67,959

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO.

DAVID W. TROEDEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

SUMMARY BRIEF ON MERITS
IN SUPPORT OF APPLICATION FOR
STAY OF EXECUTION

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STATEMENT OF THE CASE AND FACTS

On November 4, 1985, the Governor signed Mr. Troedel's death warrant, and his execution date was set for December 3, 1985. [ROA ___]. Mr. Troedel had not been represented by counsel for purposes of post-conviction relief prior to the date his death warrant was signed. The Office of the Capital Collateral Representative immediately began investigating Mr. Troedel's case, after being notified the warrant had been signed.[1] Because the Tallahassee CCR office was representing Mr. Spaziano, Mr. Troedel's case was assigned to the St. Petersburg office, now staffed by one attorney, Steven Malone. The circumstances surrounding counsel's representation of Mr. Troedel, and the diligence in pursuing this claim in the time allotted is discussed in counsel's affidavit, Exhibit H, Appendix, Motion to Vacate Judgments and Sentences.

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[1] The Office of the CCR has been unable to proceed on any cases in which warrants have not been signed, because its staff has been working 12 to 16 hours a day on the crisis cases in which execution dates have been set. Since opening October 1, 1985, it has been responsible for representing Raleigh Porter and Jerry White, whose execution dates were set for October 28, 1985. Mr. White's execution was stayed October 24, 1985, and Mr. Porter's on October 26, 1985. The offices were then required to move to represent Ronnie Jones and Robert Preston, whose warrants resulted in execution dates for November 4, 1985. Mr. Preston's execution was stayed by the trial court on October 31, 1985, Mr. Jones' by this Court on November 2, 1985. Mr. Spaziano's warrant was signed at the same time as Mr. Troedel's, on November 4, 1985, and execution was also set for December 3, 1985. His execution was stayed by this Court on November 25, 1985.

The post conviction motion, application for stay of execution, and related motions were filed in this case on Tuesday, November 26, 1985. [ROA ___]. Hearing on the application for stay was held November 27, 1985. [ROA ___]. The state, in responding to the motion for post conviction relief, addressed every issue on the merits, and argued that only grounds four and six were not appropriate for post conviction relief because they could have been or were raised on direct appeal. [ROA ___]. The trial court denied Mr. Troedel's request for an evidentiary hearing, ruling the motion to vacate was refuted by the files and record. [ROA ___]. The court did not make any other findings, and did not attach to its order portions of the file or record it considered refuted the motion.[2]

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[2] In fact, the trial court could not have reviewed the record because it was not even before it.

ARGUMENT

POINT ONE

DENIAL OF THE STAY APPLICATION AND MOTION TO VACATE JUDGMENTS AND SENTENCES WHEN COUNSEL DID NOT HAVE AN ADEQUATE OPPORTUNITY TO INVESTIGATE AND PREPARE MR. TROEDEL'S CLAIMS DEPRIVED APPELLANT OF A FULL AND FAIR HEARING, DUE PROCESS OF LAW, AND WAS CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The frenzied rush to investigate and prepare Mr. Troedel's motion to vacate judgments and sentences in the wake of counsel's work on the three preceding death warrants is catalogued in Exhibit 6, Appendix to the Memorandum in Support of Application for Stay of Execution, and pages 1-3 of the Memorandum of Law in Support of Application for Stay of Execution filed in the trial court. If attorneys in private practice in civil cases tried to prepare a complex case in the time allotted counsel for Mr. Troedel, no jury or judge would hesitate in finding them guilty of legal malpractice. The standard should be no less in this capital case, where it is not money, but a man's very life which is at stake. There is no way this frenzied rush to filing adds to the reliability of a sentence of death required by the United States Supreme Court. Gardner v. Florida, 430 U.S. 349 (1977). This haste imposed upon counsel produces just the opposite, and invites nothing but mistakes.

This office was created in response to the call of distinguished jurists and bar leaders to answer the crisis in the

representation of indigent death row inmates. See Chapter 85-332, Fla. Sess. L. Rptr. 1537. [copy of bill attached as Exhibit 1, Appendix to Memorandum of Law in Support of Application for Stay of Execution]. At the June, 1984, meeting of the Florida Bar, Chief Judge John C. Godbold, United States Court of Appeals for the 11th Circuit, noted: "In another respect we have not succeeded--in making counsel available to death sentenced prisoners. The failure is by all of us--judiciary, legislative and executive branches, and the bar." If all this office was created to do was to stumble from crisis to crisis, which is, in essence, what it has been doing since it opened, the failure is still by all of us. What indigent death row inmates now have in Florida, and what Mr. Troedel has had so far, is not representation, but the illusion of representation.

While the courts in the past have not recognized a right to counsel in post conviction proceedings, Ross v. Moffitt, 417 U.S. 600 (1974), the Legislature of the State of Florida created such a right when it passed the Capital Collateral Representation Act. Having now created a right to counsel under state law, Mr. Troedel is entitled under the sixth and eighth amendments, and the due process and equal protection clauses to the fourteenth amendment, to counsel who has had an opportunity to fully investigate and prepare his claims, engage in effective argument, and has had time in which to conduct an evidentiary hearing. Evitts v. Lucey, 105 S.Ct. 830 (1985); See Goldberg v. Kelley,

397 U.S. 254, 262 (1970). When Mr. Troedel filed his application for a stay below, he filed with it a Motion to Vacate Judgments and Sentences with Leave to Amend. The motion was filed with leave to amend because counsel had not had adequate time to investigate and prepare Mr. Troedel's claims prior to the date set for his execution. That fundamental fact has not changed. The trial court's consideration on the merits of Mr. Troedel's motion for post-conviction relief, and failure to give counsel adequate opportunity to investigate and prepare his motion, violated Mr. Troedel's right to a full and fair hearing[3], and the constitutional provisions set forth above. Surely the haste in which counsel has been required to prepare in this case was not the sort of representation envisoned by the State of Florida in creating this office, is not the representation which should be required by this Court, and does not satisfy in any manner the requirement for an orderly and deliberative process in the capital sentencing determination required by the United States Constitution.

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[3] See 28 U.S.C. Sec. 2254.

POINT 2

THE TRIAL COURT ERRED IN FAILING TO STATE ITS FINDINGS WITH PARTICULARITY, RULING ON THE MOTION WITHOUT THE RECORD BEFORE IT, AND IN FAILING TO ATTACH PORTIONS OF THE RECORD TO ITS ORDER DENYING RELIEF.

The following facts cannot be disputed: (1) The hearing held on the 27th of November was noticed as a hearing on an application for a stay of execution; (2) The trial court had no record before it when it considered the application for a stay of execution; (3) The trial court did not make any findings in its denial of the motion, and failed to attach portions of record to its order. It is clear under Florida Law that where the trial court determines a motion under Rule 3.850 is facially insufficient, it must attach those portions of records which conclusively refute the motion. Henry v. State, 453 So.2d 1387 (Fla. 1st DCA 1984); Lambert v. State, 446 So.2d 243 (Fla. 1st DCA 1984); Allen v. State, 427 So.2d 280 (Fla. 2d DCA 1983). This Court should similarly reverse the order of the trial court, and direct it to consider the 3.850 motion on a record which is before it, as required by the Rule, and if it finds the motion insufficient in light of that record, to attach those portions of the record which so show.

POINT 3

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING

Five of the eight grounds raised in the trial court below are appropriate for post-conviction relief, and require an evidentiary hearing: Grounds one, two, three, seven, and eight. Mr. Troedel proffered significant and substantial factual matters in support of each of his claims, contained in the motion to vacate judgments and sentences and in the accompanying appendix, incorporated by reference. There is no reasonable basis upon which any court could rule on the claims, which involve the knowing use of false and misleading testimony, a Brady violation, and ineffective assistance of counsel, without resolving disputed factual matters. The State did not contend at any point in the hearing below that those Grounds could have been or were raised on appeal, and any argument to that effect by the Attorney General in this Court should be deemed to be waived. Clark v. State, 363 so.2d 331 (Fla. 1978). A hearing on the first and second Grounds was required by Arango v. State, 437 So.2d 1099 (Fla. 1983), and Bogan v. State, 211 So.2d 74 (Fla. 2d DCA 1968). The third, seventh and eighth Grounds, all involving a claim of ineffective assistance of counsel either by State intereference with the right to counsel or otherwise, likewise were sufficient to require an evidentiary hearing and this Court has held so on numerous occasions. Jones v. State, No. 67,835 (Fla. Nov. 4, 1985); Meeks v. State, 382 So.2d 673 (Fla. 1980).

This case should be remanded for an evidentiary hearing.

POINT 4

The trial court erred in denying a stay of execution and in denying the Motion to Vacate Judgments and Sentences because the issues raised in the Motion are substantial and require an evidentiary hearing. Each of the Grounds raised in the trial court, and before this Court on this appeal, is discussed in summary fashion below.

First Ground

THE STATE'S KNOWING USE OF THE FALSE OR MISLEADING TESTIMONY OF AN EXPERT RELEVANT TO THE CRITICAL ISSUE OF WHO FIRED THE MURDER WEAPON AND THAT EXPERT'S CONDUCT IN CHANGING HIS OPINION FROM THAT REFLECTED IN HIS WRITTEN REPORT AND PRIOR TESTIMONY, AND OTHER MISLEADING AND INCONSISTENT TESTIMONY VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On the two most highly significant and damaging pieces of evidence admitted into the trial in this case, the state took inconsistent and misleading positions. In particular, the gunpowder residue analysis was the sole piece of evidence tending to demonstrate Mr. Troedel was the shooter, and committed a premeditated murder. It is the fundamental basis upon which the jury found Mr. Troedel guilty of premeditated murder, upon which the trial court found Mr. Troedel the "trigger man", and therefore imposed a sentence of death, and upon which this Court

upheld the sentence of death. See Troedel v. State, 462 So.2d 392 (Fla. 1984). Yet, on this significant evidence, the state presented to the jury only those facts which it felt supported its theory. In Mr. Hawkins' case, the state presented Mr. Riley's testimony that either Hawkins or Mr. Troedel could have fired the murder weapon or been in proximity to the weapon when it was fired. It also argued the legitimacy of his opinion, and explicitly asked Mr. Riley whether in fact Mr. Hawkins could have fired the murder weapon. In Hawkins' case, Mr. Riley said Hawkins could have. Yet after receiving a verdict of felony murder in Mr. Hawkins' case, when the state was free to prove Mr. Troedel was the shooter in the case and thereby establish premeditated murder, it presented the significantly different, and in fact, false testimony that in Mr. Riley's opinion, Mr. Troedel had fired the murder weapon. This manipulation of an expert's testimony is precisely the sort of conduct that the courts should not, and do not, tolerate. Particularly in a capital case, where a man's life is at stake, the manipulation of evidence undermines in a very significant way the reliability of the convictions and sentences of death.

It is fundamental that the state is prohibited by the fourteenth amendment to the United States Constitution from knowingly presenting false evidence to a jury. Alcorta v. Texas, 355 U.S. 28 (1957). This is true whether the falsity involves credibility, Napue v. Illinios, 300 U.S. 264, 269 (1959),

interpretation or explanation of an exhibit, Miller v. Pate, 386 U.S. 1 (1967), or "manipulation of the evidence by the prosecution [which is] likely to have an important effect on the jury determination." Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). The fair trial requirement of the fourteenth amendment due process clause demands a prosecutor "refrain from improper methods which are calculated to produce wrongful conviction . . ." Berger v. United States, 295 U.S. 78 (1935).

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the court vacated a death sentence where it found prosecutorial argument presented inaccurate and misleading information to a jury. In a series of cases beginning with Gardner v. Florida, 430 U.S. 349 (1977), the Supreme Court has required a heightened degree of reliability of evidence in cases in which the death penalty is to be imposed. Accord, Eddings v. Oklahoma, 102 S.Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 536 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

The failure of the state to notify the defense that their expert would change his testimony from that contained in his report and prior testimony is a separate violation of Mr. Troedel's right to due process, right to confront witnesses and right to the effective assistance of counsel. Defense counsel was lulled by the expert's report into believing he would testify only that either defendant could have fired the murder weapon. The right to a full and fair cross-examination is "absolute and

fundamental". Coxwell v. State, 361 So. 2d. 148 (Fla. 1978). See also Poynter v. Texas, 380 U.S. 400 (1965). It is ". . . the greatest legal engine invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970); Ohio v. Roberts, 448 U.S. 56, 63. 6 (1980). "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). The state's failure to disclose the fact that the "expert" on gunpowder residue was going to change his mind and point the finger on Mr. Troedel completely undercut Mr. Troedel's attorney's ability to prepare an effective cross-examination. In a similar case involving gunpowder residue testimony, the Supreme Court of Mississippi reversed on due process grounds at a conviction where a gunpowder residue had changed his testimony from that given at discovery, in Acevedo v. State of Mississippi, Case No. 54,738 (Miss. April 10, 1985) (attached as Ex. 4, Appendix to Memorandum of Law in Support of Application for Stay of Execution).

This is clearly a case where the state has interfered with the right to effective assistance of counsel by presenting misleading and false testimony, or otherwise tricking defense counsel into believing there would be no need to consult with experts or otherwise prepare an effective cross-examination rebuttal by leading him to believe the expert's testimony would not be particularly damaging. In cases in which a state

interferes with the assistance of counsel, prejudice is presumed. United States v. Cronic, 104 S.Ct. 2039, 2047 (1984); Strickland v. Washington, 104 S.Ct. 2052, 2064, 2067 (1984); Geders v. United States, 425 U.S. 80 (1976); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

In this case, however, defendant has proffered substantial evidence in the affidavit of an expert, and in the form of a proffer of a statement of Mr. Riley himself that it was in fact not possible to conclude from the testing he had performed and information he had that Mr. Troedel had fired the murder weapon.

These facts present a substantial question concerning the reliability of the fundamental basis upon which the premeditated murder convictions and sentences of death are based. This ground is clearly cognizable in a motion for post-conviction relief under 3.850, Fla.R.Crim.P. Bogan v. State, 211 So.2d 74 (Fla. 2d. DCA 1968). This evidence, which goes to the very core of the convictions of premeditated murder and sentences of death, suggests that the "very premise" of our adversary system of criminal justice, that "the guilty be convicted and the innocent go free" Herring v. New York, 422 U.S. 853, 862 (1975), has not been satisfied in this case. The defendant should be given opportunity to prove this claim.

Second Ground

THE STATE'S FAILURE TO DISCLOSE SIGNIFICANT AND PROBATIVE EVIDENCE OF CO-DEFENDANT HAWKINS' PARTICIPATION IN THE BEATING OF AN INMATE TO PREVENT HIM FROM TESTIFYING, THE STATEMENTS OF THE CO-DEFENDANT HAWKINS' FORMER GIRLFRIEND, AND THE SUBSTANCE OF A STATEMENT BY PAULA AYERS VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The state's withholding of information about Mr. Hawkins' violent conduct in the jail and other evidence indicating it was Mr. Hawkins, not Mr. Troedel, who committed the crime violates Brady v. Maryland, 373 U.S. 83 (1953), and progeny. The evidence would have substantially corroborated the defense at both the guilt and penalty phases of trial, and is reasonably likely to have affected the outcome of the trial. The evidence is particularly probative at penalty phase, where the relative culpability of the two defendants was, and remains, a critical issue. In Chaney v. Brown, 730 So. 2d. 1334 (10th Cir. 1984), the Tenth Circuit vacated a sentence of death where the state had withheld evidence indicating a third person may have been responsible for the crime at issue. Even if the withheld evidence would have been inadmissible at the guilt phase, it was clearly relevant to the relative culpability of Mr. Troedel to Hawkins, and would have been admissible at the penalty phase of trial. See Green v. Georgia, 442 U.S. 95 (1979); Enmund v. Florida, 458 U.S. 782 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

The admissibility and relevancy of the evidence withheld by the state is discussed in more detail in the next section, Third Ground. It is clear that this Brady violation is appropriate for the trial court to hear on a Motion for post-conviction relief, and that an evidentiary hearing is required. Arango v. State, 437 So. 2d. 1099 (Fla. 1983).

Third Ground

MR. TROEDEL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF TRIAL CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Mr. Troedel has alleged, with supporting affidavits, statements and records, the specific errors of counsel and resulting prejudice to the extent possible in the short amount of time counsel has had time to prepare this motion. Those allegations unquestionably meet the requirements of Strickland v. Washington, 466 U.S. _____, 104 S.Ct. 2052 (1984), and Knight v. State, 394 So.2d 997 (Fla. 1981), and require an evidentiary hearing for their resolution. O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Vaught v. State, 442 So.2d 217 (Fla. 1983). This memorandum is being prepared on short notice, and discusses the general areas in which counsel was ineffective.

In Strickland v. Washington, _____ U.S. _____, 104 S. Ct. 2052, 80 L.Ed.2d at 674 (1984), the Court held that counsel has "a duty to bring such skill and knowledge as will render the trial a

reliable adversarial testing process." 80 L.Ed.2d at 694. A person convicted of a crime is entitled to relief where his counsel "made errors so serious the counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment", and counsel's deficiency resulted in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." 80 L.Ed.2d at 693, 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 698. The reliable adversarial testing required by the sixth and eighth amendments was not met either at the guilt or penalty phases of this trial.

1. Counsel's failure to adequately investigate, prepare for, cross-examine or rebut the expert testimony concerning the gunpowder residue.

The absolute failure of trial counsel to conduct any investigation into the reliability or basis of the expert opinion of the gunpowder residue witness resulted in the admission of highly incriminating and unreliable testimony against Mr. Troedel. The courts have repeatedly pronounced that "[A]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 214, 217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Rummell v. Estelle, 590 F.2d 103, 104-05 (5th Cir. 1979); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[A]t the heart of effective

representation is the independent duty to investigate and prepare.") The Supreme Court has repeatedly stressed the importance of defense access and consultation with experts to minimize the risk of error when the state intends to introduce expert testimony which will be a factor at trial. Ake v. Oklahoma, 470 U.S. ___, 84 L.Ed.2d 53, 106 S. Ct. ___ (1985). See Blake v. Kemp, 758 F.2d 523, 529-533 (11th Cir. 1985). See also Little v. Streater, 452 U.S. 1 (1981) (In a paternity action, the state cannot deny the putative father blood grouping tests, if he cannot otherwise afford them).

Faced with the knowledge an expert in gunpowder analysis was going to testify against his client, defense counsel did nothing. He made no attempt to depose the expert, made no attempt to discuss possible faults with the expert's conclusion with a defense expert, or otherwise attempt to establish a basis to rebut or confront any inference which could be drawn from the expert's testimony. This complete lack of investigation resulted in the presentation to the jury of entirely unreliable and misleading testimony upon which, and only upon which, it could have based its verdicts of premeditated murder, and recommendation of death. The affidavit of Dale Nute establishes the numerous variables affecting the expert's opinion, and the fact that there was an insufficient foundation for the expert to form an opinion that Mr. Troedel had fired the murder weapon. [See affidavit of Dale Nute, Ex. D, Appendix to Motion to Vacate

Judgments and Sentences]. Counsel made no attempt to establish with the expert that his opinion could have been undercut by a number of variables, including the handcuffing of the defendant, his pat down by the same officer who had retrieved the weapons, the handling of the weapons at the scene, the fact the .22 caliber could have been fired with ammunition in the past which contained antimony and barium, and other variables more fully discussed in the report. Trial attorneys are not experts on everything, and they are required to fully investigate and become knowledgeable of the basis for an expert's opinion. That was not done in this case, and the resulting prejudice is clear from the record now before the Court.

2. The failure to fully investigate the defense in the case.

The defense in this case was straightforward: Mr. Troedel contended Mr. Hawkins surprised him at the scene, herding the victims, along with him, into the house, and that Hawkins shot and killed the victims. In support of this defense theory, counsel presented exclusively the testimony of Mr. Troedel, when full investigation would have produced substantial, additional evidence pointing the finger at the co-defendent Hawkins. This is precisely the sort of failure to investigate into the chosen theory of defense which the Supreme Court in Strickland held could constitute the ineffective assistance of counsel. Available, but not sought out, was the testimony of Scott Gill, who was approached by Hawkins in precisely the same manner as Mr.

Troedel attested to at trial. Hawkins told Mr. Gill, the same as he told Mr. Troedel, that he wanted to use Mr. Gill's car because he was "out of gas". Hawkins also made the highly incriminating and relevant statement to Mr. Gill reflecting his motivation in committing the killings: He thought one of the victims was "messing around" with his girlfriend and "wanted to teach him a lesson". It was only because Mr. Gill knew of Hawkins' prior attempts to get him into trouble, and of his violent behavior in the past, that he did not go with him. Mr. Troedel was not so lucky.

Witness after witness would have attested, as the statements reflect, that Hawkins was a violent man, had a reputation for violence in the community, and, significantly, was very jealous of his girlfriend. In comparison, Mr. Troedel was not a violent man; he was peaceful, and had a reputation for being so.

This evidence would have been admissible at the guilt phase of the trial. It is clear under Florida Law that "one accused of a crime may show his innocence by proof of the guilt of another." Moreno v. State, 418 So. 2d 1223 (Fla. 3rd DCA 1982); Pahl v. State, 415 So. 2d 42 (2nd DCA 1982). In Moreno, the Court reversed where the trial court had refused to permit the defense to show the probability that the state's key witnesses actually committed the crime for which the defendant was charged because they had committed a similar crime some months later. Holding

the defendant was not bound by the strict requirements of the Williams rule in Florida, the Court reversed, finding that in such circumstances "all doubt should be resolved in favor of admissibility." Id. at 1225. Similarly, in Chandler v. State, 366 So. 2d. 64 (Fla. 3rd DCA 1978), the Court reversed an arson conviction where the trial court refused to permit evidence proffered by the defendant that the victim had set fires in the past. The Court stated "nevertheless, where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission." Id. at 70.

The Constitution requires no less. In Washington v. Texas, 388 U.S. 14 (1967), the United States Supreme Court invalidated a state statute which precluded a defendant from calling an accomplice on his behalf. In Washington, the defendant's theory of the defense was that an accomplice, not he, had committed the murder for which he was accused. Declaring the Texas statute constitutionally infirm, the Court stated: "the framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." Id. at 23.

This admissible, highly probative evidence of the defendant's innocence and the guilt of Hawkins was never presented to the jury, and, this Court must agree, its absence undermines the fundamental evidence supporting Mr. Troedel's convictions and sentences of death.

3. The failure to object to inadmissible evidence and to improper prosecutorial arguments.

The impropriety of the arguments referred to under this ground is addressed in the Memorandum under Sixth Ground. Counsel has stated he had no tactical reason for failing to object to the clearly improper and prejudicial arguments of the state.

The state's cross-examination of Mr. Troedel on his prior crimes when he testified exceeded the bounds permissible under Florida Law and the Constitution. Improper comments on prior crimes of the accused resulted in reversible error in Florida where objection is made, Dixon v. State, 426 So. 2d. 1258 (2nd DCA 1983); Panzavecchia v. Wainwright, 658 So. 2d. 337 (5th Cir. 1981).

The courts have recognized a reasonably effective attorney is required to present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F. 2d 636, 637 (5th Cir. 1970). Counsel has been found to be ineffective for failing to raise objections, to move to strike and to seek to limit instructions regarding inadmissible, highly prejudicial testimony, Vela v. Estell, 708 F. 2d. 954, 961-66 (5th Cir. 1983), cert. denied ____ U.S. ____, 79 LED 2d. 195 (1984), for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F. 2d. 938 (8th Cir. 1976), for failing to object to improper questions, Goodwin v. Balkcom, 684 F. 2d. at 816-17, and for failing to object to improper jury

argument, Vela, 708 F. 2d at 963.

Counsel has shown substantial enough deficiencies to require an evidentiary hearing or to question defense counsel concerning his reasons for failing to object to the highly prejudicial and inadmissable comments of the prosecutor.

Penalty Phase

The courts have held defense attorneys who undertake representation of defendants in capital cases to a very high standard of effectiveness. This is because in a capital case, "accurate sentencing information is an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. at 190. The courts have expressly found trial counsel in capital sentencing proceedings ineffective for failing to investigate and prepare mitigating evidence, object to inadmissible evidence or improper jury instructions, and for having made an inadequate closing argument. Tyler v. Kemp, 755 So.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, ___ U.S. ___ (1984), 104 S.Ct. 3575, adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, ___ U.S. ___, 85 L.Ed.2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, ___ U.S. ___ 104 S.Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984)

(cert. denied) ___ U.S. ___, 84 L.Ed.2d 321 (1985); Holmes v. State, 429 So.2d 297 (Fla. 1983). In Tyler, the court set forth a rationale for its enhanced standards for effectiveness of attorneys handling capital cases:

> In Lockett v. Ohio, 438 U.S. 586 (1978) the court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty decision that was made was thus robbed of the reliability essential to assure confidence in that decision.

Tyler, 755 F.2d at 745 (emphasis supplied).

The substantial mitigating evidence of Mr. Troedel's childhood and background was available to defense counsel, had he sought it, and would have been persuasive enough to the sentencing jury and court to have affected the outcome of the sentencing proceeding. The Supreme Court has recognized the substantiality of such testimony as evidence of the many "compassionate and mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The jury and sentencing court are required to consider "relevant facts of the character and record of the individual offender and the circumstances of the particular

offense as a constitutionally indispensible part of the process of inflicting death." Woodson, U.S. at 304. In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court clarified those "relevant facets" by stating that the sentencing authority may "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for sentence less than death." Id. at 604 (emphasis in original). The anectodal testimony about Mr. Troedel's childhood, separation from his natural father and rearing by an abusive step-father, medical problems in his youth and on the day of the crime, good acts, peacefulness and non-violence, and relative culpability to Hawkins is likely to have affected the sentencing jury and court, particularly in light of the fact the recommendation of death was rendered by the one vote margin of 7-5.

In closing argument at penalty phase, counsel failed to mention any of the mitigating factors, and instead focused exclusively on rhetoric and ineffectual appeals to the jury. Such arguments did not adequately guide the jury in its critical sentencing recommendation, and can form a basis for a finding of ineffective assistance. See King v. Strickland; Douglas v. Wainwright, supra.

Entirely absent from the penalty phase of the proceeding is any discussion of the relative guilt of Hawkins in the killings,

and any evidence relating to the fact that Mr. Hawkins could have dominated Mr. Troedel. This evidence consists primarily of testimony from Mr. Troedel's relatives that he was nice, respectful, and exhibited passive behavior. Because of the lack of any evidence concerning Hawkins, the trial court failed to find as mitigating circumstances either that Hawkins had dominated Mr. Troedel or that he was the primary mover and that Mr. Troedel was less culpable for the crimes.

Substantial evidence of the domineering, violent, and unpredictable behavior of Hawkins together with the evidence of Hawkins' motives and prior attempt to manipulate another person into coming with him, from the statements of Mr. Gill and of Ms. Paula Ayers, was admissible and highly relevant to whether the jury should recommend a sentence of death for Mr. Troedel. The evidence would have been admissible, and in fact would have been required to be admitted and considered by the sentencer, under clear holdings of the Supreme Court that any circumstances of the offense must be considered by the sentencer. Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Supreme Court has recognized that the eighth amendment requires a consideration of the relative culpability of two co-defendants in the killing in determining whether a sentence of death is appropriate. In Enmund v. Florida, 45 U.S. 782 (1982), even the dissenters held the eighth amendment required a focus on the relative culpability of two co-

defendants as a mitigating circumstance. Enmund, 102 S. Ct. at 3392 (quoting Proffitt v. Florida, 428 U.S. 242, 258 (1976)). See Chaney v. Brown, 73 F. 2d. 1334, 1351-57 (10th Cir. 1984).

The principle is such an important one that any state law evidentiary rule which might preclude some of the evidence proferred in the motion would have to fall on its weight. Green v. Georgia, 442 U.S. 95 (1979). In Green, the defendant was denied an opportunity to introduce testimony of a third person who repeatedly made an incriminatory statement about the co-defendant because of the Georgia hearsay rule. Exclusion of such proof at the penalty phase at trial was held to be a violation of the eighth amendment. The Supreme Court stated:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constitutes a violation of the due process clause of the fourteenth amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, See Lockett v.Ohio, 438 U.S. 586, 604-605 (1978) (Parrell the opinion); Id. at 613-616 (Opinion of Blackman, J.), and substantial reasons existed to assume its reliability. Id. at 97, 99 S. Ct. at 2151.

Under these standards, the incriminating statements made by Hawkins to both Gill and Ms. Ayers, and even the police report which recorded Ms. Ayers' statement, and her deposition testimony, would have been admissible at the penalty phase of the proceeding. Other evidence of Hawkins' violence and bad acts would likewise have been admissable, had they only been investigated.

The defendant has proffered substantial evidence to demonstrate he is now serving convictions and sentences of death under circumstances which "undermine" their "reliability." He is entitled to a stay of execution for further development of these facts and for an evidentiary hearing upon reasonable notice.

Fourth Ground

THE SELECTION OF JURORS QUALIFIED TO RECOMMEND A SENTENCE OF DEATH AND THE CIRCUMSTANCES SURROUNDING THE DEATH QUALIFICATION PROCESS VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The constitutionality of the practice of qualifying for service only those jurors who can vote for death was explicitly reserved by the United States Supreme Court in Witherspoon v. Illinois and is to be decided by that Court this term in Lockhart v. McCree, 54 U.S.L.W. 3223 (Oct. 17, 1985) (order granting certiorari). The intervening years have brought a still-growing body of social science evidence uniformly showing death-qualified juries are prosecution-prone, and are more likely to convict in the guilt phase than a jury not qualified to render a decision of death. Exclusion of death-scrupled jurors is also unrepresentative of a fair cross-section of the community. This claim presents three separate, but related questions.

a. First, a death qualified jury is unnaturally and unconstitutionally prone to convict a defendant at the

guilt/innocence phase, where some jurors are excluded from sitting for the entirely irrelevant reason that they cannot vote to impose a sentence of death. In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), cert. granted sub. nom., Lockhart v. McCree, 54 U.S.L.W. 3223 (Oct. 17, 1985), the Court reviewed the overwhelming scientific evidence on the issue, and so concluded. The rationale for the decision, briefly put, is that a juror's beliefs on the death penalty represents an amalgam of values held by that individual. In statistically significant numbers, jurors who oppose the death penalty also hold beliefs which make them less likely to convict than death penalty supporters, who are generally more authoritarian and intuitively biased toward the prosecution. The result is that capital cases in which death-scrupled jurors are disqualified from sitting fail to meet the most basic tenet of our jury trial system: that a jury should be fair and impartial.

b. It is not only the disqualification of death-scrupled jurors, but the questioning process itself involved in that selection, which produces an unfair and partial jury. From the start, the attention of prospective jurors in this case was directed to the decision of death. It is to the participants, and particularly the Court, that jurors look for information about the case before them and for their duties and responsibilities.

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.), affd. 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 (Oct. 17, 1985).

c. Finally, the death-qualified jury, having been stripped of citizens opposing the death penalty, does not represent a fair cross-section of the community. See Grigsby, supra.

There was no objection at trial to the death-qualification process in this case on the grounds stated above, but historically, the Supreme Court has not required an objection to Witherspoon-related issues. See Adams v. Texas. Defense counsel could not be expected to object, though, since this case was tried before any court had ruled the process challenged here was constitutionally defective. This Court in Witt v. State recognized that claims are appropriately raised in a post-conviction motion in the absence of an objection when a fundamental change in constitutional law is fashioned by either that Court or the United State Supreme Court in the interim. The en banc decision of the Eighth Circuit in Grigsby is based on solid, reliable evidence and addresses the specific issue before this Court in a manner which, if binding, would require the vacation of Mr. Troedel's convictions and death sentences. The

issue is now before the United States Supreme Court in McCree, and will be decided this term. We do not pretend to be able to predict the Supreme Court's decision on this claim will be a favorable one, but, if it is favorable, it will unquestionably be a fundamental change in the law governing capital cases, and thus properly before this Court. We ask that Mr. Troedel not be executed while the Supreme Court ponders a claim directly bearing on the constitutionality of his convictions.

Fifth Ground

IMPROPER PROSECUTORIAL COMMENTS WHICH INVOKED ITS REPRESENTATION OF THE COMMUNITY, DEROGATED THE JURY'S ROLE IN THE DEATH SENTENCING DECISION, AND IN WHICH THE STATE RELIED ON THE NON-RECORD TESTIMONY OF HAWKINS IN HIS TRIAL VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The jury in this case was grossly misinformed about its role in the sentencing process, and was invited to disregard the substantial importance of its recommendation of death. While the jury was told on several occasions its decision on sentencing was "only a recommendation," under Florida law this Court has "consistently held that a jury's sentencing recommendation is entitled to great weight." Hawkins v. State, 462 So.2d 392 (Fla. 1984); Tedder v. State, 322 So.2d 908 (Fla. 1975); Walsh v. State, 418 So.2d 1000 (Fla. 1982). This campaign of misinformation went unabated, as the jury was variously informed it could shed its solemn responsibility and rely on the previous

judgments of the jury convicting the co-defendant Hawkins, on the community's support for the prosecution team, and after the fact, on this Court to correct any errors.

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the Supreme Court vacated a death sentence where, as here, the prosecution told the jury "as I know, and as Judge Baker has told you, that the decision is automatically reviewable by the Supreme Court." Id. at 2638. The jury was repeatedly here told this Court would review any decision it made, [Tr. 275-6, 335-6, 493-4, 501, 738, 869, 952-3 and 1023], a comment roundly condemned by the United States Supreme Court in Caldwell:

> [I]t is constitutionally impermissible to rest a death sentence on determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Id. at 2639.

The prosecutor's reference to review only if a death sentence was imposed likewise implicated another concern of the Supreme Court in Caldwell: that the jury would be encouraged to recommend a death sentence to ensure proper review. In the Court's words:

> If the jury understands that only a death sentence will be reviewed, it will also understand that any decision to "delegate" responsibility for sentencing can only be effectuated by returning that sentence. But for a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the spectre of the

> imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns.

Id. at 2641. No other understanding than that feared by the Court in Caldwell could have been relayed to the jury by the prosecutor's statements "[s]hould the -- for instance, the jury recommend death, and the Judge sentences the individual to death, he is entitled as a matter of right for a direct appeal to the Supreme Court of Florida." [Tr. 275-6 and others noted in motion].

In her concurring opinion in Caldwell, Justice O'Connor emphasized that the prosecutor's comments "were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." Id. at 2646. The prosecutor in Caldwell, as here, left the jury with the mistaken impression that automatic appellate review would authoritatively determine whether death was appropriate, without simultaneously informing the jury its recommendation of death was both to be given great weight by the trial court and reach the Florida Supreme Court with a presumption of correctness. Justice O'Connor concludes:

> I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that 'the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake.'

Id. at 2647.

The trial court's invitation to the prosecutor to make the

remarks lent then further credibility and importance in the jury's eyes.

The invocation of the community as favoring the prosecution and the prior jury determination of guilt likewise diminished the jury's sense of responsibility in the case. Similar remarks have been condemned on those grounds because they led "the jury to believe that the whole governmental establishment had already determined the appellant to be guilty ahead of time." Brooks v. Kemp. See also, Westbrook v. General Tire and Rubber Co., 754 F.2d 1233 (5th Cir. 1985) (en banc); United States v. Kupituk, 690 F.2d 1289, 1242-3 (11th Cir. 1982).

This claim is cognizable under Witt v. State, 387 so.2d 922 (Fla. 1980), because the Supreme Court fundamentally changed the standard of review of arguments to the jury in capital cases in Caldwell. The legal standard set by the Supreme Court in Caldwell is a significant departure from that previously used to determine the propriety of prosecutorial closing arguments, articulated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), for two reasons.

Donnelly was a non-capital case holding challenges to prosecutorial arguments are to be subjected to a "fundamental fairness" standard under the Sixth and Fourteenth amendments. Id. at 642. While the same "fundamental fairness" wording is used in Caldwell, the Court for the first time makes clear that for the purpose of reviewing arguments in the sentencing phase of

a capital case, it will apply a heightened standard corresponding with the need for enhanced reliability of the sentencing determination under the eighth amendment. The Court holds:

> In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S., at 305, 96 S.Ct., at 2991 (plurality opinion). Such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing procedure as to violate the Eighth Amendment.

Caldwell, 105 S.Ct. at 2645.

Perhaps more important is the abandonment by the Court in Caldwell of any necessity for demonstrating prejudice when a prosecutorial argument may affect the reliability of the death sentencing process, thereby implicating the Eighth Amendment. Unlike a number of prior cases requiring a showing of prejudice when an improper closing argument is made, the standard adopted by the Supreme Court bypasses an inquiry into prejudice when the argument may affect the death sentencing determination. The Court's only reference to any semblance of a prejudice requirement is its passing comment that "[b]ecause we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S.Ct. at 2646. The language used by the Court is essentially a paraphrase of the

harmless error test articulated in Chapman v. California, 386 U.S. 18 (1967). Justice O'Connor's concurring opinion casts the standard in similar language: "I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that 'the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake'." 105 S.Ct. at 2647.

This announcement of fundamental changes in the legal analysis to be applied to review of challenges to closing arguments in the penalty phase of capital cases reflects a sufficient change in the law to make this issue cognizable under Witt, supra.

Sixth Ground

THE SENTENCES OF DEATH RESULTING FROM A VERDICT OF PREMEDITATED MURDER AND CONSEQUENT TRIAL COURT FINDING MR. TROEDEL WAS THE "TRIGGER MAN" ARE BASED ON INACCURATE STATEMENTS OF THE PROSECUTOR REGARDING IMPUTED INTENT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court declared unconstitutional then-existing Florida law which permitted the imposition of a death sentence regardless of the defendant's intent to kill. The Court held:

> [I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one . . . who aids and

> abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

The Fifth Circuit has held in a series of cases that in order to impose a sentence of death the critical finding of intent must be made by the jury after receiving carefully guided instructions focusing on the issue. The first case to so hold is Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984), where the Court vacated a death sentence based on jury instructions permitting a conviction based on participation in a conspiracy. The Court held:

> A reasonable juror carefully heeding these instructions fairly could conclude that Jones's intent to commit murder may be imputed to Reddix. That imputation is exactly what Enmund and the eighth amendment prohibit in death penalty cases. Consequently, the death sentence is infirm under the United States Constitution and cannot stand.

Id. at 709.

On rehearing, the Court made clear the basis for its holding was not whether there was sufficient evidence of intent in the record, but whether it could determine the jury made the requisite finding of intent.

> In its petition for rehearing, the state essentially urges us to adopt a position we have already adopted. We agree with the state that a felony murder conviction may support the death sentence. We also agree that the evidence in this case is sufficient to support a jury conclusion that Reddix had a personal intent to kill.

> What the panel held, however, and a point with which the state takes issue, is that because the jury instructions might have led the jury to believe it could impute the intent of Reddix's accomplice, who actually committed the murder, to Reddix, we do not know whether the jury concluded that Reddix had the personal intent to kill necessary before the state may impose the death sentence. This holding is exactly what Enmund . . . require[s].

732 F.2d at 494 (emphasis added).

In Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984), the Court held the Eighth Amendment required both that there be sufficient evidence of intent in the record and that the jury is required to make a sufficient finding of intent. Id. at 812. The death sentence in that case was also vacated. Similarly, in Bullock v. Lucas, 743 F.2d 244 (5th Cir.) cert. granted, Cabana, Supt. v. Bullock, 53 U.S.L.W. 3757 (Apr. 17, 1985), the Court vacated the death sentence where the same infirmity existed. The Court respected the constitutional requirement that the state must focus on the personal intent and culpability of the defendant where it seeks to impose a death sentence, holding that "while the trier of fact may impute intent to an aider and abetter, for the purpose of determining guilt, that imputation may not be done for the purpose of imposing the death penalty." Id. at 247.

The comments of the prosecutor can be sufficient to render the jury's verdict on the premeditated murder issue meaningless. It is not just the instructions the Courts look to in trying to divine the meaning of a jury verdict, but "what the jury heard and

saw as the trial progressed, from beginning to end." Fleming v. Kemp, 748 F.2d 1435, 1454 (11th Cir. 1984), citing, Lamb v. Jernigan, 683 F.2d 1332, 1339 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983). Inaccurate prosecutorial comments alone relating to the jury's sentencing function were the basis of the Supreme Court's decision to vacate the sentence of death of the petitioner in Caldwell v. Mississippi, 165 S.Ct. 2633 (1985).

The Eleventh Circuit has adopted a standard of reviewing the evidence in the light most favorable to the defendant, together with the surrounding arguments and charges, in determining the sufficiency of the finding of intent under Enmund, in Ross v. Kemp, 750 F.2d 1483 (11th Cir. 1985) (en banc).

This issue is clearly a substantial one which goes to the heart of whether Mr. Troedel's death sentence is a constitutional one. The Supreme Court granted certiorari on this issue and will render a definitive decision in Cabana, Supt. v. Bullock, 53 U.S.L.W. 3757 (U.S. Apr. 17, 1985). The pendency of a substantial issue raised on behalf of a death-sentenced defendant is certainly a legitimate basis for staying execution until it is resolved. In Autrey v. Estelle, 104 S.Ct. 24 (1983), Justice White stayed the execution in a successor habeas case pending the disposition of the issue raised by that petitioner which was then pending before the United States Supreme Court. Justice White, noting the grant of certiorari reflected the substantial nature of the issue, held:

> Of course I do not know how the Court will rule on the question, but in view of the judgment of the Court of Appeals from the Ninth Circuit and in view of our decision to give the case plenary consideration, I cannot say that the issue lacks substance. Accordingly, I issue a certificate of probable cause and stay petitioner's execution pending the final disposition of the appeal by the court of appeals, or until the Court's or my final order.

Id. at 25.

This claim is properly before the Court at this time.

A change in the law governing capital cases has been held to be an appropriate basis for post-conviction relief in Witt v. State, 387 So.2d 923 (Fla. 1980). Witt recognizes a claim based on a change is cognizable where that change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. This Court recognized the Enmund theory nearly identical to the one before the Court can be heard in post-conviction in Tafero v. State, 459 So.2d 1054, 1055 (Fla. 1984):

> As his first point on appeal, Tafero claims that his death sentences violate the eighth amendment per Enmund v. Florida, 458 U.S. 782 (1982), because the jury did not specifically find that he killed anyone, intended to kill anyone, or that anyone be killed. To start, we find Enmund to be such a change in the law as to be cognizable in post-conviction proceedings under Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 796 (1980).

Enmund was not decided until after the trial in this case

was completed, but an Enmund claim was raised on appeal. However, there was no case law to support the specific Enmund claim presented here, since Reddix and its progeny were not even decided until 1984. This case is in the same posture as Tafero. The United States Supreme Court will shortly establish the proper rules for the Court and jury when it decides Cabana, deciding the issue not contemplated or discussed in Enmund. Mr. Troedel's execution should be stayed pending that decision.

Seventh Ground

MR. TROEDEL WAS DENIED HIS RIGHT TO BE FREE FROM SELF-INCRIMINATION, TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TOM OSTEEN, ASSISTANT PUBLIC DEFENDER, UNDERTOOK REPRESENTATION OF BOTH HIM AND MR. HAWKINS AND RECEIVED CONFIDENTIAL COMMUNICATIONS FROM MR. TROEDEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the critical first six weeks in which investigation of the circumstances surrounding the offense can be most fruitful, Mr. Troedel was effectively denied the representation of counsel because his assistant public defender represented conflicting interests. The sixth amendment to the United States Constitution guarantees the criminally accused the right to conflict-free representation: "The 'assistance of counsel' guaranteed by the sixth amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent

conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). Prejudice is presumed when a defendant demonstrates "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). The former fifth circuit in Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981) (Unit B), defines actual conflict of interest as follows:

> An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.

Id. at 396.

In this case, literally every action taken on behalf of Mr. Hawkins by Mr. Troedel's former counsel, Tom Osteen, damaged Mr. Troedel. As counsel recognized during the motion to sever, the defenses were antagonistic and conflicting, with both defendants pointing the finger at the other. The record created by defense counsel, in representing Mr. Hawkins, served as a basis for upholding not only the convictions but the sentences of death imposed upon Mr. Troedel. See Troedel v. State, 462 So.2d 392, 397 (Fla. 1984). The statements made by former counsel Osteen to the effect that every other client he had represented he thought was guilty of committing the murder, but that Mr. Hawkins wasn't, was made before the same sentencing judge who sentenced Mr. Troedel to death, and could be used as an inference that Osteen had received confidential information from Mr. Troedel that he had in fact committed the crime. That record was also reviewed

by the Florida Supreme Court and relied upon as a basis for affirming Mr. Troedel's sentence of death.

In addition, the fact Mr. Troedel had communicated privately and confidentially with counsel for the codefendant Hawkins could have affected Mr. Grogan's decision whether to put Mr. Hawkins on the stand and testify in Mr. Troedel's trial. Uninformed as to what information Mr. Osteen may impart to Mr. Hawkins, the decision as to how much to point the finger at Mr. Hawkins, and whether to subject him to adverse examination could be affected by such concerns.

The dangers inherent in multiple representation are forbidden by the federal rules, which require the court to make an immediate inquiry into conflicting defenses when it appears that multiple representation is involved. See Fed.R.Crim.P. 44(c). The United States Supreme Court has noted:

> Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation.

Cuyler, 446 U.S. at 346. In both Georgia and California, in all capital cases, each defendant is to be provided with separate, independent counsel. Fleming v. State, 270 S.E.2d 185 (Georgia 1980); People v. Mroczko, 672 P.2d 835 (California 1983).

The dangers of multiple representation are so antagonistic to our concept of an adversarial system of criminal justice that

the courts require close scrutiny of any case in which it occurs. See Cuyler, supra. The facts here proffered by the defendant are sufficient to require further exploration in an evidentiary hearing.

Eighth Ground

BECAUSE OF THE TIMING OF THE REDUCTION OF THE CO-DEFENDANT'S SENTENCE TO LIFE IN PRISON, COUNSEL WAS PRECLUDED BY STATE ACTION FROM EFFECTIVELY REPRESENTING HIS CLIENT IN PRESENTING A PENALTY PHASE DEFENSE, AND CONFRONTING AND CROSS-EXAMINING EVIDENCE, ALL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The critical and undeniable fact undermining any reliability of the sentence of death in this case is that no sentencer, either the jury or this trial court, ever had an opportunity to consider Mr. Troedel's sentence in light of the life sentence of the codefendant Hawkins. Mr. Hawkins was not sentenced at the time of Mr. Troedel's sentencing hearing and his sentence was not reduced to life until this Court did so in July of 1983. See Hawkins v. State, 436 So.2d 44 (Fla. 1983). This is a case in which the state court processes, and timing of the decisions bearing both on the sentence of Hawkins and Mr. Troedel denied his attorney any opportunity to fully develop a penalty phase defense based on the relative culpability of Hawkins compared to that of Mr. Troedel. The Supreme Court has found that state interference with the assistance of counsel renders a conviction or sentence presumptively unconstitutional in a variety of

circumstances. See, e.g., Geders v. United States, 425 U.S. 80, 91 (1976) (order prohibiting defendant from consulting with counsel during overnight recess); Herring v. New York, 422 U.S. 853, 865 (1975) (refusal to permit defense attorney to make closing arguments in criminal bench trials). While the error occurred because of the timing of the Supreme Court processes, it is clear this issue was appropriately before the trial court as it involves a denial of trial counsel the ability to present an effective penalty phase defense before the trial court. Claims based on ineffective assistance of counsel in this manner, which inherently involve the taking of evidence, are appropriate for post conviction relief. This Court has held on numerous times that a defendant is precluded from arguing he was denied the effective assistance of trial counsel in his direct appeal. Perri v. State, 441 So.2d 606, 607 (Fla. 1983); Gibson v. State, 351 So.2d 948 (Fla. 1977); State v. Barber, 301 So.2d 7 (Fla. 1974).

Reasonably effective trial counsel would have focused the penalty phase defense on facts which quite noticeably are now absent from the record of the case: those involving the relative culpability of Hawkins and Troedel. The defendant has now proffered substantial factors which would have affected that decision, set forth more fully in the preceding grounds, and is entitled to an evidentiary hearing on this substantial claim.

This Court has repeatedly stressed the importance and

persuasive value of a comparison of the treatment of codefendants in determining whether a death sentence is appropriate. In Slater v. State, 316 So.2d 539 (Fla. 1975), the court stated:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

Id. at 542. Had this case been remanded for resentencing by this Court, it is unquestionable a sentencing jury and the trial court would have been permitted to consider and hear evidence on the relative culpability of Hawkins and Troedel in light of Hawkins' life sentence. Gafford v. State, 387 So.2d 333 (Fla. 1980). Mr. Troedel should not be denied this opportunity because of a fluke in the timing of the sentencing determinations made in both cases.

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 to Peggy Quince, Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida, this 22 day of November, 1985.

Attorney