., Meeks v. State*, 382 So.2d 673 (Fla. 1980); *Martin v. State*, 349 So.2d 226 (Fla. 4th DCA 1977); *Bagley v. State*, 336 So.2d 1236 (Fla. 4th DCA 1976); *Brown v. State*. 390 So.2d 447 (Fla. 5th DCA 1980). The same standard applies to the appellate court's review where a hearing has been denied in a 3.850 proceeding. Rule 9.140(g), Fla.R.App.P.

Mr. Porter has raised at least three claims that depend on the development of facts not contained in the existing record: (1) that trial and resentencing counsel rendered ineffective assistance of counsel in failing to investigate powerful and available evidence in mitigation of the penalty of death; (2) that the State obtained the indictment in bad faith by knowingly allowing an unqualified and biased grand juror to serve; (3) that trial counsel labored under an actual conflict of interest in this case.*/ Each of these claims will be discussed in turn. First, Mr. Porter will outline the claim presented. Second, he will discuss why fair resolution of the claim requires a hearing.

*/ This discussion is not intended in any manner to concede that only these three claims required a hearing. Further investigation, without the pressure of an imminent execution date, might well reveal other claims that need further evidentiary development.

A.

1. The Claim

TRIAL AND RESENTENCING COUNSEL CONDUCTED NO OR GROSSLY INADEQUATE INVESTIGATION INTO EVIDENCE IN MITIGATION OF PUNISHMENT, THEREBY DEPRIVING MR. PORTER OF AN INDIVIDUALIZED SENTENCING HEARING IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Trial counsel in this case, Mr. Stephen Widmeyer and Mr. Robert Jacobs, and resentencing counsel, Mr. Wayne Woodard conducted no or substantially inadequate investigation into Mr. Porter's background and social history, and consequently they were unable to present at sentencing any evidence in mitigation of punishment other than Mr. Porter's own brief testimony.[1]/

Had Mr. Widmeyer and Mr. Jacobs, Mr. Porter's attorneys in 1978, and Mr. Woodard, at resentencing, conducted any investigation into Mr. Porter's background, they would have discovered substantial evidence in mitigation of punishment which could and should have been presented to the jury and to the sentencing judge.

This failure to investigate continued into the proceedings conducted pursuant to the resentencing

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[1]/ Claims of ineffective assistance of counsel clearly are cognizable in a Rule 3.850 proceeding. ***See, e.g., Smith v. State***, 400 So.2d 956 (Fla. 1981).

remand. By motion filed on July 14, 1981, counsel for Mr. Porter requested to be allowed to introduce evidence regarding the background, social history and character of Mr. Porter and the Court granted that motion.

In the motion seeking to introduce character evidence, counsel indicated that Mr. Widmeyer and Mr. Jacobs, of the same Public Defender's Office which represented Mr. Porter in the original sentencing proceeding, failed to present evidence in 1978 because of their reasonable belief that Florida Statutes precluded the introduction of such evidence at sentencing. But for counsel's belief in 1978, substantial evidence in mitigation of punishment could have been presented to the jury and judge.

Despite the fact that counsel on remand requested and was allowed to introduce evidence going to mitigation of punishment, counsel failed to present any evidence whatsoever in mitigation. Resentencing counsel's failure to present evidence of statutory and nonstatutory mitigating circumstances during the remand hearing resulted from their failure to conduct a reasonable investigation into mitigating circumstances.

A reasonable investigation into mitigating circumstances would have revealed powerful evidence in

mitigation of the death penalty. Raleigh Porter's history contains compelling mitigating features which were excluded from consideration by the jury and the court through the inexcusable neglect of trial counsel. Attached to the Motion to Vacate are affidavits and other materials outlining Mr. Porter's background and upbringing. No attempt to discover these material was made by trial counsel, and consequently the image of Raleigh Porter created by the aggravating circumstances found at trial presents at best an inaccurate and incomplete portrayal of him. The sentencing jury, even without the benefit of these materials, found that death was not the appropriate punishment under the circumstances, but the trial court overrode the life recommendation.

As part of his 3.850 motion in the trial court, Mr. Porter profferred affdaivts setting out some of the information that even a superficial and hasty investigation into Mr. Porter's background would have revealed. Mr. Porter will not repeat here the factual allegations contained in Claim I of the Motion to Vacate. Our investigation, which occurred within the extremely limited time available during a Death Warrant, is yet partial and incomplete. But even this tentative exploration reveals a particularly abusive

and generally harsh and alienating childhood, physical and emotional abuse at home and in "school", and myriad other difficulties. The portrait of Raleigh's past and the psychological and societal forces which shaped his character created by these mitigating materials should and would have militated against the trial judge's imposition of the death sentence in disregard of the jury's recommendation of life. Given adequate time and resources, even more compelling mitigation could be produced by undersigned counsel.

Thus, powerful mitigating and explanatory evidence was available. Such evidence would have permitted the capital sentencer to see that Mr. Porter's actions are explained, at least in part, by the abuse, rejection and hostility of his home and institutional environments that shaped him during the most critical of his formative years. This sort of "humanizing" evidence would also have shown that there was a Raleigh Porter worth saving.

2. The Need For A Hearing

The United States Supreme Court in ***Strickland v. Washington,*** 104 S.Ct. 2040 (1984), stressed that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case..." For

example, "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decision..." *Id* Compentency of counsel can only be determined "in light of all the circumstances." *Id.*

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

Moreover, in the absence of the evidentiary hearing, the court could not have known the extra-record facts necessary to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case..." *Strickland.* The evidentiary

inquiry implicitly required by ***Strickland*** dovetails with the state law requirement of a hearing. Fla. R. App. P. 9.140(g) provides that: "unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing." This Court has especially applied this standard in cases of ineffective asssistance of counsel, granting stays and remanding for evidentiary hearings. ***Meeks v. State***, 382 So.2d 673, 676 (Fla. 1980). Indeed this Court has noted that ineffectiveness claims are particularly suited for evidentiary development, suggesting "even when not legally required that trial courts conduct, in most instances evidentiary hearings on this type of issue." ***Jones v. State***, 446 So.2d. 1056, 1063 (Fla. 1984).

This issue of Mr. Porter's case is controlled by ***O'Callaghan v. State***, 461 So.2d 1534 (Fla. 1984). The claim of ineffective assistance alleged in ***O'Callaghan*** was remarkably similar to the claim alleged by Mr. Porter:

> O'Callaghan alleges, in part, that his counsel's motion for a psychiatric examination of O'Callaghan was granted, but that O'Callaghan's counsel never had the examination conducted; that O'Callaghan's counsel called no

> witness in mitigation or for any purpose at the sentencing hearing; that O'Callaghan's counsel never contacted O'Callaghan's parents prior to the trial; that if his parents had been contacted his counsel would have discovered that O'Callaghan suffered a harsh and alienating childhood, serious physical and psychological abuse as a child, a serious drug problem as a teenager, and had a family history of mental illness; and that a mental health professional's affidavit asserts he exhibits likely evidence of brain damage and mental illness. We conclude that these allegations are sufficient to require an evidentiary hearing on the issue of ineffective assistance of counsel.

Id. at 1355-56. The trial court in ***O'Callaghan*** denied the Motion to Vacate, denied on evidentiary hearing and denied a stay of execution. This Court granted a stay and thereafter remanded for a hearing.

The Court's decision in ***O'Callaghan*** recognized that a hearing was required because facts necessary to the disposition of the failure to investigate claim would not appear on the record. ***See Vaught v. State,*** 442 So.2d 217, 219 (Fla. 1983). Indeed, this Court has stated that it would

> ...encourage trial judges to conduct evidentiary hearings when faced with this type of proceeding in view of the relatively recent decision of the United States Supreme Court in ***Sumner v. Mata,*** 449 U.S. 539, 100

S.Ct. 764, 66 L.Ed.2d 722 (1981). It is important for the trial courts of this state to recognize that, if they hold an evidentiary hearing on this type of issue, under the ***Sumner*** decision their finding of fact has a presumption of correctness in the United States district courts.

* * *

When a state court does not hold an evidentiary hearing, the United States district courts believe they are mandated to hold an evidentiary hearing because of the provisions of subparagraphs (2) (3), (6), (7) and (8) of section 2254(d) unless they can find that the petition is totally frivolous. The practical effect of the state court's denial of an evidentiary hearing on an ineffective-assistance-of-counsel claim is to leave the factual finding on this issue to the federal courts. It is for this reason that we suggest, even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue.

Jones v. State, 446 So.2d 1056, 1062-63 (Fla. 1984)[2] No hearing need be held when "nothing has been shown to this Court concerning what evidence would have been discovered had counsel not failed to do the specific acts which appellant claims constitute ineffective assistance of counsel," *Smith v. State*, 445 So.2d 323, 325 (Fla. 1983); *accord Zeigler v. State*, 452 So.2d 537, 539 (Fla. 1984), or when the trial court gives

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[2] Mr. Porter clearly would be entitled to a hearing in federal court should he fail in securing one in state court. The Eleventh Circuit has delineated a two-part test for determining when an evidentiary hearing is mandatory in federal court based on facts not adequately developed in the state court proceeding:

> first, that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that the fact was 'material' .... and second, that failure to develop that material fact at the state proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass.

Id. at 986. This is the test applied in the Eleventh Circuit. *See, e.g., Dennis Wayne Smith v. Louis Wainwright*, ____ F.2d ____, No. 83-3690, slip op. at 8, 17 (11th Cir. August 24, 1984); *Hall v. Wainwright*, 733 F.2d 766, 777 (11th Cir. 1984); *Ross v. Hopper*, 716 F.2d 1528, 1534, 1536, 1538 (11th Cir. 1983), *rehearing en banc granted on other grounds*, ____ *F.2d* ____ *(11th Cir. 1983)*; *Spencer v. Zant*, 715 F.2d 1562, 1579-1580 & n.10 (11th Cir. 1983); *Coleman v. Zant*, 708 F.2d 541, 545,547 & n.10 (11th Cir. 1983); *Morgan v. Zant*, 582 F. Supp. 1026, 1030-1031 (M.D. Ga. 1984); *Hall v. Wainwright*, 565 F. Supp. 1222, 1241 (M.D. Fla. 1983); *Dodd v. Williams*, 560 F. Supp. 372, 377 (M.D. Ga. 1983).

"detailed consideration to appellant's arguments and related factual allegations," ***Middleton v. State***, 465 So.2d 1218, 1221 (Fla. 1985), ***Muhammad v. State***, 426 So.2d 533, 537 (Fla. 1982), or when the motion is successive. ***Witt v. State***, 465 So.2d 510, 511 (Fla. 1985). Still, trial judges both before and after ***Jones***, recognizing the extra-record nature of many claims of ineffectiveness, have often held hearings and made fact findings on these types of claims. ***See, e.g., State v. Bucherie***, 468 So.2d 229, 230 (Fla. 1985); ***Mikenas v. State***, 460 So.2d 359, 360 (Fla. 1984); ***Dobbert v. State***, 456 So.2d 424, 426 (Fla. 1984); ***Downs v. State***, 453 So.2d 1102, 1103 (Fla. 1984); ***Funches v. State***, 449 So.2d 1283, 1284 (Fla. 1984); ***Griffin v. State***, 447 So.2d 875, 876 (Fla. 1984); ***Arango v. State***, 437 So.2d 1099, 1104 (Fla. 1983); ***Jent v. State***, 435 So.2d 809, 811 (Fla. 1983); ***Ruffin v. State***, 420 So.2d 591, 592 (Fla. 1982). This Court has not hesitated to remand Rule 3.850 cases for required hearings. ***See, e.g., Zeigler v. State***, 452 So.2d 537 (Fla. 1984); ***Vaught v. State***, 442 So.2d 217 (Fla. 1983); ***Smith v. State***, 400 So.2d 956 (Fla. 1981); ***O'Callaghan v. State***, 461 So.2d 1354 (Fla. 1985); ***Morgan v. State***, 461 So.2d 1534 (Fla. 1985); ***Meeks v. State***, 382 So.2d 673 (Fla. 1980); ***McCrae v. State***, 437

So.2d 1388 (Fla. 1983); ***LeDuc v. State***, 415 So.2d 721 (Fla. 1982); **Demps v. State**, 416 So.2d 808 (Fla. 1982); ***Arango v. State***, 437 So.2d 1099 (Fla. 1983).

The trial court's order denying relief in Mr. Porter's case underscores why a hearing is necessary: The court assumed facts nowhere in the record and imputed to counsel a "strategy" that the record itself fails to support. The trial court rejected Mr. Porter's ineffective assistance of counsel claim as follows:

> [The resentencing court] granted the request by defense counsel, Mr. Woodard, Wayne, that the Defendant, Porter, be permitted additional time, a continuance for the opportunity to explore for witnesses for that matter of mitigation and also, which motion was granted, and upon motion made to that judge, to introduce evidence at that sentencing from family members as to the matter of mitigation. Even submitted the name of Myrtle Porter of Dayton, Ohio, for instance, was listed by the Defendant, Porter, as such a prospective witness and thereupon, the hearing was thus continued till August the 3rd, following which or at which the judge at that time resentenced the Defendant, Porter, to death.
>
> It would seem to me not an unreasonable or viable conclusion that following such an obvious awareness of the possibility of that form of mitigating evidence and circumstance, that the failure to produce it then was a result of the considered and a tactful decision as opposed to one of negligence by Mr. Woodard who is and known by me to be a very capable and dedicated and

> tenacious advocate in view of this history of the case... I deny the requested relief.

(RP 708). The court's reasoning is wrong for two reasons, both flowing from the need for a hearing.

First, the trial court inferred a reasonable strategy from the fact that counsel on resentencing moved for, and was granted, an opportunity to present mitigating character evidence at the resentencing; the trial court reasoned that because the possibility of presenting a psychiatric or character defense ***occurred*** to defense counsel, then he must have had a good reason for abandoning that defense. But the very point of Mr. Porter's claim is that counsel failed to ***investigate*** the claim. For example, the trial court noted that the name of Mr. Porter's mother was listed as a prospective witness. (RP. 708) But the mother's affidavit, attached to the Motion to Vacate, clearly states that counsel did **not** contact her. The point is that counsel did not **investigate** the claim. Investigation is the keystone of effective assistance of counsel, since strategic decisions are only as good as the information upon which they are based. ***Nealy v. Cabana***. 764 F.2d 1173, 1177 (5th Cir. 1985). It is difficult to imagine how an attorney can make a reasonable choice among alternative strategies without first investigating the

possibilities. "Strategic" decision of an attorney without reasonable investigation can amount to no more than speculation. Here we have an attorney who "chose" to abandon a character and psychiatric defense without consulting the obvious individuals who could confirm or deny the claim: the mother and sister of the defendant. The affidavits of the mother and sister make clear that they were ***never*** contacted by trial or resentencing counsel.

Second, the trial judge inferred effective representation ***in this case*** from the fact that resentencing counsel "is known by me [i.e., the judge] to be a very capable and dedicated and tenacious advocate" (RP 708) attorney is competent in general cannot insulate him from a claim that he rendered ineffective assistance of counsel ***in a particular case.***

Thus, what is left is a powerful case in mitigation that was never presented to the capital sentencer and no explanation for that failure apparent from the record. Only an evidentiary hearing can set the record straight.

B.

TRIAL COUNSEL'S SIMULTANEOUS REPRESENTATION OF THE KEY PROSECUTION WITNESS AND MR. PORTER CONSTITUTED AN ACTUAL CONFLICT OF INTEREST, AND COUNSEL'S FAILURE TO WITHDRAW AS COUNSEL FOR MR. PORTER WAS PREJUDICIAL, AND VIOLATED MR. PORTER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

1. The Claim

In representing Mr. Porter at trial, his attorney was forced to cross-examine a former client. That former client was the key witness against Mr. Porter. This conflict of interest was not addressed by the trial court in its order denying relief to Mr. Porter.

Mr. Porter was arrested in this case on August 22, 1978. The Public Defender's Office was appointed to represent Mr. Porter on August 23, 1978 and Mr. Widmeyer assumed initial responsibility for handling Mr. Porter's case.

On July 18, 1978, Mr. Matha Lee Thomas was arrested and charged with forgery. He was being held in the Charlotte County Jail under a $1,575.00 bond at the time Mr. Porter was arrested and placed in the same jail on August 22, 1978. *See* Motion to Vacate Attachment "M". On July 27, 1978, the Public Defender was appointed to represent Mr. Thomas, and Assistant Public Defender, Widmeyer assumed the responsibility

for representing Mr. Matha Lee Thomas. *See* Motion to Vacate Attachment "M".

On August 25, 1978, Mr. Widmeyer's client, Matha Lee Thomas, gave a statement to the police. Mr. Widmeyer's client, Mr. Thomas, stated that Mr. Widmeyer's client, Raleigh Porter, had told Mr. Thomas that he (Porter) had committed the robbery and murders forming the basis of the prosecution herein. Mr. Widmeyer's client, Mr. Thomas, indicated that he would testify against Mr. Widmeyer's client Raleigh Porter.

After having filed several pretrial pleadings for his client, Mr. Thomas, who Mr. Widmeyer had represented before being appointed to Mr. Porter's case, Mr. Widmeyer filed a motion to withdraw as counsel in Mr. Thomas' case on September 1, 1978. *See* Motion to Vacate, Attachment "N". Also on September 1, 1978, Mr. Widmeyer stipulated with the State Attorney, Eugene C. Berry to reduce his client, Matha Lee Thomas', bond from $1,575.00 to $500.00, and as a result Mr. Widmeyer's client, Mr. Thomas was released from jail. *See* Motion to Vacate, Attachment "O".

On September 5, 1978, Mr. Widmeyer's motion to withdraw from the representation of Matha Lee Thomas was granted by the court, and Mr. Robert Norton was appointed to represent Mr. Matha Lee Thomas.

At no time did Mr. Widmeyer advise Mr. Porter of any possible conflict of interest.[3]/ At no time did Mr. Widmeyer move to withdraw from representing Raleigh Porter, and in fact represented him throughout the remainder of pretrial, trial, and sentencing proceedings herein.

Mr. Thomas' trial was scheduled to begin October 31, 1978, but the trial was continued and ultimately never occurred.

Mr. Widmeyer's former client, Mr. Thomas, testified against Mr. Widmeyer's client, Raleigh Porter at trial, and offered incredibly inculpatory evidence against him. (R. 645-46). Attorney Widmeyer was thus faced with the prospect of cross-examining a former client in order to benefit a current client.

After Mr. Thomas' testimony, and after Mr. Porter had been convicted and sentenced to death herein, the State Attorney, Mr. Eugene C. Berry, by letter dated January 9, 1979, "nolle prossed" the forgery and probation/parole revocation charges against Mr. Widmeyer's former client, Matha Lee Thomas. *See* Motion to Vacate, Attachment "P".

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[3]/ Claims of ineffective assistance of counsel are cognizable in a proceeding brought pursuant to Rule 3.850. *See, e.g., Smith v. State,* **400 So.2d 956 (Fla. 1981).**

As Mr. Widmeyer correctly recognized, his conflict of interest prevented him from representing Matha Lee Thomas. However, Mr. Widmeyer's conflict also should have prevented him from representing Mr. Porter, and Mr. Widmeyer failed to move to withdraw from the representation of Mr. Porter.

Mr. Widmeyer had maintained files on both Mr. Thomas and Mr. Porter. He obtained, and is presumed to have obtained, confidences and secrets from Mr. Thomas. Those confidences limited Mr. Widmeyer's ability to effectively cross-examine the former client. The actual cross-examination was insufficient and incomplete, and, for instance, did not reveal that Mr. Widmeyer assisted in obtaining a bond reduction for (and ultimately release of) his client Mr. Thomas, who had agreed to help authorities place Mr. Widmeyer's client Mr. Porter in the electric chair.

This actual conflict of interest prejudiced Mr. Porter. It was unreasonable attorney conduct for Mr. Widmeyer not to withdraw from Mr. Porter's representation. The evidence at trial was almost exclusively the testimony of accessories who lacked credibility and whose cross-examination was ineffectively done. The cross-examination of a "neutral" jail house snitch was especially important

and counsel's failure to withdraw violated Mr. Porter's sixth, eighth, and fourteenth amendment rights.

The sixth amendment guarantees the right to conflict-free counsel. ***Alvarez v. United States***, 580 F.2d 1251 (5th Cir. 1978). This right is violated when a conflict impairs an attorney's ability to vigorously defend his client. ***Stephens v. United States***, 595 F.2d 1066 (5th Cir. 1979).

The United States Supreme Court has forbidden attorneys to have such conflicting loyalties. "Joint representation of conflicting interests is suspect because of what it tends to **prevent** the attorney from doing." ***Holloway v. Arkansas***, 435 U.S. 475, 490 (1978). Ineffectiveness is **presumed** where counsel "actively represented conflicting interests." ***United States v. Cronic***, 104 S.Ct. 2039, 2048, n. 28 (1984); Cuyler v. Sullivan, 446 U.S. 335, 356 (1980). The dangers inherent in the representation of conflicting interests in a criminal trial are so extensive that in such cases a showing of prejudice is not required. ***Strickland v. Washington***, 104 S.Ct. 2052, 2067 (1984); ***Cuyler***, 446 U.S. at 345-50.

The conflict in this case is plain: Counsel simultaneously represented both Mr. Porter and the State's star witness against Mr. Porter; counsel took

active steps to get the snitch out of jail after the client/snitch agreed to testify against the client/target, and now counsel was faced with the prospect of cross-examining the snitch (ex)-client. The abysmal cross-examination actually conducted itself shows ineffectiveness, but it is merely a symptom of the problem created by counsel's failure to withdraw from both cases.

An attorney is presumed to have received confidences and secrets from any client he or she has represented. ***See United States v. Sheppard***, 675 F.2d 965, 980 (8th Cir. 1982); ***United States v. Provenzano***, 620 F.2d 985, 1005 (3d Cir. 1980); ***United States v. Kitchen***, 592 F.2d 900, 905 (5th Cir. 1979); ***United States v. Deluna***, 584 F.Supp. 139, 145 (W.D. Mo. 1984). This serious conflict placed Mr. Widmeyer in the untenable position of having to choose whether to discredit his (former)-client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve the witnesses's attorney/client privilege. ***See United States v. Armato Sarmiento***, 524 F.2d 591 (2nd Cir. 1975). Mr. Widmeyer was also faced with the unpleasant reality that he could severely impair his former client's chance for a favorable resolution of the charges against him, by

destroying his credibility as a witness. In ***United States v. Deluna***, 575 F.Supp. 103 (N.D. Ill. 1983), the court recognized that such a situation impairs an attorney's effectiveness when it stated:

> a conflict of interests usually occurs when a defense attorney has earlier represented a prosecution witness.

An irreconcilable conflict exists any time an attorney will be required to cross examine a former client as a prosecution witness. ***United States v. Martinez***, 630 F.2d 48 (2nd Cir. 1984).

No additional demonstration of prejudice is necessary. Prejudice is so potent in this situation that a defendant need not even show, as he or she must in co-defendant conflict situations, that counsel "actively represented conflicting interests" and that the conflict "adversely affected his lawyer's performance," ***Cuyler***, 445 U.S. at 350:

> Defendants in such cases risk, to a greater extent than do jointly represented co-defendants, the effects of an often undetectable "erosion of zeal."

Comment, ***Conflict of Interest in Mutiple Representation of Criminal Co-Defendants***, 68 J.Crim.L.&C. 226, 239

(1977), ***cited in Cuyler***, 445 U.S. at 350, n. 15. As is apparent from Mr. Porter's case:

> The situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of [defendant's] rights whether or not it in fact influences the attorney or the outcome of the case.

Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974).

2. The Need For A Hearing

This claim consists almost entirely of facts outside of the existing record. The sequence of events of Mr. Widmeyer's representation of Mr. Porter and the key witness against him, the existence of confidences passed from Thomas to his attorney, Widmeyer, and even the present location and status of Thomas are all matters to be explored at a hearing.

C.

1. The Claim

THE STATE OBTAINED AN INDICTMENT IN BAD FAITH BY ALLOWING A GRAND JURY MEMBER TO SERVE, WHO WAS RELATED BY BLOOD OR MARRIAGE TO THE VICTIMS, IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTION, AND THE STATE'S SUPPRESSION OF THIS EXCULPATORY INFORMATION VIOLATED THE FOURTEENTH AMENDMENT

1. The Claim

No person shall be tried for a capital crime without indictment by a grand jury. Fla. Const., art. I, §15. A grand jury shall consist of 18 members, of which 15 shall be necessary to constitute a quorum. ***Fla. Stat.*** §905.01(2). A person who is related by blood or marriage to the victim of the capital crime charge is not qualified to serve and is subject to challenge on those grounds, ***see Fla. Stat.*** §§905.04(1)(c), 905.37(3); ***Howell v. State***, 136 So. 456 (1931); ***Cruce v. State***, 100 So. 264 (1924), as is a person whose state of mind will prevent him or her from acting impartially and without prejudice to the defendant. ***Fla. Stat.*** §905.04(1)(b); ***See also Lieby v. State***, 50 So.2d 529 (1951).

This case generated substantial pretrial publicity, and there was substantial pressure brought to bear for an indictment to be returned charging an

individual or individuals with the Walrath murders. *See* Motion to Vacate, Attachment "Q". The State intended to take their case before the grand jury and seek a first degree murder indictment on September 5, 1978. However, on September 5, 1978, the presentation of the case to the grand jury was postponed because of the lack of a quorum of 15 grand jurors to consider the evidence. *See* Motion to Vacate, Attachment "R".

The State Attorney seeking the indictment in the case, Eugene Berry, spoke frequently to the press and discussed the case before he attempted to seek an indictment on September 5, 1978. The fact that an indictment would be sought on that day had been widely publicized.

After the failure to gather a quorum on September 5, 1978, Mr. Berry indicated that he would attempt to compel a quorum on September 6, 1978, and present evidence to the grand jury at that date. *See* Motion to Vacate, attachments "R" and "S". Apparently, a quorum was impossible on the 6th.

Patrick Whalen, an individual who sat on the grand jury that ultimately returned an indictment on September 8, 1978, against Raleigh Porter, discussed with Mr. Berry on that date the fact that his wife was related to the victims in the case. The grand juror

discussed his discomfort with sitting on the grand jury which would hear the case. Mr. Berry informed the grand jury member that his presence was necessary in order to have a quorum so that the grand jury could act, and instructed the grand juror to sit on the grand jury and hear testimony as regards to Raleigh Porter, but not to cast a final vote. ***See*** Affidavit, attached to Motion to Vacate as attachment "T".

Before the grand jury returned an indictment in this case, counsel for Mr. Porter requested that he be allowed to ***voir dire*** the grand jury members about their qualifications to sit as grand jurors. (R. 6) The motion was denied. Mr. Porter has no quarrel with the general rule that grand jurors may not be examined on ***voir dire***; secrecy is inherent in the American concept of the grand jury process.

However, that general secrecy concealed a grave injustice in this case. Had the motion been allowed, counsel could have discovered the bias and prejudice of grand juror Patrick Whalen and could have successfully moved to quash the indictment herein.

Prejudice here occurred in either of two ways -- on the one hand, a grand juror who ***himself*** recognized and expressed reservations about his ability to fairly judge the evidence against Mr. Porter sat as a grand

juror and presumably took part in deliberations. Second, even if the tainted juror refrained from voting, his very presence provided the quorum required by law. But for the inclusion of an incompetent grand juror on the panel which indicted Mr. Porter herein, a quorum would not have been achieved, and no indictment could have issued.

Trial counsel did everything possible to discover the grand jury's disability to serve, but the efforts were thwarted. As is now known, there is a very real possibility that a grand jury member was inappropriately allowed to sit, ***even though he explained to the prosecutor his lack of qualifications***.

A stay in this case must be entered and relief on this claim allowed. Mr. Porter must be allowed to interview Mr. Whalen and other grand jury members, to determine and prove: (a) their lack of qualification to serve; (b) their bias and prejudice, and (c) the prosecutor's misconduct involved when a State Attorney has knowledge of disqualifying factors and ignored or subverted them. [4]/

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[4]/ This issue is cognizable in a proceeding brough pursuant to Rule 3.850. ***See Smith v. State***, 400

The indictment in this case is invalid, and should be quashed, inasmuch as it was returned by a grand jury that was not impartial, in violation of Mr. Porter's due process rights under the fourteenth amendment to the United States Constitution. In addition, the State's action in obtaining an indictment from a prejudiced and unqualified grand jury violates the fourteenth amendment prohibition against prosecutional misconduct.

The State's failure to disclose its knowledge that Mr. Whalen was an unqualified grand juror, despite the fact that counsel indicated to the State explicitly that counsel wanted such information when counsel asked the court to allow examination of the grand jurors to determine whether they were qualified. The State's silence in the face of this request violated Mr. Porter's right to receive requested exculpatory information, which would have resulted in the quashing of the indictment herein.

2. The Need For A Hearing

Once again, this is a claim almost entirely outside of the existing record. The crucial facts supporting this claim were not known, and not

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So.2d 956 (Fla. 1981) (claim of prosecutorial misconduct in withholding exculpatory evidence properly brought in Rule 3.850 proceedings).

reasonably knowable through the exercise of due diligence, at the time of trial. This Court noted on Mr. Porter's direct appeal that Porter did not "challenge a juror or jurors in this cause." ***Porter v. State***, 400 So.2d at 7. And in Mr. Porter's direct appeal brief to this Court, he stated:

> In addition to seeking to determine possible bias, Appellant's motion also sought permission to examine the grand jurors with regard to their qualifications, another statutory ground for challenge under Section 905.04(1)(a), as well as their awareness of the possible penalty. These reasons for the requested voir dire have not been raised on this appeal becaue counsel for Appellant is not aware of any indication that any of the grand jurors were unqualified and concedes that consideration of the possible penalty was not a proper function of the grand jury.

Initial Brief at 15 n.1.

This Court has remanded for hearings in cases raising claims of compentency to stand trial, ***Hill v. State***, 473 So.2d 1253 (Fla. 1985), State withholding of exculpatory evidence, ***Smith v. State***, 400 So.2d 956 (Fla. 1981), and ineffective assistance of counsel. ***O'Callaghan v. State***, 461 So.2d 1354 (Fla. 1984). The common doctrinal thread in these cases is that when a claim presents facts not "known at the close of the

trial," the claim is properly brought in a Rule 3.850 proceeding and a hearing may be necessary to develop such facts. ***Zeigler v. State***, 452 So.2d 537, 539 (Fla. 1984). In ***Zeigler***, "all but one of the facts [and circumstances asserted in the Rule 3.850 motion were] known at the close of the trial. Therefore, those issues could have been addressed on direct appeal and are not cognizable under Rule 3.850. There is one factual basis of which was not known" until after direct appeal. ***Id.*** This Court then proceeded to explore that one new factual ground.

Mr. Porter's claim is even stronger than the claim addressed in ***Zeigler***. Mr. Porter ***did*** raise the claim on direct appeal, as best he could. It was only recently, through the fortuity of a happenstance dinner conversation, that Mr. Porter discovered that ***in fact*** a grand juror ***was*** biased and unqualified. Only through a hearing can the facts of this claim be ascertained. Only the adversorial testing of these newly discovered facts can fairly resolve this claim.

Thus, at least three of Mr. Porter's claims require further evidentiary development. The remaining claims will now be discussed.

IV.

MR. PORTER'S SENTENCE OF DEATH OFFENDS THE EIGHTH AMENDMENT BECAUSE THE JURY IN HIS CASE WAS NOT REQUIRED TO FIND, AND DID NOT FIND, THAT HE SPECIFICALLY INTENDED TO KILL OR THAT HE CONTEMPLATED IN ADVANCE OF THE FELONY/ MURDER THAT LETHAL FORCE WOULD BE USED.

The eighth amendment prohibits the imposition of the death penalty upon one who does not kill, intend to kill, or contemplate that deadly force would be used. This much is clear from ***Enmund v. Florida***, 458 U.S. 782 (1982). This case presents a question left open in ***Enmund***: Whether the jury at the trial level is the body which must make the finding of intent which ***Enmund*** identified as a necessary precondition to imposition of a death sentence, or whether an appellate court reviewing the trial record may make the requisite ***Enmund*** finding of intent. This question left open in ***Enmund*** has divided the State and Federal courts. ***Compare Reddix v. Thigpen***, 728 F.2d 705 (5th Cir. 1984), ***cert. denied***, 105 S.Ct. 397 (1984) (resentencing required where it is unclear from the ***jury's verdict*** whether defendant intended to kill); ***Chaney v. Brown***, 730 F.2d 1334, 1356 n.29 (10th Cir. 1984) ***cert. denied***, 105 S.Ct. 601 (1985) (death sentence vacated on other grounds; in addressing ***Enmund*** claim the court said that "in any further sentencing proceedings, careful ***jury***

instructions must explain the essential elements required by ***Enmund*** before a death sentence can be imposed"); ***with Ross v. Kemp***, 756 F.2d 1483 (11th Cir. 1985) (***en banc***) (***Enmund*** findings can be supplied by a federal court on collateral review); ***People v. Garcia***, 454 N.E.2d 274, 284-85 (Ill. 1984) (state appellate court may make ***Enmund*** finding); ***State v. Tison***, 690 P.2d 747, 748-49 (Ariz. 1984) (***en banc***) (same). This open question will be decided this Term by the United States Supreme Court in ***Cabana v. Bullock***, 105 S.Ct. 2110 (1985), ***granting certiorari*** in ***Bullock v. Lucas***, 743 F.2d 244, 247 (5th Cir. 1984).

Mr. Porter's case will be controlled by the forthcoming decision in ***Cabana***. Should the Supreme Court agree with those State and Federal courts holding that due process requires that the ***Enmund*** findings be determined by the jury, then Mr. Porter's death sentence cannot stand. This is so because Mr. Porter's jury was not required to find, and in fact did not find, that Mr. Porter specifically intended to kill or that he contemplated in advance of the felony murder that lethal force would be used. Indeed, the fact that the advisory jury recommended a life sentence strongly suggests that the jury's verdict of first degree murder was based upon the State's theory of "pure" felony

murder (i.e., that the contemporaneous felony supplied the intent requirement for first degree murder) rather than a finding of premeditated murder. ***Cf. Enmund***, 458 U.S. at 794 (juries tend not to sentence to death in cases of felony murder). And this Court upheld the conviction because "the evidence is sufficient to find that Porter caused the Walraths' deaths ***while he was engaged in the crime of robbery***". ***Porter v. State***, 400 So.2d 5, 6 (Fla. 1981) (emphasis added).

Mr. Porter was indicted on two counts of first degree premeditated[3/] murder pursuant to ***Fla. Stat.*** § 782.04(1)(a), which provides:

> The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, **or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb**, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or

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3/ The fact that the indictment listed only premeditated murder in no way precludes the trier of fact from convicting of first degree murder based on a felony murder theory. ***Adams v. State***, 412 So.2d 850, 852 (Fla. 1982).

> older, when such drug is proven to be the proximate cause of the death of the user, **shall be murder in the first degree** and shall constitute a capital felony, punishable as provided in § 775.082

At trial, the prosecution pursued a theory of premeditated murder as well as a theory of felony murder. The prosecutor's opening statement, for example, told the jury that the State's evidence would "show that Raleigh Porter committed those murders, premeditated, during the course of burglarizing the house." (R. 482). The prosecutor elicited from State's witness Tammy Lloyd that Mr. Porter was "going to do a B and E"[4/] on the night of the homicides. (R. 562). The prosecutor also elicited from Tammy Lloyd testimony that Mr. Porter was in possession of the Walraths' jewelry and automobile after the crime occurred. (R. 563-564). As the Florida Supreme Court observed, the "victims' car and goods taken from their home were linked to Porter." ***Porter***, 400 So.2d at 6. The prosecutor in closing argument told the jury that he had been incorrect in his opening statement when he had said that Mr. Porter committed a robbery; in closing, the State's felony murder theory was

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[4/] The term "B and E" is street language for "breaking and entering."

predicated on the underlying felony of robbery. (R. 668).

The jury was instructed as follows:

> the killing of a human being in committing or attempting to commit arson, rape, robbery, burglary, abominable and detestable crime against nature, or kidnapping is murder in the first degree even there's no premeditated design or intent to kill.

(R. 693-694). The jury also was instructed on premeditated murder. (R. 692-693).

During deliberations, the jury asked to hear an excerpt from the testimony of Tammy Lloyd. (R. 713). That testimony pertained to coins and jewelry taken from the victims' house. Though the jury's request was denied, (R. 714) the jury's question indicated a concern with the State's felony murder theory.

The verdict form given to the jury provided for a general verdict: The jury was allowed ***only*** to present its findings of guilt of first degree murder without specifying whether that verdict was grounded upon a finding of premeditation or upon a theory of felony murder. (R. 182-183). Consequently, as in ***Cabana***, Mr. Porter was convicted without any specific finding by the jury that he specifically intended to kill or that he contemplated in advance of the felony/murder that

lethal force would be used. Because this claim will be controlled by ***Cabana***, this Court should stay Mr. Porter's execution pending the imminent decision in that case.

V.

THE PROCESS OF JURY DEATH QUALIFICATION VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE IT RESULTS IN JURIES THAT ARE (a) BIASED IN FAVOR OF THE PROSECUTION, (b) UNDULY PRONE TO CONVICT, AND (c) UNREPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY.

Mr. Porter's jury was selected through a death qualification process. (R. 283, 286, 306, 312, 318, 329, 345, 352, 360, 365-366, 376, 390). Death qualification, or "***Witherspoon***ing", is the process by which courts identify and exclude from capital juries those people whose views on the death penalty are considered incompatible with the duties of capital jurors. The constitutionality of death qualification will be decided this Term by the United States Supreme Court in ***Lockhart v. McCree,*** 54 U.S.L.W. 3223 (U.S. October 17, 1985) (order granting ***certiorari***). The Court will examine an ever-growing corpus of social science evidence which shows that death-qualified juries are prosecution prone, in the sense that they are more likely to ***convict***, in the guilt-innocence

phase, than a non-death qualified jury would be. Further, a death qualified jury is not representative of a cross-section of the community. The Supreme Court resolution of this question will control this issue in Mr. Porter's case, because the jury in this case was death qualified. Two specific questions are presented.

First, the death-qualification process traps the participants into the necessity of communicating false cues to the jury. It is natural for prospective jurors to look to the participants, and particularly to the judge, for information about the case and what their duties and responsibilities will be.

> By focusing on the penalty before the trial actually begins the key participants, the judge, the prosecutor and the defense counsel convey the impression that they all believe the defendant is guilty, that the "real" issue is the appropriate penalty and that the defendant really deserves the death penalty.

Grigsby v. Mabry, 569 F.Supp. 1273, 1303 (E.D. Ark.), ***affirmed on other grounds***, 758 F.2d 226 (8th Cir. 1985) (***en banc***), ***cert. granted sub. nom., Lockhart v. McCree***, 54 U.S.L.W. 3223 (U.S. October 17, 1985).

Second, the prosecutor in this case systematically exercised his peremptory challenges to exclude from the

guilt-innocence phase those jurors who could follow the law and serve fairly as to guilt, yet who expressed moral or religious objections to the death penalty. (R. 318, 345, 365-366, 390). This group of prospective jurors (i.e., those people with scruples about the death penalty but who could not be dismissed for cause under ***Witherspoon***) share distinct attitudes, not merely towards the death penalty, but towards a whole range of criminal justice issues. Because Mr. Porter's jury was deprived of these peoples' perspectives, the jury was more prone to ***convict*** and the jury did not constitute a fair cross-section of the community. ***See generally,*** Winick, ***Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis***, 82 Mich.L.Rev. 1 (1982).

The prosecutor in this case asked the prospective jurors if they had "any religious or moral beliefs that, under certain circumstances and instructions of law, would prevent [them] from recommending the death penalty." (R. 274, 277, 283, 288-289, at ***Passim***).

At least eight potential jurors indicated that they had some objection to the death penalty. (R. 283, 286, 306, 312, 329, 352, 360, 376). However, all of these jurors said that they could fairly and impartially consider the evidence in this case.

Despite these assurances, however, the prosecutor, over defense objections (R. 390), peremptorily excluded these potential jurors. (R. 318, 345, 365-366, 390).

This systematic exclusion offended the Constitution.

VI.

ON ITS FACE AND AS APPLIED, THE AGGRAVATING CIRCUMSTANCE, "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" HAS FAILED ADEQUATELY TO CHANNEL THE SENTENCING DECISION PATTERNS OF JURIES [AND JUDGES]," AND ITS WIDESPREAD APPLICATION AMONG CASES AND ITS SINGULARLY OVERWHELMING MANDATE FOR DEATH WITHIN EACH CASE HAS THEREBY RESULTED IN A PATTERN OF ARBITRARY AND CAPRICIOUS SENTENCING AS FOUND UNCONSTITUTIONAL IN FURMAN

Mr. Porter relies upon and incorporates by reference herein his discussion in Claim VI of his Motion to Vacate and the corresponding discussion in his Memorandum of Law in Support of Defendant's Application for Stay of Execution filed in the trial court. Time constraints preclude full briefing of this claim in this Initial Brief. Mr. Porter in no manner waives any portion of this ground for relief.

VII.

THE APPLICATION OF THE AGGRAVATING CIRCUM- STANCE THAT THE CAPITAL OFFENSE HEREIN WAS COMMITTED DURING THE COMMISSION OF A ROBBERY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE AGGRAVATING CIRCUMSTANCE FAILS TO GENUINELY NARROW THE CLASS OF INDIVIDUALS AGAINST WHOM THE ULTIMATE PENALTY OF DEATH WOULD BE METED OUT.

Mr. Porter relies upon and incorporates by reference herein his discussion in Claim VII of his Motion to Vacate and the corresponding discussion in his Memorandum of Law in Support of Defendant's Application for Stay of Execution filed in the trial court. Time constraints preculde full briefing of this claim in this Initial Brief. Mr. Porter in no manner waives any portion of this ground for relief.

VIII.

THE EXECUTION OF A CONDEMNED PERSON BY ELECTROCUTION AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT, IN LIGHT OF EVOLVING STANDARDS OF DECENCY AND THE AVAILABILITY OF LESS CRUEL BUT EQUALLY EFFECTIVE METHODS OF EXECUTION

Mr. Porter relies upon and incorporates by reference herein his discussion in Claim VIII of his Motion to Vacate and the corresponding discussion in his Memorandum of Law in Support of Defendant's Application for Stay of Execution filed in the trial

court. Time constraints preculde full briefing of this claim in this Initial Brief. Mr. Porter in no manner waives any portion of this ground for relief.

IX

REJECTING THE JURY VERDICT OF LIFE IN THIS CASE VIOLATED THE CONSTITUTION

Mr. Porter relies upon and incorporates by reference herein his discussion in Claim IX of his Motion to Vacate and the corresponding discussion in his Memorandum of Law in Support of Defendant's Application for Stay of Execution filed in the trial court. Time constraints preculde full briefing of this claim in this Initial Brief. Mr. Porter in no manner waives any portion of this gound for relief.

X.

THE DEATH PENALTY IN FLORIDA HAS BEEN IMPOSED IN AN ARBITRARY, DISCRIMINATORY MANNER -- ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE CAPITAL SENTENCE DETERMINATION PROCESS BY THE FLORIDA DEATH PENALTY STATUTE AND THE UNITED STATES CONSTITUTION. THESE FACTORS INCLUDE THE FOLLOWING: THE RACE OF THE VICTIM, THE PLACE IN WHICH THE HOMICIDE OCCURRED (GEOGRAPHY), AND THE SEX OF THE DEFENDANT. THE IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF SUCH FACTORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

TO THE UNITED STATES CONSTITUTIONS AND REQUIRES THAT MR. PORTER'S DEATH SENTENCE, IMPOSED DURING THE PERIOD IN WHICH THE DEATH PENALTY WAS BEING APPLIED UNCONSTITUTIONALLY, BE VACATED.

Mr. Porter relies upon and incorporates by reference herein his discussion in Claim X of his Motion to Vacate and the corresponding discussion in his Memorandum of Law in Support of Defendant's Application for Stay of Execution filed in the trial court. Time constraints preculde full briefing of this claim in this Initial Brief. Mr. Porter in no manner waives any portion of this ground for relief.

XI

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT FELONY (ROBBERY) MURDER, AND THE PROCESS THROUGH WHICH THE STATE RELIED UPON ROBBERY MURDER WAS FUNDAMENTALLY UNFAIR, THE VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS

Mr. Porter relies upon and incorporates by reference herein his discussion in Claim XI of his Motion to Vacate and the corresponding discussion in his Memorandum of Law in Support of Defendant's Application for Stay of Execution filed in the trial court. Time constraints preculde full briefing of this claim in this Initial Brief. Mr. Porter in no manner waives any portion of this ground for relief.

CONCLUSION

Mr. Porter respectfully asks the Court, first, to grant a stay of execution to permit him time to prepare a full brief on the merits of his claims. Second, Mr. Porter requests that the judgment of the trial court be vacated and the case remanded for the evidentiary hearing to which Mr. Porter is entitled. Third, Mr. Porter asks that this Court reverse the trial court's denial of his Motion to Vacate Judgment and Sentence.

Respectfully Submitted,

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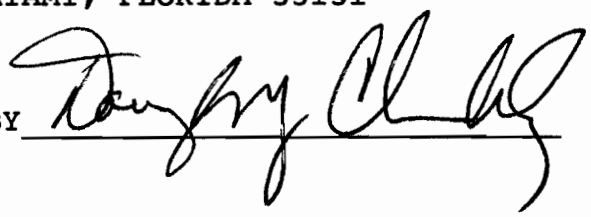
BY 

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to the office of the Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida 32301 this 24 day of October, 1985, to:

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02-108-65d