IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

FILED

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Nos. 68,581 & 69,112

ON APPEAL FROM ORDERS OF THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA, WHICH DENIED POST-CONVICTION AND RELATED RELIEF

APPELLANT'S INITIAL BRIEF

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APPELLANT'S INITIAL BRIEF

I. PRELIMINARY STATEMENT

Appeal No. **68,581** is **(1)** from a March **12, 1986** order of Hon. John E. Santora, Jr., of the Fourth Judicial Circuit Court, Duval County, which denied in its entirety Appellant Rufus E. Stevens' Amended Motion for Post-Conviction Relief made pursuant to Rule 3.850, Fla. R. Crim. P., and (2) from other orders made in the course of the post-conviction proceedings. Stevens had challenged his conviction and his death sentence claiming, inter alia, ineffective assistance of counsel at both trial and sentencing,[1] his lack of opportunity

[1] Stevens will soon be filing with this Court a petition for a writ of habeas corpus, challenging the ineffective assistance of counsel rendered him on the direct appeal (No. **57,738)** of his conviction. The same attorney who represented Stevens at trial represented him on his original appeal to

to review the presentence investigation and a psychiatrist's report --- both of which were relied upon by Judge Santora in imposing sentence and both of which contained serious errors--- and the prosecution's failure to reveal information which would have provided trial counsel with the basis for obtaining the suppression of one of the two pieces of evidence which appeared to link Stevens to participation in the actual killing of the decedent. We continue to press those and other grounds for relief. In addition, we maintain that Judge Santora's failure to grant our motion to disqualify himself from conducting the post-conviction hearing not only violated statutory and case law which required his recusal but also resulted in an unfair proceeding and a seriously biased order denying the relief sought.

Stevens' application for clemency is pending before the Governor and the Cabinet. No warrant for his execution has ever been signed.

Consolidated Appeal No. 69,112 is from a July 9, 1986 order of Judge Santora denying pro bono counsel for Stevens reimbursement of their out-of-pocket expenses incurred during the post-conviction proceedings. This Court has jurisdiction of both appeals. Art. V, §3(b)(1), Fla. Const.

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this Court --- thereby compounding the serious errors and omissions which pervaded the trial and sentencing proceedings in the court below.

II. STATEMENT OF THE CASE[2]

Stevens was arrested on March 20, 1979 for the murder a week earlier of Eleanor Kathy Tolin, and he and Gregory Scott Engle were indicted for murder in the first degree on April 5, 1979 (R 1).[3] On March 26, 1979 John R. Forbes of Jacksonville was appointed by Judge Santora to represent Stevens, who was insolvent (RDA 6).

A hearing was had on July 5, 1979 on Stevens' motion to suppress and motion in limine --- both of which sought to exclude statements made by him (TT 12-189). Stevens' trial before a jury began on July 16, 1979 and resulted in a verdict of guilty of murder in the first degree on July 20 (TT 192-1191). After a short penalty hearing the following day, the jury recommended that Stevens be sentenced to 25 years to life in prison (TT 1196-1295). On August 17, 1979 Judge Santora

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[2] A comprehensive statement of all the motions and other proceedings in this matter would be unduly lengthy. We therefore give the Court an overview of the relevant proceedings. Other proceedings are discussed below when relevant to the presentation of our arguments.

[3] Parenthetical references preceded by "R" and "SR" are to the appropriate pages of the record and supplemental record (respectively) on Appeal No. 68,581; those preceded by "RDA" are to the record on the direct appeal, No. 57,738; those preceded by "RCA" are to the record on consolidated appeal, No. 69,112; those preceded by "T" are to the stenographer's transcript in the post-conviction proceeding; and those preceded by "TT" are to the stenographer's transcript of the trial, sentence and related proceedings.

ignored the jury's recommendation and imposed a sentence of death (TT 1298-1307).[4]

Judge Santora appointed Forbes to handle Stevens' direct appeal (RDA 110). This Court affirmed the conviction and sentence on September 14, 1982. Stevens v. State, 419 So. 2d 1058 (Fla. 1982). Justice McDonald, joined by Justice Overton, dissented as to the sentence, finding that there had been a rational basis for the jury's recommendation. Id. at 1065.[5] Review by the United States Supreme Court was denied on February 22, 1983. Stevens v. Florida, 459 U.S. 1228 (1983).[6]

Stevens thereafter sought clemency from his death sentence.[7] A hearing before the Governor and the Cabinet was

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[4] Engle moved for and was granted a separate trial on the ground that Stevens had made statements which incriminated Engle. Engle was tried in May of 1979 and found guilty of murder in the first degree. The jury recommended life imprisonment. Engle moved for and was granted a separate sentencing hearing based upon his rights under Bruton v. United States, 391 U.S. 123 (1968). On August 17, 1979 Engle also was sentenced to death by Judge Santora.

[5] Following this Court's affirmance of the conviction, present pro bono counsel began representing Stevens.

[6] On Engle's direct appeal to this Court his conviction was affirmed but his death sentence was vacated because Judge Santora had unconstitutionally relied upon Stevens' statements implicating Engle. Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984).

[7] A substantial excerpt from his clemency brief is set forth at R 149-68.

held on March 21, 1984. The application for clemency is still pending.

On March 22, 1984 Stevens filed a Motion for Post-Conviction Relief (R 12-195) in the Circuit Court. On November 8, 1984 an Amended Motion for Post-Conviction Relief (R 252-493) was filed. A Supplement to the Amended Motion was filed on January 22, 1985 (R 515-50). A hearing was held on the Amended Motion and the Supplement thereto on November 9, 1984 and January 23, 24 and 25, 1985 (T 154-959). On March 12, 1986 Judge Santora denied Stevens' motion in all respects (R 629-39).

III. STATEMENT OF FACTS[8]

Eleanor Kathy Tolin, a clerk in a convenience store, was robbed, kidnapped, raped and killed in Jacksonville in the early morning hours of March 13, 1979. As to these facts there was essentially no dispute. Stevens confessed that he participated in the robbery, kidnapping and rape-(TT 898-918). He stated, however, that Engle, and Engle alone, killed Tolin (TT 923-24). The crucial factual issue at the trial therefore

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[8] As was true with the procedural history above, we set forth here only an overview of the facts of the case. Specific facts relevant to the points we make are discussed below as part of the arguments to which they are related.

was whether Stevens was a participant in, and responsible for, Tolin's killing.

There were but two pieces of circumstantial evidence which even tended to show some connection between Stevens and the actual killing, and both were admitted in violation of Stevens' constitutional rights.

The first was testimony elicited from Nathan Hamilton, who turned Stevens and Engle in to the authorities.[9] Hamilton testified that Engle[10] told him the following, among other things (TT 578): "... Rufus went crazy and started saying she's [Tolin's] going to identify us ...." The prosecutor characterized this statement --- which he referred to as the "most accurate" evidence in the case, even more accurate than Stevens' entire statements to the police (TT 1127) --- as meaning: "... let's kill her so she can't identify us" (TT 1139).

The second item of circumstantial evidence tending to link Stevens to the actual killing was a dull knife found under Stevens trailer (TT 677-78).[11] The knife was testified

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[9] At least a significant part of Hamilton's motivation was an outstanding $5,000 reward (see Parmenter deposition pp. 5-6).

[10] Engle's statement as repeated by Hamilton clearly should have been excluded in accordance with Bruton v. United States, supra. See pp. 39-40, infra.

[11] The knife was found as a direct result of post-indictment statements elicited by the police in clear violation of Stevens' constitutional right to counsel. In viola-

by the medical examiner to be consistent with a bruise found on Tolin's back --- caused by an apparent attempt to stab her (TT 800-01). In his summation the prosecutor referred to the dull knife again and again, linking the attempted stab wound on the back to the knife found under Stevens' trailer. See, e.g., TT 1115, TT 1121.

IV. SUMMARY OF ARGUMENT

Despite the tremendous number of appeals --- direct and collateral --- that this Court must consider each year in capital cases, this matter is a particularly disturbing one. Stevens' principal claims in his post-conviction motion in the Circuit Court revolved around the ineffective assistance of counsel he received both at trial and sentencing.

Had counsel at trial been effective, he would have been able to have the largest portion of the State's case excluded on constitutional grounds. Stevens' detailed confession to involvement in the robbery, kidnapping and rape which preceded the homicide should have been excluded upon two grounds based upon the Fourth Amendment to the United States Constitution and Article I, §12 of the Florida Constitution.

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tion of Brady v. Maryland, 373 U.S. 83 (1963), the prosecution suppressed the evidence which proved that the dull knife had been found as a result of Stevens' unconstitutionally-obtained statements. See Point Five, infra.

Counsel, however, never sought suppression on either of these grounds. Significantly, Stevens' confession denied any responsibility for the killing which he said was committed solely by Engle. The evidence[12] which principally connected Stevens to the killing --- a statement Engle allegedly made to a mutual friend --- was admitted without objection despite the fact that it was clearly inadmissible pursuant to Bruton v. United States, supra. The only other evidence which had even a slight tendency to connect Stevens to the killing, a dull knife found under his trailer, was admitted after the State suppressed information --- in violation of its due process obligations pursuant to Brady v. Maryland, **373** U.S. **83 (1963)** --- which, had counsel been effective, would have enabled him to convince the trial court to exclude such evidence.

At sentencing it appears from the record that counsel either threw in the towel when he learned that the judge was going to impose a death sentence or unjustifiably thought that there was no reason to worry about a death sentence because the jury had recommended life imprisonment. Whichever explanation applies, counsel --- and we are not exaggerating --- did not do one single thing nor say one single word to seek a life sentence following the jury's

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[12] The State in summation characterized this evidence as the "most accurate" in the case --- more important even than Stevens' detailed confession because that statement did not connect him to the killing (TT **1127).**

recommendation. In brief, Stevens' attorney failed to discover and present a tremendous amount of readily-available mitigation evidence and failed to have excluded very prejudicial unconstitutionally-admitted evidence used to support several aggravating circumstances.

While we submit that there is little doubt that counsel's deficiencies created a clear breakdown in the adversarial process which left him with a conviction and death sentence --- neither of which likely would have occurred had counsel been effective --- we recognize that this Court hears numerous such claims. Disturbing as such claims are, when valid, none could strike at the fabric of our system of law more deeply than what occurred in this case during the post-conviction proceedings in the Circuit Court.

The trial attorney, John Forbes, recognizing that he had committed a number of serious blunders and had been deficient in numerous aspects of his representation, decided to lie about why he had chosen, or failed to choose, certain courses of action. In our view the majority of Forbes' testimony on contested points is perjurious. We came to this conclusion most reluctantly. Certainly in light of the obligations he owes a tribunal, an attorney should be presumed, absent evidence to the contrary, to be truthful. We were forced to wrestle time and again, however, with skepti-

cism that that presumption was applicable to Forbes' testimony. We carefuly considered whether the erroneous tesitmony could possibly be the product of an honest mistake or a lapse in memory. The more we analyzed the evidence, however, the more we doubted that the errors could be ascribed to innocent causes. The errors occurred too many times and in circumstances which ruled out any explanation other than that Forbes was deliberately not telling the **truth.**[13]

The conclusive instances of perjury set forth below are significant not so much because of the topics about which Forbes lied but because they have eliminated the presumption of truthfulness which would otherwise have cloaked the balance of his testimony. If Forbes were willing to deliberately lie

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[13] Deliberate lying is convincingly proven in the following instances: **(1)** Forbes pretended not to remember the circumstances surrounding his being given (just hours before he testified at the post-conviction hearing) a copy of Bruton v. United States (see pp. **47-48**, infra); (2) Forbes contended that he wanted to fortify the credibility of one of the two principal prosecution witnesses when in fact he had attacked that witness's credibility on numerous occasions (see pp. **61-65**, infra); **(3)** In the eleven days between his deposition and his hearing testimony, Forbes categorically changed his testimony concerning his note-taking practices and why he had destroyed every note in his file in this case (see pp. **72-74**, infra); **(4)** Forbes claimed to have investigated the facts of Stevens' prior criminal record, but then not only failed to correct others' mistakes concerning that record but also mischaracterized that information himself in a manner detrimental to his client (see pp. **106- 08**, infra); and **(5)** Forbes professed that he welcomed as helpful to Stevens the prosecution's presentation of a witness at the penalty stage who testified that, two months before the crime for which Stevens was convicted, he had raped her at knifepoint in the same woods to which Tolin was abducted (see pp. **114-16,** infra).

on more than one occasion, how can one believe that the rest of his testimony --- particularly testimony which on its face strains one's credulity --- is truthful? We therefore request that this Court keep in mind while considering this appeal that Forbes' word --- most unfortunately --- cannot be trusted.

Compounding the most serious problem of Forbes' perjury is the fact that the trial judge failed to disqualify himself, when requested to do so because, inter alia, of his long and particularly close relationship with Forbes. Judge Santora, who had originally handpicked Forbes to represent Stevens, leaned over backwards to prevent present defense counsel from making inquiries in areas which would have embarrassed Forbes. No matter how incredible Forbes' testimony was, Judge Santora always found it to be credible. In addition to his close ties to Forbes, Judge Santora also was clearly biased against Stevens, having taken an extrajudicial position that Stevens should be shown no mercy and that he was particularly deserving of being executed. Because of his close ties to Forbes and because of his bias against Stevens, Judge Santora conducted an unfair hearing and, far more importantly, decided Stevens' claims unfairly. Without regard for the facts and the fair inferences to be drawn from the evidence before him, the judge uniformly denied each and every claim made and item of relief sought.

We recognize the seriousness of our charges and the extremely natural reluctance to accept them unless they are convincingly proven. We know, however, that this Court will consider this necessarily extremely lengthy brief with minds and hearts open to our arguments so that it can fairly determine whether the facts support our claims --- as we have no doubt that they do. The stakes, of course, are high. Rufus Stevens' life hangs in the balance.

V. ARGUMENT

POINT ONE

JUDGE SANTORA IMPROPERLY FAILED TO RECUSE HIMSELF AND CONDUCTED THE HEARING AND DECIDED THE FACTS IN A BIASED MANNER

A. Introduction

Before the hearing Stevens made a motion to disqualify Judge Santora.[14] That motion, which met all the procedural requirements of Rule 3.230, Fla. R. Crim. P. was denied on November 6, 1984. That denial was fundamentally at

[14]. The motion also sought the assignment of a new judge by a random selection process (R 218-21) rather than a hand-picked choice of a substitute by the Chief Judge. Since the time of the hearing in this matter, Judge Santora has become Chief Judge of the Fourth Circuit.

odds with more than 50 years of Florida law and denied Stevens his federal and state due process rights to a fair hearing. See V, XIV Amends., U.S. Const.; Art. I, §9, Fla. Const.; State v. Steele, 348 So, 2d 398, 401 (Fla. 3d DCA 1977). Not only did Judge Santora's denial of the motion for disqualification thwart the law requiring his recusal, but the manner in which he conducted the hearing and decided the issues raised by the post-conviction motion demonstrated his strong bias. Judge Santora's failure to recuse himself therefore resulted in an unfair hearing with biased findings and conclusions, many of which are clearly at odds with the applicable facts and law.

B. The Facts

1, The Grounds for Disqualification'

a. The Judge's Relationship with Forbes

A central issue underlying much of Steven's motion for post-conviction relief was the effectiveness of his trial

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[15]. In addition to the three grounds for disqualification discussed below, Stevens contended (R 218, R 225-26) that Judge Santora was fatally prejudiced because of his prior reliance in imposing the death sentence on constitutionally improper evidence. Stevens also stated (R 218) his intention to call Judge Santora as a witness at the post-conviction hearing. The latter ground was withdrawn by a letter from counsel dated November 6, 1984 (R 240) (the day Judge Santora denied the motion) and the former ground is not pressed to this Court.

counsel John R. Forbes. Forbes for his part had made it clear to Stevens' post-conviction counsel that he would do everything in his power to have Stevens' motion on that ground denied. Forbes told Stevens' counsel that they were adversaries (R 226, T 240). He refused to meet with defense counsel before the hearing on the post-conviction motion[16] and stated that he would do nothing to assist the defense (Ibid).

In this context the relationship between Forbes and Judge Santora, who would be making findings concerning Forbes' effectiveness, was critically important. Forbes had told post-conviction counsel in 1984 that "Santora is a good buddy of mine" (R 227). In 1979 Forbes had told Stevens that he had a close relationship with Judge Santora and that he frequently saw the judge when he was not on the bench (R 229). In the late 1970's and the early 1980's --- a period which includes Stevens' 1979 trial --- Judge Santora used to drop by Forbes' office late in the afternoon approximately once a week and he and Forbes would then go drinking together (R 501-02, T 149-50).[17] In the mid-1970's Judge Santora and a friend, Forbes and his wife and two others had spent the weekend together on a friend's ranch (R 501, T 149). On another more recent

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[16]. By contrast, Forbes went to the State Attorney's office to be prepared for his testimony before 7:00 a.m. on the day the hearing began (T 236), even though Stevens was calling him as his witness.

[17]. By the time of the post-conviction hearing Forbes no longer drank alcohol (T 149-50).

occasion the judge was a guest at a party at Forbes' house (R 502).[18]

b. The Judge's Extrajudicial Communication

On April 8, 1983 Judge Santora wrote a letter opposing clemency for Stevens when his case came before the Governor and the Cabinet. The body of the judge's letter stated in its entirety (R 223, R 234):

> The victim was a young mother of two infants and not only was she brutually raped and murdered, but her vigina [sic] was ripped open by a soft drink bottle,[19] and if anyone should receive the death penalty, this man should. (Emphasis added.)

2. The Judge's Order

With respect to Stevens' claim that Judge Santora was prejudiced because of his close social relationship with

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[18]. We do not contend that these contacts between Forbes and Judge Santora represent the entire relationship between them. Rather, they represent the extent to which out-of-town counsel was able to learn of that relationship by talking to various members of Jacksonville's legal community. This caveat is particularly important since Judge Santora would not allow Forbes to be questioned at the hearing concerning the judge's and his relationship (T 254).

[19]. The trial evidence did not show exactly what caused the injury to the deceased's genitals. The medical examiner's testimony was that an unknown object --- a soda bottle being one possibility --- had caused the injury (Floro: TT 531-32).

Forbes, the judge's order denying the disqualification motion made the following statements (R 250):

> Rubbish! Absolutely no merit.

As to the letter he wrote opposing clemency, Judge Santora reiterated that he did not believe that there was any basis for executive clemency and found that his having written the letter did "not constitute grounds for disqualification" (R 250).

3. The Additional Ground for Disqualification

In Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978), this Court noted that it had repeatedly held that, in denying a motion for disqualification, a judge should simply do so based upon the legal insufficiency of the motion and should not attempt to refute the allegations. This longstanding rule was promulgated so as to avoid "'an intolerable adversary atmosphere' between the trial judge and the litigant." Its violation creates an independent ground for disqualification, Ibid. Judge Santora's order violated the Bundy rule at the very least by characterizing one of Steven's claims as

"rubbish" and by insisting that Stevens did not deserve clemency.[20]

C. The Legal Standards

The basic standards concerning when a judge should disqualify himself on a claim of prejudice against the moving party or in favor of the adverse party were enunciated by this Court more than half a century ago and have remained unchanged. This Court, in Livingston v. State, 441 So. 2d 1083, 1086 (Fla, 1983), succinctly identified the central issue in this area:

> The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially. (Emphasis added.)

Accord, State ex rel. Brown v. Dewell, 131 Fla. 566, 179 So. 2d 695, 697-98 (1938). The issue is whether there is an "appearance of impropriety," not whether bias exists. See Giuliano v. Wainwright, 416 So. 2d 1180, 1181 (Fla. 4th DCA

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[20]. When Stevens' counsel --- who had just received a copy of the judge's order denying disqualification the day before --- began to raise this ground at the outset of the post-conviction hearing, Judge Santora twice interrupted him, making clear that he would hear nothing further concerning disqualification (T 155-56).

1982); State ex rel, Aguiar v. Chappell, 344 So. 2d 925 (Fla. 3d DCA 1977). In circumstances where a judge's "neutrality is shadowed or even questioned," he "should be prompt to recuse himself." Dickenson v. Parks, 104 Fla. 577, 140 So. 459, 462 (1932).

It is clear that bias concerning a lawyer involved in a case or a crucial witness is sufficient to show prejudice. The bias need not be in favor of or in opposition to a party personally. See, e.g., State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 614 (1939) ("we would hesitate to say that prejudice to the lawyer could not be of such a degree as to adversely affect his client"); Brewton v. Kelly, 166 So. 2d 834, 836 (Fla. 2d DCA 1964).

D, Discussion

1. The Judge's Relationship with Forbes

At the very least, Judge Santora's close friendship with Forbes created the appearance of partiality and thus required the judge's recusal, according to the well-established case law discussed above, One of the principal issues before Judge Santora was whether Forbes had been effective in representing Stevens, both at trial and at sentencing. Forbes made it very clear how insulted he was by

the claims of his ineffectiveness and that he was going to strive mightily to defeat those claims.[21] How could Stevens expect to obtain an impartial result when the judge determining the issue had been a longtime drinking companion of the lawyer and had had other significant social contacts with the lawyer, including going away for a weekend with the lawyer and his wife, As it turned out, not only was there no <u>appearance</u> of impartiality at the hearing but indeed there was no impartiality as far as Forbes was concerned.[22] Judge Santora went to extremes to protect his friend during the hearing and reached findings which are not based upon a fair evaluation of the facts,

The judge stated during colloquy that he had handpicked Forbes to defend Stevens[23] (T 116-17, T 1002-03). He stated that he had deliberately picked Forbes because he

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[21]. The State stipulated that Forbes was a witness hostile to Stevens and the judge also declared him to be hostile (T 253).

[22]. The case law we have discussed above makes clear that the erroneous denial of Stevens' disqualification motion is enough to obtain a reversal. See, e.g., <u>Livingston v. State</u>, <u>supra</u>, 441 So, 2d at 1087. While it is therefore unnecessary for us to show that Judge Santora was <u>in fact</u> prejudiced, the evidence of partiality is such that we believe that no court could find that Stevens received a fair hearing. This discussion is important, then, so that Judge Santora's factual conclusions will not be given a weight they do not deserve.

[23]. The judge also revealed that he had authorized higher payments to Forbes than the law allowed for his services and that he had convinced the City of Jacksonville to pay those higher sums despite the lack of a legal basis for it (T 143, T 1003-04).

thought that he would do a good job and Forbes' talents would avoid there being a subsequent contention of ineffective assistance of counsel. Judge Santora thereby demonstrated that 'he viewed Stevens' claims of ineffectiveness as a reproach to his own judgment in having chosen to appoint Forbes. The judge thus had an additional incentive to reject defendant's claims, as he later did.

Judge Santora went to extraordinary lengths to protect Forbes, particularly to prevent the defense from showing that Forbes had a debilitating drinking problem at the time he was representing Stevens --- such a severe drinking problem that only a few months before he had been guilty of serious malpractice. Defense counsel had information from a lawyer who practiced in Jacksonville that Forbes had been in a depression in 1979 at the time he was representing Stevens and had been drinking heavily (T 248-50, T 255-60). Judge Santora would not allow counsel to question Forbes on that subject (T 249-50).[24]

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[24]. When defense counsel tried to make a proffer as to the good-faith basis for his proposed questions, Judge Santora refused to accept it, taking the position that the defense would have to call a witness to testify to those facts (T 255-60). During the trial of this matter Judge Santora had accepted a proffer from the prosecution (TT 1196-99) made in exactly the same fashion as defense counsel tried to employ here. Moreover --- despite having ruled that an actual witness would have to be called on the subject of Forbes' drinking problem --- Judge Santora later refused to hear just such a witness. See pp. 22-25, infra. We know of no case supporting the proposition that evidence of a person's condition or conduct cannot be elicited from the person

When counsel tried to question Forbes about a malpractice suit which had been brought against him by one Richard W. Lee for gross neglect occurring just several months before Forbes began to represent Stevens and which had been settled for $60,000, Judge Santora declared the subject immaterial (T 405-06). Counsel then tried to make a proffer, which included asking the Court to take judicial notice of various files in the Duval County Courthouse's Clerk's Office. Judge Santora took the position that he would not even allow such a proffer (T 407).

Judge Santora did allow counsel to ask Forbes whether his drinking between March and August of 1979 --- the period of his representation of Stevens in the Circuit Court --- had impaired his performance as an attorney. Forbes responded with a weak "no, not in my opinion, no" (T 410). When counsel tried to ask the same question about November and December of 1978 --- concerning which he had information of significant impairment --- Judge Santora would not allow the question to be answered. Moreover, the judge refused to accept a proffer as to the evidence the defense hoped to elicit and refused to hear legal argument concerning the admissibility under Florida law of such habit evidence (T 410-13).

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himself, but must be shown, if at all, by extrinsic evidence.

Forbes did admit (T 539-40) that during the time he represented Stevens in the Circuit Court he would drink at lunch once or twice a week. On those occasions Forbes would do no further work for the entire balance of the day--- thereby strongly suggesting quite a severe alcohol problem during the relevant period. To corroborate that testimony and the reasonable inferences therefrom, and to rebut Forbes' self-serving opinion (T 410, T 536-37) that his drinking had not impaired his performance as Stevens' attorney, the defense called as a witness Martha Sue Register, Forbes' secretary from January of 1978 until January of 1979. Through her Stevens tried to elicit testimony concerning Forbes' severe drinking problem in November and December 1978 --- near the end of her employment with Forbes and just three or four months before Forbes began representing Stevens.

When the State objected (T 719) to the admission of such testimony, Stevens argued (T 719-24) that when intoxication at a particular time (in this case between March and August, 1979) is at issue, evidence of prior intemperate habits of a person --- i. e., that he was habitually intoxicated --- is relevant evidence as to whether the person was intoxicated at the time in question. In so arguing, he relied upon the following authority: State v. Wadsworth, 210 So. 2d 4, 5-7 (Fla. 1968); Locke v. Brown, 194 So. 2d 45, 46-47 (Fla.

2d DCA 1967);[25] Ehrhardt, 1 Florida Evidence 157-58 (2d ed. 1984).

Judge Santora refused to admit Register's testimony (T 724). While he did not explain his ruling at the time, Judge Santora later stated that he had sustained the objection to Register's testimony on materiality grounds because "[s]he did not work for [Forbes] throughout the period of time that he represented Rufus Stevens ..." (T 942). Judge Santora thus totally ignored the established principles of Florida law concerning habit evidence in making his ruling. .Moreover, the record strongly supported the reception of such evidence. Surely Forbes' admission --- that on one or two days out of every five during the time he represented Stevens he went to lunch, began drinking and did no further work until the next day (T 539-40) --- was sufficient to satisfy the minimal threshhold requirement of showing that Forbes had an alcohol problem. Cf. Nationwide Mutual Insurance Co. v. Jones, 414

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[25]. In Wadsworth this Court determined that evidence--- that a defendant in a vehicular manslaughter case had for two years prior to the fatal collision bought a 1.6 ounce bottle of vodka two or three times a week and had admitted to the liquor store clerk that he "had a problem" --- was properly admitted to corroborate other evidence that the defendant was intoxicated at the time of the accident. In Locke --- the reasoning of which was approved in Wadsworth, at 7 --- it was held to have been proper to have admitted evidence in a negligence case that the defendant had been hospitalized for alcoholism in 1959, on five occasions in 1961 and on several occasions in 1962 to corroborate the contradicted testimony that the defendant appeared to be intoxicated at the time of the accident on January 21, 1962.

So. 2d 1169, 1171 (only some proof of practice is required); Ehrhardt, op. cit., at 158.

After sustaining the prosecution's objection to the evidence concerning Forbes' intemperate habits, Judge Santora refused to allow Stevens' counsel to make a proffer (T 724).[26] Finally, shortly before the close of the hearing, the judge allowed Stevens' counsel to mark for identification the transcript of Register's deposition taken in a malpractice case as a proffer[27] of the testimony counsel would have elicited from Register (T 942-44).[28] As can readily be seen

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[26] Shortly thereafter, Judge Santora again denied counsel the right to make a proffer concerning another excluded line of questioning of Register (T 732-34).

[27] Judge Santora once again refused to admi't Register's testimony as evidence (T 942-44).

[28] Among the facts to which Register swore in her February 24, 1981 deposition in Richard W. Lee v. John R. Forbes, et al. (Duval Co. Cir. Ct. No. 80-14806-CA) and which counsel would have sought to elicit are the following: (a) that during November and December of 1978 Forbes drank alcohol in his office during the working day on an almost daily basis (23-24); (b) that during the same period Forbes used to take long lunches during and after which his voice indicated that he had been drinking (24); (c) that as a result of those lunches Forbes would cancel scheduled afternoon appointments (24-25); (d) that in her opinion Forbes' use of alcohol impaired his representation of the plaintiff Lee --- for whom a notice of appeal was not timely filed --- and of other clients as well (32); (e) that that impairment was caused by Forbes' absences from the office, his not being fully in possession of his faculties while in the office, his not being "conscientiously concerned about doing what had to be done ... [or] aware [or] alert" (32); (f) that Register had reminded Forbes several times to approve the notice of appeal which she had prepared well before the time to appeal had expired (35); (g) that Register, consistent with Forbes' desires, used to prepare, sign and send out pleadings, including complaints,

from the facts set forth in n. 28, Stevens had strong evidence that Forbes had a serious drinking problem which severely affected the representation his clients received only several months before he began representing Stevens. Such evidence, which Judge Santora erroneously excluded, when coupled with his admission that his problem continued at least until the time of Stevens' sentence, would have gone far toward explaining much of Forbes' ineffectiveness. See Points Two and Three, infra.[29]

Judge Santora's repeated refusals to allow counsel to make offers of proof contravened clearly-established law on the subject, See, e.g., Johnson v. State, 338 So. 2d 252, 253 (Fla. 1st DCA 1976); Musachia v. Terry, 140 So. 2d 605, 608

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without his reviewing or signing the pleadings until she was advised by an attorney friend to cease doing so (17, 42-43); and (h) that she left Forbes' employ in January of 1979 because she believed that "the clients were not represented properly, that the right amount of attention and time were not expended on the cases" (45, 4-5). That latter fact --- that a secretary quit her job with an attorney because of her concern over the inadequacy of his representation of his clients--- speaks volumes as to just how bad that representation must have been,

[29] The importance of evidence of a defense attorney's alcohol problems is emphasized by the fact that such problems were factors in convincing the State to accede to the settlement of at least two capital cases, by consenting to the vacating of death sentences and the imposition of life sentences in their stead, State v. Richard Sherman Williams, Case No. 80-24-CF, Bradford County; State v. John Le Duc, Case No. 75-53 (Shalimar), Okaloosa County. (This information was obtained from the lawyers for the defendants. If the Court desires any additional information concerning these cases, we would be glad to provide it.)

(Fla. 3d DCA 1962). Indeed, in Piccirrillo v. State, 329 So. 2d 46, 47 (Fla. 1st DCA 1976), the court stated that it was "compelled to reverse" on the sole ground that the trial court had rejected a proffer of testimony. The fact that the judge flouted such a well-established rule shows how deep-seated his prejudice against Stevens was, how ardently he wished to protect both the professional reputation of a friend and his own reputation concerning the appointment of competent counsel, and how unfairly the hearing was conducted.

Not only did Judge Santora improperly bar admission of relevant testimony concerning Forbes' drinking but he also provided unsworn testimony rebutting Stevens' contentions. For example, the judge stated (T 249) that there had been no evidence of a lawyer having a drinking problem during Stevens trial; had there been, he would have taken action. When counsel objected, Judge Santora denied that he had acted as a witness, instead characterizing what he said as "a statement" (T 250). The judge reiterated his "statement" later in the hearing (T 408) and relied upon similar unsworn-testimony by the State Attorney.[30]

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[30] On one occasion the State Attorney admitted that he was "testifying" without being sworn concerning the facts that he "never saw [Forbes] with anything on his breath or acting anything but alert and perform[ing] brilliantly in this case" (T 257). Judge Santora refused to strike that admittedly unsworn testimony (T 258).

We submit that there can be little question concerning Judge Santora's strong prejudice in favor of Forbes, which necessarily translated into strong prejudice against Stevens' position. Such circumstances are similar to those in Dickenson v. Parks, supra, in which the judge was found to have improperly failed to disqualify himself where, inter alia, the result depended almost entirely on questions of credibility and the judge had a close relationship with the chief witness for the opposition. See also, Livingston v. State, supra, 441 So. 2d at 1087 (emphasizing the importance of a judge's avoiding even the appearance of being prejudiced in capital cases); State ex rel. Davis v. Parks, supra.

2. The Judge's General Bias

The judge's findings concerning the credibility of the witnesses at the post-conviction hearing were as unfair and biased as his erroneous evidentiary rulings which protected his friend Forbes. Judge Santora made a blanket finding (R 631):

> That the testimony of trial counsel at the hearing on this motion is credible and believable, thereby warranting reliance upon it in determining the outcome of this motion; that the testimony of Movant that conflicts with the testi-

mony of trial counsel is unworthy of belief.[31]

We will discuss in Points Two and Three, infra, a significant number of instances in which the record conclusively proves that Forbes was not worthy of belief. At this point we wish to cite several examples of the inadequacy and biased nature of the above-quoted credibility findings --- examples which demonstrate that Judge Santora's main concern was to deny Stevens' claims, regardless of the facts.

One of Stevens' claims was that Forbes failed to give him a copy of, or to review with him, the psychiatrist's report which, inter alia, was presented to Judge Santora at the time of sentence. Stevens testified that he had never seen the psychiatric report until 1984, that various prejudicial portions of the report were untrue and that Forbes had told him nothing concerning the report other than that he had been found competent (T 896-900). Forbes' testimony on the subject was that he did not believe that he had gone over the report with Stevens, that he "imagined" that he had discussed the general conclusions of the report with his client and that he did not remember whether or not he had discussed the facts in that report with Stevens (T 492). Despite that record, Judge Santora found (R 635 Par. 1) that Stevens had in fact

[31] Apparently the court found the remainder of Stevens' testimony to be credible.

reviewed the psychiatric report.[32] There simply is no support in the record for that conclusion, and ample evidence--- including evidence given by Forbes --- which negates it.

In contradictory fashion --- but without ever referring to, or attempting to resolve, the contradiction--- Judge Santora found "credible the testimony of the trial prosecutor [Henry M. Coxe, III] at the hearing on this motion that defense counsel was informed regarding how the [dull] knife was located" (R 635 Par. 2). Forbes, however, had testified at the hearing that he had not known at the time of the trial the details of how the dull knife had been found (T *395-96);* that Coxe had not told him about how it had been found (T 402); and that a memorandum made by Detective Parmenter concerning Stevens' statements and the recovery of the knife --- of which memorandum he had been totally unaware --- would have aided him in seeking to suppress the knife (T *396-97).* Without making any finding that Forbes was unworthy of belief on these points, Judge Santora implicitly found that to be so. There is no other way the judge could have found the prosecutor's testimony to be credible.

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[32] There is a slight ambiguity in the court's findings. In referring to Stevens' claim that he was not given an "opportunity to review the presentence investigation and psychiatric report," Judge Santora found that "Movant did review it" (emphasis added). Presumably (based on the negative conclusion) "it" refers to both reports.

How, one might reasonably ask, could Forbes be credible in all other respects and lacking credibility in the one portion of his testimony favorable to Stevens and contradicted by a witness for the State? There is only one rational answer: i.e., that Judge Santora made his findings of fact with one consideration in mind --- making sure that Stevens lost his claims. How else could Judge Santora have found some of Forbes' patently incredible testimony credible and how else could this be the only portion of Forbes' lengthy testimony which Judge Santora did not accept? Such blatant unfairness in the findings strongly suggests in and of itself that Judge Santora's decision should be vacated because it is neither factual nor unbiased.[33]

Judge Santora's fundamental unfairness was further demonstrated by his refusal to order the marking for identification[34] of a police report --- which the prosecution used in the cross-examination of a witness at the hearing (T 647-48) and which the court itself examined (T 743, T 744, T 752). The defense sought production of the police report pursuant to Brady v. Maryland, supra. When the judge denied the Brady request, counsel asked (T 751-53) to have the document marked

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[33] The judge strikingly evidenced his bias when he commented --- obviously referring to Stevens' presentation: "I have heard three days of questions and answers and 90 percent of it has been immaterial to me" (T 778).

[34] As Judge Santora later conceded (T 943), a party has the right to mark anything for identification.

so that this Court would be in a position to examine the report to determine whether it should have been turned over as requested. Incredibly, Judge Santora refused even to mark the document (T 752-53).[35]

3. The Judge's Extrajudicial Communication

Canon 3(A)(6) of the Code of Judicial Conduct enjoins a judge from making any public comment about a pending or impending proceeding in any court, much less his own. While Stevens' case was not pending at the moment when Judge Santora wrote his letter to the Parole and Probation Commission, it should have been obvious to an experienced jurist such as Judge Santora that, since Stevens' matter was a capital case, not only would it soon be pending again, but that a post-conviction motion would soon be before him.[36]

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[35] Judge Santora's general bias against Stevens was shown, inter alia, by his refusal to grant counsel's applications (T 154, T 890) that Stevens' leg shackles be removed during the four-day hearing, including when he testified--- despite the absence of any history of disruptive activities by Stevens. It is noteworthy that the judge's rulings were based solely upon the fact that Stevens had been sentenced and not upon any potential security problems (T 155, T 891).

[36] To our knowledge no one has been executed in this State in the last fifteen years without having brought at least one motion pursuant to Rule 3.850, Fla. R. Crim. P. Such motions in the normal course are initially heard by the trial judge.

Not only was it improper that Judge Santora made a comment relating to an impending matter, but the nature of that comment was adverse to Stevens in the extreme. Judge Santora's letter had no connection to any legal judgment; rather it stated an advocate's position that Stevens should be denied "an act of grace."[37] Notably, Judge Santora took that very strong position without knowing what evidence or arguments would be presented to the Governor and the Cabinet in support of Stevens' application for clemency. All else pales in significance, however, compared to the vehemence of the judge's substantive position: i.e., that no one was more deserving of being executed than Stevens.[38] That truly is as adverse a position as Judge Santora could have taken.

The advocacy of a far more moderate position has recently caused a federal court to reverse a judge's resentence and to remand for further resentencing before another judge. In United States v. Diaz, 797 F.2d 99 (2d Cir. 1986), the judge wrote his United States Senator to advocate a change in the law to close what he considered to be a defect in previous legislation which had allowed Diaz to have his conviction reversed in part. He also communicated on the same subject with the United States Attorney. Following that, the

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[37] Clemency is so defined by Rule 1 of the Rules of Executive Clemency of Florida.

[38] That is, we submit, the clear meaning of "if anyone should receive the death penalty, this man should" (R 234).

judge resentenced Diaz. The Second Circuit held at 100 that "the appearance of justice" was lacking and that the judge's impartiality "might reasonably be questioned."

In Diaz the judge's basic position was that Congress should amend the law. Here Judge Santora's basic position was that Stevens should be executed. Obviously, therefore, Stevens and any objective observer would have ample, well-founded reasons to question Judge Santora's impartiality. Having become an advocate for the upholding of his previously-imposed sentence, it was improper for Judge Santora to subsequently determine whether Stevens' claims seeking to overturn his conviction and sentence were valid. In such circumstances the judge should have disqualified himself. Livingston v. State, supra, 441 So. 2d at 1086-87; Irwin v. Marko, 417 So. 2d 1108, 1109 (Fla. 4th DCA 1982).

4. The Judge's Adverse Position Concerning the Recusal Motion

In addition to being an advocate for Stevens' execution, Judge Santora also assumed an adversarial role with respect to Stevens' motion to disqualify him from conducting the post-conviction proceeding. His strong feelings with respect to the claim that he had a close personal relationship with Forbes were plain for all to see in his angry denial of that branch of the motion. He stated (R 250):

Rubbish! Absolutely no merit.

It was exactly for the purpose of avoiding such antagonistic rulings and the resulting adversarial relationship between the judge, on the one hand, and the moving party and his counsel, on the other, that judges are strictly forbidden from taking positions with respect to the facts alleged in support of recusal motions. See Bundy v. Rudd, supra; State ex rel. Brown v. Dewell, supra.

While succinct, Judge Santora's "rubbish" ruling could not have been a much clearer violation of the rules for resolving recusal motions. The judge likewise, but in somewhat less dramatic fashion, violated those rules in reiterating his opinion that there was "no basis" for clemency and in arguing that the sentence was both proper and lawfully imposed (R 250). By making specific rulings upon Stevens' claims, Judge Santora was prejudging some of the issues which would come before him in the post-conviction proceeding. Thus, the judge had not only argued that no one was more deserving of execution than Stevens, but also had decided before the hearing that there were no errors with respect to his sentence. Such prejudgment and personal interest in the sentence is clearly improper. See Anderson v. State, 287 So. 2d 322, 324 (Fla. 1st DCA 1973).

E. Conclusion

At the very least Stevens' recusal motion raised serious questions about Judge Santora's impartiality and neutrality in this matter. Indeed, we submit that the motion showed that Judge Santora had assumed a partisan stance which was seriously adverse to Stevens and his interests and that his response to the disqualification motion was equally adverse. Furthermore, the judge subsequently demonstrated significant actual bias in his conduct and resolution of the hearing on Stevens' claims. In such circumstances a recusal was mandated. Rule 3.230, Fla. R. Crim. P. Moreover, the failure of the judge to disqualify himself in such circumstances "constitutes a denial of due process and, accordingly, is per se reversible error." State v. Steele, supra, **348** So. 2d at 403.

POINT TWO

STEVENS' ATTORNEY'S GROSS DEFICIENCIES AT TRIAL DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

There are at least six different ways in which Forbes' ineffectiveness contributed to Stevens' conviction for

murder in the first degree. We will discuss each of Forbes' following deficiencies below: (1) he failed to object to devastating evidence linking Stevens to Tolin's killing, despite the fact that the evidence was clearly inadmissible pursuant to Bruton v. United States, supra; (2) he did not know that statements and admissions may be suppressed upon Fourth Amendment grounds, and therefore did not make such a claim which would have resulted in the exclusion of a damaging confession admitting participation in the robbery, kidnapping and rape; (3) he failed to utilize the most telling impeachment evidence against Hamilton, one of the prosecution's star witnesses; (4) he also failed to object to a jury instruction which presumed the existence of an element of murder in the first degree; (5) he inexcusably failed to object to the prosecution's failure to comply with the discovery rules; and (6) he failed properly to prepare for trial.

As to all of those failings (except the second one), Forbes made up a strategic reason or an excuse for his failure to do what he should have done. Despite the fact that Forbes' contentions were false and despite some demonstrable perjury, Judge Santora accepted Forbes' testimony at face value---even when the remainder of the record refuted Forbes' stated positions at the hearing.

B. The Controlling Standards

A defendant in a criminal case is guaranteed the effective assistance of counsel. Amends. V, XIV, U.S. Const.; Art. I, §§9, 16, Fla. Const. The governing legal standards for determining whether a defendant has been afforded such effective assistance at ~~trial~~[39] were enunciated by the Supreme Court in Strickland v. Washington, supra. Cf. Downs v. State, 453 So. 2d 1102, 1106-09 (Fla. 1984). In Washington the Court held that ineffective assistance of counsel would be measured by the test of whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. 466 U.S. at 686. In order to make this determination, the Court delineated a two-part inquiry. First, did counsel in fact render a deficient performance? And second, if counsel's performance was deficient, was this prejudicial to the defense in any particular way?

In order to make the first determination, the Court said that the test must be whether counsel's conduct fell below an objective standard of reasonableness as established by prevailing professional norms. ~~Id.~~ at 687-88. In deter-

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[39] The same legal standards govern capital sentencing proceedings. Strickland v. Washington, 466 U.S. 668, 686 (1984). Since that is so, these standards will not be repeated in the discussion of counsel's ineffectivness in the sentencing proceedings. See Point Three, infra.

mining whether counsel's performance was outside the "range of professionally competent assistance ... [a] court should keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case." Id, at 690 (emphasis added),

In order to make the second determination, it must be shown that the acts of counsel which were outside the range of competence were prejudicial. Id. at 692. In order to show prejudice, it must be demonstrated that there was a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." The Court went on to define a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id, at 694.

The Court emphasized that the two-pronged test should not be applied mechanically. It held, at 696:

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

We will demonstrate below that just such a breakdown occurred in both the guilt and penalty phases of this matter.

C. Counsel's Ineffectiveness

1, Despite the Fact that the Crucial Evidence Linking Stevens to the Actual Killing Violated the Bruton Rule, Forbes Failed to Seek Its Exclusion.

a. The Inadmissible Evidence

On at least six occasions during the trial the prosecution, without objection,[40] elicited testimony of inadmissible hearsay statements made by the co-defendant Engle to various witnesses called by the State (see R 254-59). Such evidence violated the rule of Bruton v. United States, supra, and thus violated Stevens' constitutional rights. Amends. VI, XIV, U.S. Const.; Art. I, §§9, 16, Fla. Const, In Bruton the Supreme Court held that the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment was violated by the admission into evidence at trial of a non-testifying co-defendant's statements implicating the defendant in the commission of the crime for which he was being tried. As this Court stated in Hall v. State, 381 So. 2d 683, 687 (Fla. 1979):

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[40] The only exception to Forbes' total silence on this point was a single general objection (TT 633), which was not pursued while the prosecutor conducted the last of his six lines of questioning in violation of Bruton.

> The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant.

By far the most egregious violation of Bruton was elicited as the final series of questions put to Nathan Hamilton[41] by the State Attorney (TT 577-78) (emphasis added):

> Q Did you have any other conversation with Scott Engle?
>
> A Yes, sir.
>
> Q About this particular incident?
>
> A Yes, sir.
>
> Q When did you have the conversation?
>
> A. The same night I tried to trade knives with him.
>
> Q What was the conversation?
>
> A I [Hamilton] asked him [Engle] why they did it and he said that they took her out of the store to get her away from a phone, they took her out into the country and Rufus went crazy and started saying she's going to identify us and I asked him, I said, man, was it worth killing a little gal over a lousy $50 robbery and he said no, it wasn't.
>
> MR. AUSTIN: You may inquire.

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[41] On the direct appeal this Court correctly labeled Hamilton as one of the State's two "main witnesses." Stevens v. State, supra, 419 So. 2d at 1061. Detective Parmenter was the other principal witness.

b. The Prosecutor's Summation

Henry Coxe, who tried the case together with State Attorney T. Edward Austin, made the above-quoted unconstitutionally-admitted statement by Engle the most important point in his entire summation, saying that that statement was more important than Stevens' confession to committing robbery, kidnapping and rape. He argued as follows (TT 1127):

> ... isn't it amazing that Scott tells Nathan Hamilton that Rufus went crazy? The one statement in this case that was not made to the police officer about what happened where nobody's got a chance to prepare: Scott, was it worth a lousy $50- or $60-robbery to kill her? No, Rufus went crazy.
>
> What is the one statement that gives you the most accurate picture of what happened? When Scott Engle says we were watching the movie Zoro on Sunday night, the 18th of March, and Rufus went crazy. That tells you more than the entire statement [Stevens' confession to the underlying felonies] that Lester Parmenter received from that witness, right there. (Emphasis added.)

Coxe also closed his summation contending that the defendants "said let's kill [the deceased] so she can't identify us" (TT

1139) --- a contention which could have been drawn only from Hamilton's testimony concerning what Engle had told him.[42]

One thing seems certain based upon the prosecutor's summation: if Forbes' failure to attempt to exclude Hamilton's testimony concerning Engle's "Rufus went crazy" statement constituted deficient performance (the first prong of the ineffectiveness test), there can be little quarrel that it constituted actual prejudice. When the trial prosecutor has termed the evidence admitted as a result of counsel's unjustifiable failure to object to it as "the most accurate picture of what happened" and more informative than the defendant's explicit confession to kidnapping, robbery and rape, the State simply cannot now persuasively argue that there is no reasonable probability of a more favorable result for Stevens absent the Engle statements.[43]

c. Forbes' Supposed Strategy

Forbes claimed during the post-conviction proceeding that he deliberately, as a matter of strategy, had allowed the introduction into evidence of Hamilton's devastating statement

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[42] Forbes objected to none of these comments in the prosecutor's summation.

[43] The numerous statements admitted in violation of Bruton (see R 256-59) --- other than the "Rufus went crazy" statement --- served to tie Stevens to Engle and Engle's damaging admissions.

of what Engle had said (T 296). The record conclusively refutes Forbes' present assertions and, we submit that, had Judge Santora not been so disposed to protect Forbes, he would have found that Hamilton's testimony was admitted because of trial counsel's deficient performance.

Forbes testified (T 292-302) that Hamilton's statement of what Engle had said showed (1) that Engle was dominating Stevens,[44] (2) that Stevens had diminished mental capacities and did not premeditate the murder,[45] and (3) that Engle did the actual killing.[46] He contended that this evidence fit into his overall strategy of trying to obtain a life sentence because he thought the chances of conviction were high[47] (T 295-97). Forbes also admitted that the "Rufus

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[44] Forbes was never able to explain how Hamilton's testimony showed such domination (see T 300, T 301).

[45] Forbes maintained in one answer (T 299) that the Hamilton testimony "showed [Stevens'] lack of lucidity, lack of planned design, high emotional state, together with all the other evidence we had, the intoxication, responding instead of acting."

[46] Forbes interpreted Engle's statement that it had not been "worth killing a little gal over a lousy $50 robbery" as an admission that Engle alone had killed Tolin (T 302). As discussed more fully at p. 45, infra, Forbes' interpretation is quite an unreasonable one. It is virtually impossible to believe that a jury would subscribe to Forbes' view, particularly because Hamilton testified that he had asked Engle why "they did it" (T 577).

[47] Forbes' did not explain why if this was his strategy he allowed the "Rufus went crazy" statement into evidence at the guilt phase of the trial, rather than restricting it to the penalty phase.

went crazy" portion of the testimony was unhelpful but that the detriment from that evidence was outweighed by the helpfulness of the subsequent "not worth it" portion (T 297, T 301).

Judge Santora found (R 636 Par. 10) with respect to this point that Forbes had made "a tactical decision in which trial counsel reasonably considered the statement taken as a whole to be exculpatory."[48]

d. Forbes' Deficient Performance

Forbes claimed that he had allowed the introduction into evidence of the devastating "Rufus went crazy" statement because another part of Hamilton's statement advanced Stevens' interest. Judge Santora accepted Forbes' contention at face value. Had the judge examined the record, instead of accepting Forbes' testimony unquestioningly, he would have found that no reasonable factfinder could have confidence in Forbes' claims on this point. In short, Forbes fabricated a justification for his failure to object to the evidence admitted in

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[48] Judge Santora also refused to consider on its merits Stevens' claim of a violation of Bruton v. United States because any such claims "were waived at the trial level by a failure to file a timely motion to suppress or to otherwise pose a timely objection" (R 635 Par. 3) (emphasis added).

violation of the Bruton rule. There are several reasons to doubt Forbes' truthfulness at the hearing.[49]

First, his contentions, even standing alone, do not make sense. Forbes maintained that while he "wasn't real happy" about the "Rufus went crazy" part of Hamilton's statement, he affirmatively wanted the part of the testimony concerning Engle's statement that it had not been worth killing the girl for $50 (T 301-02).

Based upon the facts (1) that Stevens had admitted to Parmenter that he had participated in the robbery, kidnapping and rape and that he was in the vicinity when Engle committed the murder (TT 909-13) and (2) that the part of the statement Forbes claimed to believe was helpful immediately followed "Rufus went crazy and started saying she's going to identify us," the only reasonable interpretation of the "not worth it" part of the statement was that both Stevens and Engle had participated in the killing, rather than that Engle had acted alone. That is certainly the interpretation the prosecution drew from that statement (TT 1127-28, TT 1139). When one remembers (1) that without Hamilton's statement, the jury had uncontradicted evidence from Stevens' confession that he had had no connection with the killing (TT 892, TT 923-24)

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[49] These reasons are in addition to the fact that we know conclusively that Forbes committed perjury on several subjects raised by the post-conviction proceedings. See p. 10 n. 13, supra.

and (2) that Engle's knife was apparently the murder weapon (Floro: TT 797-98), it is obvious that Hamilton's statement, which was at best ambiguous as to Stevens' involvement in the killing, materially worsened Stevens' position.

Forbes' other two rationales for favoring the admission of Hamilton's statement --- that it showed that Engle dominated Stevens (T 292) and that Stevens had diminished mental capacities and did not premeditate the murder (T 292, T 299) --- make such little sense that Forbes could not rationally explain his own theories at the hearing (see T 293, T 300).

Second, if Forbes truly had wanted the "not worth it" segment of the Hamilton testimony in evidence so much so that he was willing to allow it into evidence despite the inadmissibility of what he admitted (T 301) was the prejudicial "Rufus went crazy" segment, he surely would have relied on the "helpful" segment later in the proceedings. In fact, however, he never argued his interpretation of the "not worth it" segment of the Hamilton testimony at any time --- not to the jury in either the guilt-[50] or penalty-phase summations,

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[50] Instead, Forbes made counterproductive arguments in summation such as attacking the evidence which linked Engle to the murder weapon and the murder (TT 1082-89). Forbes thereby argued against so much of Stevens' confession as pinned the blame for the killing on Engle and certainly took the exact opposite position from that which he claimed was the basis for his allowing into evidence the otherwise-inadmissible Hamilton testimony.

not to Judge Santora on the question of sentence, and not to this Court on direct appeal.[51]

Third, every indication was that Forbes did not have the slightest knowledge of the rule of Bruton v. United States. Taking his testimony on this subject in the order it was given, Forbes testified at his deposition on October 29, 1984 that:

(1) He could not remember the ground upon which Engle's lawyer had successfully moved for a severance of Stevens' and Engle's trials (T 20);

(2) He was not familiar with Bruton v. United States (T 20-21); and

(3) He was unable to state the law concerning the admissibility at the trial of a criminal defendant of a co-defendant's statement (T 113-115).

At the post-conviction hearing during the morning of November 9, 1984, Forbes testified that he had read Bruton since the deposition (T 277). That afternoon when pressed about his supposed refreshing of his recollectiqn concerning

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[51] Significantly, Forbes argued at length in his brief to this Court (41-44) that Engle had dominated Stevens and that Stevens' participation n the capital felony had been relatively minor but he never mentioned Hamilton's statement in any way. If the "favorable" portion of the statement were not worth mentioning in four pages of written argument on the very point to which it was supposedly germane, then it clearly was not beneficial for Forbes to have acquiesced in the reception of what certainly is the very damaging evidence found in the other portion of the statement.

Bruton Forbes clearly lied in an effort to cover up his ignorance and the fact the State Attorney's office had desperately tried to prepare him. When asked where he had been when he had read Bruton recently, he said that he could not remember whether he had been in his or the State Attorney's office. When asked if a staff member in the State Attorney's office had provided him with a copy of Bruton, he answered, "Could have been." When asked who specifically gave the copy of the case to him, he said he did not know. At that point defense counsel extracted from Forbes that he had just been provided with the copy of Bruton that very morning (T 309). Once he had been forced to admit when it was that he had been given the copy of the case, it became clear that his prior answers on this subject had been untruthful. Obviously he knew where he had read the case[52] and who had given it to him just a few hours earlier.

Forbes then proceeded to demonstrate his total ignorance of the Bruton rule. He was unable to state whether it had changed between 1979 and 1984 (T 310). When asked what his understanding of Bruton had been in 1979, Forbes said: "I

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[52] Forbes had admitted earlier that he had been in the State Attorney's office from about 6:30 or 7:00 a.m. until the hearing began at 9:00 a.m. (T 236) so he knew perfectly well that he had not read the case in his own office. The fact that Forbes so clearly lied with respect to this subject is helpful in resolving whether Forbes lied with respect to other topics as to which there is some, but less substantial, evidence that he perjured himself.

don't recall right now." When asked for his understanding of Bruton at the time of the hearing, he gave the following incredible answer (T 312):

> When you asked me about it earlier [today] I had looked at the case very briefly this morning, I believe, and I gave you an answer and since then I have forgotten. (Emphasis added.)

Forbes finally conceded --- getting somewhat nearer the truth --- that he had recognized the name of the Bruton case at the time of Stevens' trial but he was not sure if he knew what principle the case stood for (T 313).[53] We submit that Forbes' inability to remember what principle Bruton stood for from early in the morning until shortly after lunch shows that he never knew the rule. It is believable that over a five-year period one could forget something one once knew; it is utterly unbelievable that a lawyer could forget a simple legal rule after having had his memory refreshed but five hours before, if he had ever really known that rule of law.

Fourth and finally, Forbes allowed into evidence --- without ever objecting on Bruton grounds --- testimony concerning five other statements Engle made to others (see R

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[53] Forbes' lack of truthfulness is further illustrated by the fact that he told the State on cross-examination that he was sure that in 1979 he knew the legal principle enunciated in Bruton (T 526).

256-59). If Forbes truly had allowed Hamilton's damning statement into evidence despite its excludability pursuant to Bruton, because he had thought that the "not worth it" portion of it was so helpful, he obviously would have objected to the other five Bruton violations (or at least some of them). That he did not do so demonstrates that the reason for his failure to object to Hamilton's statement had nothing to do with tactics, but rather was the product of Forbes' ignorance of the Bruton rule.

Had there been a fair and objective factfinder resolving Stevens' motion, he would have been compelled to conclude that ignorance of the Bruton rule was responsible for Forbes' failure to object. The conclusion Judge Santora came to --- i.e., that it had been tactics --- is simply not supported by the credible evidence. A fair judge would also have agreed with Dillinger, defendant's expert, that any reasonably effective defense attorney --- particularly one trying a capital case where the co-defendant had already received a severance on that exact basis --- would have been familiar in 1979 with Bruton (T 609-10). Likewise, an unbiased judge would have concluded that Coxe was accurate in his summation when he paraphrased Stevens as having urged the murder to prevent her identifying Engle or him and when he characterized the inadmissible statement by Hamilton as the

"most accurate" testimony in the entire case (TT 1139, TT 1127).

We submit that Forbes' failure to object to the devastating "Rufus went crazy" evidence not only was part of a significant pattern of ineffective representation but also was the type of serious error which, even standing alone, creates an unconstitutional deprivation of the effective assistance of counsel. See United States v. Cronic, 466 U.S. 648, 657 n.20 (1984).

2. Because of His Lack of Knowledge of the Law, Forbes Failed To Seek Suppression of Stevens' Confession on Fourth Amendment Grounds

a. The Facts

On the evening of March 19, 1979 Nathan Hamilton was in a car stopped by the police upon suspicion of driving while intoxicated. After the police were told that Hamilton had information about the murder of Eleanor Tolin, he was taken to Jacksonville police headquarters for questioning (TT 655-62). He initially refused to provide James Lester Parmenter, the detective heading the investigation, with any information until after it had occurred to him that he might obtain the $5,000 reward which had been offered by the management of the convenience store where the robbery had occurred (Parmenter

deposition 5-6). Only after discussing the reward with Parmenter (who was non-committal on the subject) did Hamilton implicate Stevens and Engle in the robbery of the convenience store and the subsequent killing of its clerk (Parmenter deposition 6, TT 665-66).

Solely upon the basis of Hamilton's statements,[54] Stevens was arrested without a warrant at 3:40 a.m. on March 20 as he lay in bed in the trailer in which he and his family lived (TT 863-66). Parmenter has made two statements which demonstrate that there was no probable cause for Stevens' arrest at the time it was made. In his deposition on May 8, 1979, he asserted (25):

> I had no idea at the time I received [the information] that it was correct. It was something that had to be checked out.

Parmenter made his position even clearer in an August 17, 1979 Jacksonville Journal article in which he stated (R 69) that "the Hamilton statement left police 'a million miles from making a case"' against Stevens and Engle. Parmenter added that the "police would have had to turn the two loose had

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[54] Parmenter testified at his deposition that he "had nothing on [Engle], except what Nathan had told me" (26). It is clear from the context that Parmenter and the other officials likewise had no other information implicating Stevens.

Stevens not confessed in a lengthy interrogation following his arrest."

Stevens was interrogated continuously from shortly after he arrived at police headquarters at **4:40** a.m. until about **8:20** a.m. (TT **866-67**, TT **877**, TT **887).** During that interrogation Stevens confessed involvement in the robbery, kidnapping and rape of Tolin (TT **898-924).**

Forbes moved to suppress Stevens' confession pursuant to the Florida Constitution and the Fifth, Ninth and Fourteenth Amendments to the United States Constitution (RDA **44),** essentially on the grounds of duress and Stevens' failure to make a knowing and intelligent waiver of his rights to remain silent and to counsel. A hearing was held and the motion was denied (TT 32-189, RDA **49).**

b. The Fourth Amendment Claims

Forbes --- quite properly, considering the extremely damaging nature of Stevens' admissions --- sought their exclusion from the trial. He did so, however, solely upon Fifth Amendment grounds, despite possessing two stronger Fourth Amendment claims which, if pressed, would have resulted in suppression of Stevens' statements. Those claims were not advanced because Forbes was totally unaware that the Fourth Amendment provided bases for challenging the admission into

evidence of a defendant's statements. See also, Art, I, §12, Fla. Const. Just such an error --- the failure, due to counsel's ignorance, to raise a viable Fourth Amendment attack on a defendant's statements --- was crucial in Goodwin v. Balkcom, 684 F.2d 794, 813-14 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983), to the court's determination that counsel had been ineffective.[55]

i. The Arrest Without A Warrant

Stevens was concededly arrested in his home without a warrant, in the absence of consent or exigent circumstances.[56] The Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971), labeled warrantless seizures

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[55] Counsel in Goodwin did not know that a confession could be suppressed as the fruit of an illegal arrest, nor was he familiar with Wong Sun v. United States, 371 U.S. 471 (1963).

[56] Three factors would negate a claim of exigent circumstances, if the State were to advance such a contention. Cf, Michigan v. Tyler, 436 U.S. 499, 509 (1978). First, no one would have been in any danger if the police had delayed the short period of time necessary to obtain an arrest warrant. Second, one week had passed since the crimes occurred so there was no reason to believe that Stevens would flee in the brief time needed to obtain a warrant. Third, more than seven hours elapsed between the time the police took Hamilton into custody and the time they arrested Stevens (TT 659, TT 669) --- more than ample time to obtain a warrant. Compare State v. Santamaria, 385 So. 2d 1130, 1131 n.1 (Fla. 1st DCA 1980), in which the court relied on a 1979 Duval County Circuit Judge's finding that two hours was adequate time to obtain an arrest warrant.

inside a person's home ---in the absence of exigent circumstances --- as "per se unreasonable."[57] The requirement for a warrant was made explicit in Payton v. New York, 445 U.S. 573, 576, 589-90 (1980). United States v. Johnson, 457 U.S. 537, 562 (1982), held that Payton applied retroactively to all cases where the conviction was not yet final on April 15, 1980, the date Payton was decided.[58]

Because Payton was handed down in 1980 and Stevens was tried in 1979, Judge Santora found that Forbes was not ineffective for not having foreseen the way in which the law would develop (R 636 Par. 11). If in fact Payton had overruled precedent to the contrary or had overturned a consensus view of the federal circuit and state courts on this subject, the judge's point would have been well-taken.[59] United States

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[57] At least since Boyd v. United States, 116 U.S. 616, 630 (1886), the Supreme Court had acknowledged that the Fourth Amendment accords special protection to the home, McDonald v. United States, 335 U.S. 451, 456 (1948), stated that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." See also, United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) ("the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection").

[58] Stevens' direct appeal to this Court was not decided until September 14, 1982 so there is no doubt concerning Payton's applicability to this matter.

[59] Numerous challenges to warrantless arrests in a person's home were made years before Payton was decided, including the trial court challenges made in Payton and in the companion case of Riddick v. New York, 445 U.S. 573 (1980). See id. at 577 and 578-79. It should also be noted that Payton and Riddick made their claims despite the existence of New York statutes authorizing warrantless arrests in the home.

v. Johnson, supra, 457 U.S. at 552-54, however, held that Payton did neither, being based instead on "long-recognized principles of Fourth Amendment law and the weight of historical authority."

Our position is supported by the fact that it was well-known among criminal defense attorneys in Duval County in 1979 --- and for several years previously --- that the United States Constitution required a warrant before a person was arrested in his home in the absence of consent or exigent circumstances. That fact is shown by the numerous pre-Payton cases in which those criminal defense attorneys raised the issue. See, e.g., Brown v. State, 392 So. 2d 280, 281 (Fla. 1st DCA 1980), cert. denied, 454 U.S. 819 (1981); State v. Santamaria, supra, 385 So. 2d at 1130-31; Busch v. State, 355 So. 2d 488, 488-89 (Fla. 1st DCA 1978), vacated, 446 U.S. 902 (1980), on remand, 392 So. 2d 272, 273 (Fla. 1st DCA 1980), cert. denied, 452 U.S. 909 (1981).[60]

Our position that Forbes was obliged to seek the suppression of Stevens' confession because of the unconstitutionality of the warrantless arrest is further supported by the fact that four[61] of the six federal circuits which had

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[60] Busch sought the suppression of a confession made following an unconstitutional warrantless arrest.

[61] The Eighth Circuit joined the other four in August of 1979, United States v. Houle, 603 F.2d 1297 (8th Cir. 1979).

considered the issue by 1979 had found such arrests, in the absence of exigent circumstances or consent, to be unconstitutional. Three of the remaining then-eleven circuits had assumed that such arrests in the home were unconstitutional. See Payton v. New York, supra, 445 U.S. at 575 n.4 (citing cases).

There was no justification for Forbes' failure to challenge the statements which flowed directly from the warrantless arrest. Forbes testified that he regarded Stevens' admissions as unhelpful evidence, that he wanted them suppressed and that there was no strategic reason not to make the warrantless arrest claim (TT 325-26, TT 336, TT 55).

ii. The Lack of Probable Cause

Parmenter's deposition testimony and his statements to the Jacksonville Journal make clear that there was no probable cause for Stevens' arrest. Furthermore, applying the two-pronged test established by Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969),[62] there was no basis for Parmenter to conclude that the second

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[62] We recognize that Illinois v. Gates, 462 U.S. 213 (1983), has replaced the Aguilar-Spinelli test with a "totality of the circumstances" approach. It is appropriate in determining Forbes' effectiveness, however, to analyze the law as it existed in 1979. See Strickland v. Washington, supra, 466 U.S. at 689-90.

or "veracity" prong of that test was satisfied. There was no information that Hamilton was reliable. In fact, the police checked and found that he had an arrest record for what Parmenter termed "minor stuff"[63] (Parmenter deposition 31). Other than that, Parmenter said that he had no information as to Hamilton's reliability or unreliability. Ibid. Of course, the fact that Hamilton's accusations were apparently substantially influenced by his desire for the $5,000 reward was a factor strongly indicating unreliability. Furthermore, there was nothing to corroborate the reliability of his information. Other than his accusations against Stevens and Engle, all the information Hamilton imparted could have been derived from news reports.[64]

A long line of cases commencing in 1963 with Wong Sun v. United States, supra, and including Brown v. Illinois, **422** U.S. 590 (1975), and Dunaway v. New York, **442** U.S. **200** (1979),[65] recognizes that statements emanating from an illegal

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[63] Among that "minor stuff" was an arrest just several months before in December of 1978 for aggravated assault, possession of two concealed firearms, and possession of marijuana (Hamilton deposition **41).**

[64] Judge Santora's ipse dixit as to the existence of probable cause (R 636 Par. 11) is based upon no facts and is, we submit, simply another manifestation of his overwhelming prejudice against Stevens.

[65] In Taylor v. State, 355 So. 2d 180, **184** (Fla. 3d DCA 1978), the court stated: "Indeed, it has long been held that an illegal arrest or an illegal search presumptively taints and renders involuntary any subsequent confession or admission obtained from the victim of the arrest or search" (citing

arrest should be suppressed. In this instance all the key factors set forth in Brown v. Illinois, supra, 422 U.S. at 403-04 --- temporal proximity between the arrest and the confession, the lack of intervening circumstances and the flagrancy of the official misconduct --- weigh in Stevens' favor. See Taylor v. Alabama, 457 U.S. 687 (1982). Had the motion been made, it would have been granted.

The reason why the lack of probable cause ground was not asserted is, quite simply, that Forbes did not know of it. He testified in 1984 that the claim might well have succeeded at the time of the post-conviction hearing, but that it would not have in 1979 because the law then would not have supported such a claim (T 331). Forbes' position on this was every bit as baseless as that of the lawyer in Goodwin v. Balkcom, supra.[66] Cf. Smith v. Wainwright, 777 F.2d 609, 617 (11th Cir. 1985) (requiring as part of adversarial testing process vigorous efforts to suppress crucial evidence in the form of confessions even if no theory of defense). What Forbes thought was a new principle of law enunciated since 1979 had in fact been the law for two decades. Since Forbes was obviously totally unfamiliar with that case law, he not

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Brown, Wong Sun and Florida cases going back to 1967) (emphasis added).

[66] It should be noted that Goodwin's lawyer was ineffective for failing to raise such a claim in 1975, so Forbes was even less justified for failing to do so in 1979.

surprisingly failed to raise the appropriate Fourth Amendment claim.

c. The Ineffective Assistance

In both instances the claims should have been based upon readily-available precedents of the United States Supreme Court. Certainly the failure to be aware of such precedents is inconsistent with the prevailing professional norms. Cf. Kimmelman v. Morrison, 477 U.S. ___, 91 L. Ed. 2d 305, 326 (1986). As far as prejudice is concerned, the conclusion could not be clearer. It is perfectly obvious that there would have been a strong likelihood of acquittal had the jury not heard Stevens' admissions of participating in the robbery, kidnapping and rape of Tolin.[67]

[67] This ground, like the failure to object to the Hamilton "Rufus went crazy" testimony is the sort of serious error which, standing alone, deprives a defendant of effective assistance of counsel. See United States v. Cronic, supra. The remaining deficiencies exhibited at the guilt phase admittedly do not fit into that category. Considered, however, in conjunction with each other and with the other more serious instances of ineffectiveness, these errors warrant the direction of a new trial. They demonstrate, inter alia, how pervasive Forbes' ineffectiveness was. Our claims do not concern just a mistake or two, but rather a consistent pattern of lack of preparation and knowledge by Forbes with respect to both the facts of, and the law relevant to, this matter.

3. Forbes Not Only Ineffectively Failed To Impeach Hamilton, But He Also Fabricated an Excuse for Not Doing So

Nathan Hamilton was, as this Court said, one of the two principal witnesses against Stevens. Stevens v. State, supra, 419 So. 2d at 1061. His testimony, most particularly the "Rufus went crazy" statement, was very damaging. There was thus every reason for competent trial counsel to impeach his credibility, particularly since there was significant material available in the depositions with which to do so. Shockingly, Forbes failed to utilize the most potent material available to him in this area. Even more shockingly, Forbes tried to explain away his deficiency with a lie.

When challenged at the post-conviction hearing as to why he had not impeached Hamilton with evidence showing that he gave information to the police in the hope of receiving the $5,000 reward (Parmenter deposition 5-6), Forbes fabricated an excuse for his not having done so --- a fabrication largely forced upon him by a desire to be consistent with his earlier fabrications concerning his failure to object to Hamilton's "Rufus went crazy" evidence. Forbes adopted the position that, rather than desiring to impeach Hamilton, he wanted the jury to believe him because (as Forbes saw it) the "not worth it" part of Hamilton's testimony was an admission by Engle that he, not Stevens, had killed Tolin (T 340-42). Forbes'

position is so absurd that, if the stakes were not so high in this case, it would be comic.

What is even more disturbing than Forbes' obvious untruthfulness is the fact that Judge Santora ratified it by characterizing Forbes' position as "reflect[ing] tactical decisions" (R 637 Par. 13). That a judge would make such a finding so clearly unsupported by the record is both profoundly disturbing and a testament to the strong hold Forbes had over Judge Santora. If this Court had doubt up to this point as to how unfair this post-conviction proceeding was, Judge Santora's acceptance of Forbes' blatant lies on this subject should dispel those doubts.

While he claimed --- after it had been alleged that he had not properly impeached Hamilton --- that he wanted to build up Hamilton's credibility (T 342), Forbes in fact did try rather weakly to impeach Hamilton. For instance, he asked Hamilton: "Have you ever been convicted of a crime?" (TT 579). When Hamilton answered "yes," Forbes defying all logic dropped the line of questioning. He did so despite the fact that Hamilton's **deposition**[68] spelled out both that he had three convictions and what they involved (9-10). Forbes then tried to elicit from Hamilton that he and Stevens were not

[68] It may be significant that the portion of the deposition in which the convictions are revealed was conducted by Engle's attorney. In any event, Forbes' failure to follow up on the prior convictions question shows how grossly unprepared he was for Stevens' trial.

friendly (TT 579). Forbes next tried to suggest that Hamilton's accusations against Stevens were motivated by the breakup of his marriage to Stevens' cousin (TT 579-80).

Despite all these unequivocal efforts to impeach Hamilton, Forbes never once referred to Hamilton's most powerful motive to lie: the desire for $5,000.[69] Not only might Forbes had scored some points questioning Hamilton directly on this subject, but he could not lose the battle no matter what Hamilton said because Parmenter was already on record as saying that Hamilton had refused to talk to the police until it occurred to him that he might collect $5,000 for doing so (Parmenter deposition 5-6).[70] The failure to use strong available impeachment evidence --- when it is clear that impeachment is part of the strategy --- is ineffective. Smith v. Wainwright, 741 F.2d 1248, 1254-55 (11th Cir. 1984), cert. denied, 105 S. Ct. 1853 (1985).

The defense expert Dillinger stated that Forbes' latter-day desire to build up Hamilton's credibility made no

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[69] Forbes also did not question Hamilton about the dismissal by the State Attorney's office under unclear circumstances of recent charges for aggravated assault, possession of two concealed firearms and possession of marijuana (Hamilton deposition 41-43).

[70] Forbes recognized at the post-conviction hearing that questioning about the reward "[c]ertainly would have tainted" Hamilton's credibility (T 342). Yet, he did not mention the subject in cross-examining either Hamilton or Parmenter because he wanted to "build up" Hamilton's credibility (T 342).

sense, but in any event, Forbes' contentions were not accurate because he did attack Hamilton's credibility in summation (T **613).** And indeed he did, showing once again how he had fabricated a story to cover up his error in failing to object to the Bruton evidence. He brought out Hamilton's conviction of a crime and the animosity between Hamilton and Stevens (TT **1038,** TT **1039-40,** TT **1046).** In exactly the situation in which he should have been talking about the reward, Forbes suggested that Hamilton fabricated his accusations simply to help his friend extricate himself from a driving while intoxicated charge (TT 1060) --- hardly a believable suggestion.

In sum, Forbes tried quite hard to impeach Hamilton --- as he should have. For reasons explicable only by reason of a disgraceful lack of preparation, Forbes neglected to impeach Hamilton with other readily available material, including the damning evidence which showed that Hamilton had a motive to lie. When confronted with that failure, rather than admitting he had made a **mistake,**[71] Forbes concocted a cover story. His need for such a fictionalized account was greatly augmented by his prior fabrication as to why he had not objected to Hamilton's "Rufus went crazy" testimony. Having uttered the buzzwords "tactical decision" in an attempt

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[71] After more than **250** pages of examination concerning his failures in representing Stevens, Forbes with typical lack of candor could not identify even a single thing he would in retrospect have done differently (T **502-03).**

to justify his failure to object to Hamilton's testimony, Forbes felt it prudent or necessary to attempt to tell a consistent story. Thus, he told the court that he thought that Hamilton's testimony was so helpful that he wanted to enhance his credibility in the jurors' eyes by not questioning him about his overwhelming desire for the $5,000 reward.

While Forbes' supposed tactics were foolhardy and counter to Stevens' best interests, one need not become mired in whether the "tactics" were well- or ill-advised. What Forbes actually did --- rather than claimed to have done--- proves conclusively that his latter-day justifications for his omissions were just that. Unfortunately, Judge Santora saw fit to accept his friend Forbes' specious testimony at face value, despite the fact the record clearly contradicted it.

4. Forbes Failed to Object to the Jury Instruction That Premeditation Is Presumed As a Matter of Law and Made Up Yet Another Cover Story For His Deficiencies

Judge Santora in connection with his charge on murder in the first degree instructed the jury that "the requisite premeditation is presumed to exist as a matter of law" (TT 1179) (emphasis added). Such an instruction constitutes a mandatory presumption forbidden by Sandstrom v. Montana, 442 U.S. 510 (1979), the Fourteenth Amendment to the

United States Constitution and Article 1, §9 of the Florida Constitution. Forbes, despite having time to study a written copy of the charge, did not object to this instruction. He claimed at the hearing that he deliberately withheld his objection because he wanted the jury to be confused (T 324).

Forbes' assertion that he hoped that the judge's instruction would confuse the jury might strike one as disarming candor. Forbes' other testimony on this point, however, demonstrates that he has fabricated yet another excuse for his failings. Forbes admitted that he was not familiar at the time of the hearing with the case of Sandstrom v. Montana and could not remember if he had been familiar with that case at the time of the trial (T 322-23). When asked whether he had known in 1979 the rule with respect to jury instructions concerning conclusive presumptions, he replied: "I think I did" (T 323). When asked for the contents of that understanding, Forbes had a lapse of memory (T 323).

We suggest that, rather than a lapse of memory, Forbes was never familiar with the rule of law enunciated in Sandstrom v. Montana, which had been handed down a month before the trial of this matter, and which continued a long line of cases forbidding conclusive presumptions. See United States v. United States Gypsum Co., 438 U.S. 422, 435, 446 (1978); United States v. Morrissette, 342 U.S. 246, 274-75 (1952). Just as he had lied in the past to cover up his

deficient performance, so he fabricated yet another "tactical" ploy: a desire to confuse the jury. We submit that this Court should not be confused by Forbes' never-ending justifications for his errors.

Since it is clear that Forbes was unfamiliar with the law in this area, he could not make an informed or justified tactical decision as to whether to assert an objection or consciously to waive the error. Cf. Mauldin v. Wainwright, **723** F.2d **799, 800** (11th Cir. **1984)** (failure to obtain relevant information precluded intelligent and informed strategy decision). Rather, we are confronted again with the unfortunate spectacle of a lawyer who will say anything to avoid having to admit having made any error, small or large. And, regrettably, the judge presiding over the hearing had such protective feelings for the lawyer that he either could not, or would not, perceive the attorney's essential dishonesty.[72]

5. Forbes Inexcusably Failed To Object to the Prosecution's Failure to Comply With Discovery Rules

The only item of evidence, which had any tendency to connect Stevens to the killing of Tolin, or even to an intent

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[72] Thus, Judge Santora yet again found that the failure to object to the mandatory presumption was a tactical decision (**R 637** Par. **12).**

to kill (other than Hamilton's inadmissible evidence concerning what Engle had told him), was the dull knife recovered beneath Stevens' trailer. The medical examiner testified that a bruise found on Tolin's back was consistent with an attempt to stab the deceased with that dull knife (Floro: TT 800-01). The knife was found as a direct result of the statements Stevens made in response to the interrogation which occurred when he appeared on May 17, 1979 for an aborted polygraph examination.[73]

On April 6, 1979, Forbes had made a demand for discovery, which included the following: "Whether there has been any search or seizure and any documents relating thereto" (RDA 8, Par. 9). The prosecution was required to provide such information --- Rule 3.220(a)(ix), Fla. R. Crim. P. --- but never did. At trial the prosecution moved to introduce the seized knife into evidence (TT 677-83). Despite not having received notice of the seizure of the knife,[74] Forbes failed to point out that the prosecution had not complied with discovery and to seek the exclusion of the knife, pursuant to Rule 3.220(j)(1), Fla. R. Crim. P. Had he done so, the knife should have been excluded. At the very least he would have

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[73] These facts are discussed in far more detail in Point Five, infra.

[74] The prosecution did reveal that it had "one knife" as physical evidence (RDA 20), but gave no indication where the knife came from or that it was the product of a seizure.

been entitled to an inquiry pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971). Judge Santora's finding that Forbes "was on notice regarding the origin of the seized knife" (R 637 Par. 15) (emphasis added) is simply not supported by the credible evidence. See discussion at pp. 148-50, infra.

The dull knife was critical evidence linking Stevens to the killing of Tolin. Coxe referred to it no less than eleven times in his summation (TT 1111, TT 1115, TT 1118-19, TT 1121, TT 1128, TT 1128-29, TT 1129, TT 1130 [three times], TT 1138). Since Forbes objected to the introduction of the knife into evidence, he certainly had no tactical reason for failing to object to the prosecution's violation of the discovery rules. The failure to make such an obvious objection was clearly deficient representation which severely prejudiced Stevens.

6. Forbes Generally Failed To Prepare Properly

Forbes' preparation for trial was lackadaisical and slipshod. During the cross-examination (TT 707-14, TT 835-59) of the State's serologist, Steven Platt, Forbes was obviously unprepared. Coxe complained about Forbes' use of discovery tactics at trial and accused Forbes of having failed to avail himself of the informal discovery the prosecution had offered

(TT 710). Judge Santora also felt compelled to pointedly remark to Forbes that the trial would not be recessed to allow the conducting of depositions which should have been held in the matter before trial commenced (TT 861).

A shocking example of Forbes' lack of diligence in preparing is that he made no application to obtain a transcript of the Engle trial. Since that trial had concluded on June 2, 1979 (T 560), more than six weeks before Stevens' trial began, there had been plenty of time to do so. In light of the fact that the witnesses and testimony were very similar at both trials, a transcript would have been an invaluable aid.[75] Had Forbes done what any reasonably effective trial lawyer would have done --- i.e., obtained the transcript--- he would have recognized how damaging Hamilton's testimony about his conversation with Engle really was.[76]

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[75] Stevens would have been entitled to have the State pay for such a transcript. See Britt v. North Carolina, 404 U.S. 226, 227 (1971).

[76] Hamilton testified as follows at Engle's trial (420-21):

> Q Mr. Hamilton, directing your attention back to Sunday night, March 18, 1979, you were watching the movie "Zoro" with the defendant, do you recall what if anything you said to the defendant [Engle] during that conversation?
>
> A Yes, sir.
>
> Q What did you say?
>
> A I told him that Rufus Stevens

We realize that there is strong evidence that Forbes was unaware of the Bruton rule and thus might well not have objected even if he had had a transcript. In light of the devastating nature of the testimony, however, Forbes might well have discussed the evidentiary issues with other lawyers who would have told him that Engle's statements violated Bruton and were thus inadmissible. Furthermore, had Forbes really been preparing as an effective lawyer would have done, he would have done some legal research concerning how to exclude this key evidence. Any diligent research would have turned up both the Bruton rule and the fact that Engle's

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> had told me that his [Engle's] knife is what it was done with and he threw me his knife and said do you see any blood on my knife. I said no because I didn't see any blood on his knife. Then, I asked him if he thought it was worth a lousy fifty- or sixty-dollar robbery to take a girl out of a store and kill her and he said no, he didn't.
>
> Then, I asked him why they did it. He said that they got her out of the store, away from a telephone, got her out into the country, Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us.

No reasonable person could interpret the above statement as favorable to Stevens in any way. This slightly longer version of the conversation clearly attributed the killing to joint activity of the defendants. Forbes could not possibly have interpreted it being an admission by Engle that he alone had killed Tolin.

statement to Hamilton was inadmissible hearsay at Stevens' trial.

Forbes recognized in the post-conviction proceedings that he could not justify not knowing what had occurred at the Engle trial. Since he had to admit that he had not obtained a transcript (T 302), he tried to compensate by claiming that either he or an investigator working on his behalf attended portions of the Engle trial (T 520-21, T 555-56). Forbes was never able to specify how much of the trial either he or his investigator attended (T 302, T 556-57). Indeed, when pressed, Forbes admitted that he could not recall whether the investigator had attended the Engle trial at all (T 557, T 581).

Finally with respect to Forbes' preparation, it is more than a little significant that Forbes had destroyed all of his notes so that post-conviction counsel was deprived of a valuable tool for showing what Forbes had and had not done before trial. This certainly was a strong indication of Forbes' consciousness of his own ineffectiveness. See Roberson v. State, 40 Fla. 509, 24 So. 474, 475-76 (1898).

Forbes' testimony concerning his destroyed notes was strikingly different at his deposition and at the post-conviction hearing eleven days later:

Deposition	Post-Conviction Hearing
Forbes said that he did not take "copious" notes and that "It's customary for me to try a case for two or three days and never have more than a page or two of notes" (**T 16**).	"My usual practice [was] to keep a separate legal notebook on each witness because roughly one page would be worth four or five minutes worth of testimony as far as my notes were concerned." Forbes characterized his notes as "voluminous" (T **262**).
With respect to his general practice of retaining notes, Forbes said: "I don't normally throw away anything. I don't necessarily keep a great deal of records, but I don't usually throw them away either" (T 16).	"I normally dispose of [my notes] after every trial" (**T 262**). Asked about his "standard practice," Forbes said: "I don't retain my trial notes. I never have since I have been practicing law" (T **272**).
Forbes had no recollection of throwing away the notes he had made in connection with Stevens' case (T 15, T **18**).	Forbes remembered throwing away all his notes after the oral argument of Stevens' direct appeal to this Court (T 269).[77]

There is no explanation for the above discrepancies other than that Forbes perjured **himself.**[78] How else to

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[77] If this testimony is to be believed, Forbes destroyed all his file notes --- including accounts of what Stevens told him, notes of interviews of witnesses, etc. --- at a time when this Court was considering, inter alia, whether to order a new trial in Stevens' case. How anyone could justify destroying all his file notes --- regardless of their contents --- in such circumstances is beyond us. Does this mean that Forbes had done such a poor job in representing Stevens on appeal that he knew that no relief would be granted?

[78] Forbes' blatant perjury manifests just how much he thought he could get away with in front of his friend Judge Santora. It also shows how careless and sloppy Forbes was, even in preparing for something as important to his own interests and future as the commission of perjury.

explain exactly opposite testimony about one's general practice? The possibility of innocent mistake or lapse of memory can be conclusively ruled out. Thus, in addition to the consciousness of "guilt" shown by the destruction of the notes, there is the consciousness of "guilt" of false testimony. See Douglas v. State, 89 So. 2d 659, 661 (1956). Yet Judge Santora, who "studied ... the [entire] record of this case" (T 631), held that Forbes' testimony was "credible and believable, thereby warranting reliance upon it in determining the outcome of this motion" (T 631).

D. Conclusion

Judge Santora's unquestioning acceptance of Forbes' perjury and incredible explanations for what appear to the objective observer as serious blunders is certainly disturbing. If not reversed, the judge's decision places the imprimatur of fairness upon a severely botched trial --- a trial which led to Stevens being sentenced to death. As we have demonstrated above, the deficiencies in counsel's representation were such that Stevens was convicted of murder in the first degree, a crime of which he surely should have been acquitted had he been effectively represented.

POINT THREE

FORBES' TOTAL INACTION IN THE SENTENCING PROCEEDINGS WAS INEFFECTIVE BY ANY STANDARD

A. Introduction

Forbes was shockingly ineffective in many respects in the representation he provided Stevens at his sentencing proceedings. After the jury had recommended that Stevens be sentenced to life imprisonment, Forbes literally did nothing. He presented neither evidence[79] nor arguments to Judge Santora. He failed to object to clearly inadmissible evidence and abdicated his responsibility to make a record for this Court.

If his client had been 'facing a maximum of thirty days in jail, Forbes' disgraceful inaction would have been unreasonable under any prevailing professional norm. In the circumstances of this case, in which his client'slife hung in the balance, Forbes' failure to do anything was intolerable and, we submit, ineffective per se. See United States v.

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[79] Forbes had also presented no mitigating evidence to the jury in the penalty phase. The only defense witness had testified in surrebuttal to the prosecution's attempt to rebut a mitigating circumstance (TT 1236-40).

Cronic, supra, 466 U.S. at 659-62; Voyles v. Watkins, 489 F. Supp. 901, 912 (N. D. Miss. 1980).

B. Forbes' Excuses

During the course of the post-conviction proceedings Forbes advanced two types of excuses for his failure to make even the slightest effort on Stevens' behalf at sentence. Neither type of excuse was justified by the law or by any tactical course of which the law takes cognizance.

1. The Judge's Attitude

Judge Santora informed Forbes at a conference before the sentence that he intended to impose a death sentence (T 316). Forbes thereupon immediately concluded that it would have been a futility to make any argument to the contrary to the judge (T 316, T 357-58). Indeed, Forbes took the extreme positions that it might have been "improper" as well as an "absolute futility" to have advanced any arguments on Stevens' behalf (T 443) and that even in retrospect he could see no reason why he should have argued at sentencing on his client's behalf (T 446-47).

Assuming, arguendo, that Forbes were correct that any argument or facts he might have presented to Judge Santora

would have fallen on deaf ears, he still would be guilty of gross ineffectiveness. This is so because effectiveness at a capital sentencing proceeding requires, in part, the making of a record for the "appellate court ... [which] reweighs the evidence." See Strickland v. Washington, supra, 466 U.S. at 695.

Forbes completely failed, however, to understand that what he did or did not do in the sentencing proceeding created the facts which this Court would review to determine whether the findings with respect to aggravating and mitigating circumstances were supported by the record. Indeed, when asked what effect the fact that an appellate court would be reviewing the record should have on counsel's determination as to whether to make an argument, Forbes answered: "I don't think it ... should have had any [effect]" (T 127). In a similar vein Forbes affirmatively declared that he saw no reason to make as complete a record for this Court as possible, by filing a brief opposing the prosecution's "Brief ... Demanding ... Death" (T 79-80).[80]

Dillinger addressed himself to the proper course of action to pursue when a judge reveals that he will not follow a jury recommendation of life (T 606):

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[80] Coxe, on the other hand, testified that the State's principal reason for filing its "Brief ... Demanding ... Death" was to influence this Court's determination of the sentencing issues (T 863).

> ... you ... need to do everything that's humanly possible to protect that record to put whatever evidence you have before that court to substantiate why the jury recommendation is correct. You have to do that, and if you don't do it, there is nothing to substantiate your position from a factual point of view or legal point of view and you are going to lose. (Emphasis added.)

Had Forbes made an appropriate record, we submit that, at the very least, this Court on direct review would have found one or more mitigating factors and would have overruled one or more of the aggravating factors relied upon by Judge Santora. In such circumstances a de novo sentencing proceeding would have been ordered. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). Thus, standing alone, the failure to make an appropriate record at the sentencing stage deprived Stevens of his right to effective assistance of counsel.

2. The Life Recommendation

Forbes' principal goal at Stevens' trial was to avoid a death sentence rather than to obtain a not guilty verdict (T 426). A jury recommendation of life imprisonment was crucial to Forbes' strategy because (1) he considered it a foregone conclusion that Judge Santora would impose a death sentence regardless of the jury's recommendation (T 420-21) and (2) he considered a life recommendation as a virtual

guarantee of a reversal by this Court of any death sentence which might be imposed (T 355-56). Forbes felt so strongly about the value of a life recommendation that he sacrificed the opportunity to be properly prepared at the penalty stage so as to capitalize on what he considered were the increased chances of obtaining a life recommendation if the penalty stage were held immediately following the verdict (T 61, T 430).

The fatal flaw was Forbes' erroneous belief that a life recommendation was a virtual guarantee that this Court would overturn any death sentence regardless of the factual support in the record for such a recommendation (T 62, T 64). Forbes defended his position[81] by claiming that the law on this subject had changed between July of 1979 when the penalty phase was held and September of 1982 when this Court rendered its decision on Stevens' direct appeal (T 62, T 66). When challenged concerning his theory that the law had changed, Forbes could cite no case which stood for the proposition (T 65-66). With good reason; none exists.

The fact is that no lawyer who was aware of the state of the law in mid-1979, as Forbes claims to have been, could reasonably have come to the conclusion that a life recommendation was a virtual guarantee that this Court would

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[81] During the post-conviction proceedings Forbes still believed that it had been correct to rush into the penalty stage without being properly prepared (T 65).

overturn a subsequently-imposed death sentence. As Dillinger correctly testified, the law in this area developed in 1973 and 1974 and was clarified in Tedder v. State, 322 So. 2d 908 (Fla. 1975). The law has not changed since (T 608-09). Tedder set forth the sentencing standard applicable to jury override cases at 910 as follows:

> A jury recommendation under our trifurcated death penalty statute should be given great weight, In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. (Emphasis added.)

This Court never stated, explicitly or implicitly, that it would always follow a jury's recommendation of life, How Forbes could have come to that conclusion is unknown to us.

Whatever thought processes he employed, Forbes, in an objective sense, came to a completely unreasonable conclusion. In at least six cases handed down between 1975 and the time Stevens was convicted this Court upheld death sentences imposed over jury recommendations of life.[82] We submit that

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[82] Hoy v. State, 353 So. 2d 826 (Fla, 1977), cert. denied, 439 U.S. 920 (1978); Barclay v. State, 343 So. 2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978); Dobbert v. State, 328 So. 2d 433 (Fla, 1976), aff'd., 432 U.S. 282 (1977); Douglas v. State, 328 So. 2d 18 (Fla. 1976), cert. denied, 429 U.S. 871 (1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975), vacated on other grounds, 430 U.S. 349 (1977); Sawyer v. State, 313 So. 2d 680 (Fla. 1975), cert. denied, 428

the cases listed in n.82 conclusively refute the reasonableness of Forbes' related theories (1) that the fact that Judge Santora had apparently made up his mind justified making no record concerning why a life sentence should be imposed and (2) that a life recommendation was all that was needed for this Court to overturn a death sentence.[83]

A strategy may be so patently unreasonable that no competent attorney would embrace it. Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983), vacated, 468 U.S. 1206, 1212 (1984), reinstated, 739 F.2d 531 (11th Cir. 1984), cert. denied, 105 S. Ct. 1170 (1985).[84] Forbes' sentencing-phase strategy certainly falls into that category. His "tactic" of presenting no mitigating evidence to the judge or jury cannot be given the deference a rational and reasoned tactical decision is usually accorded because it was at total odds with

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U.S. 911 (1976). Interestingly, two of these six cases were Duval County cases -- Barclay and Dobbert. Also interestingly, one of those who prosecuted Dobbert both at the trial and appellate levels later was to be Engle's attorney. We point these facts out to show how unlikely it would have been for a lawyer in Forbes' position to reasonably believe that the battle for a life sentence was won when the jury recommended life. Even the local folklore would not have supported Forbes' theory.

[83] Dillinger noted that for years before 1979 competent trial attorneys had been aware of the need to protect the record even after receiving a life recommendation (T 608-09).

[84] There are several factual parallels between Douglas and Stevens' case. The trial lawyer in Douglas, just as was true with Forbes, not only was unprepared for the penalty phase but also failed to understand how the sentencing power was allocated in this State.

well-established law handed down by this Court prior to the time Forbes made his decision to do nothing.

C. Judge Santora's Decision

Judge Santora's decision --- surprisingly, considering the emphasis on this subject by Stevens at the hearing and in his post-hearing memorandum (R 574-96) --- deals only very slightly with the issue of ineffectiveness in the sentencing proceedings.

One mistaken concept, which should be commented upon, is the contention that because the jury recommended life, there can be no prejudice to Stevens from any deficiencies which occurred at the penalty stage (R 636 Par. 9). If the life recommendation were an end in itself, or if the penalty stage were divorced from what occurred at sentence, Judge Santora's position would have some merit. Since neither of those circumstances is in fact the case, Judge Santora's decision misses the crux of our contentions. Cf. Miller v. Wainwright, 798 F.2d 426, 430 (11th Cir. 1986) (error at penalty phase not harmless on the ground that the jury recommended life, when the judge overrides the recommendation).

Forbes' failure to present any evidence supporting mitigation and his concomitant failure to object to constitu-

tionally inadmissible evidence deprived the judge and this Court of the former and allowed Judge Santora and this Court to rely upon the latter --- all to Stevens' detriment. While Forbes' rhetoric successfully swayed the jury, his failure to present any evidence on Stevens' behalf made that recommendation worthless.[85] See Holmes v. State, 429 So. 2d 297, 301 (1983) (general argument against capital punishment ineffective because counsel should have concentrated on mitigating evidence).

Each party involved in the sentencing process--- the jury, the judge and this Court --- is supposed to reach a conclusion based upon the evidence which supports aggravating and mitigating circumstances. Even if the jury has been persuaded by emotion, the trial judge and this Court must determine what to do based upon the evidence. In this case Forbes presented no mitigating evidence. Since the prosecution had presented some evidence of aggravating circumstances, it was inevitable that there would be insufficient mitigating circumstances to outweigh the aggravating Circumstances. So much for Judge Santora's conclusion of no prejudice.

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[85] Dillinger made this point very clearly (T 713):

> ... the life recommendation has to be something that you can support and you support it with the record.... [J]ust getting a life recommendation if you can't support it from the record, you're going to lose it.

We must also comment upon one striking aspect of the sentencing proceeding before Judge Santora, which is duplicated in the judge's post-conviction decision --- the total failure to pay even lip service to the jury's life recommendation, much less to accord it the "great weight" to which it is entitled. See Tedder v. State, supra, 322 So. 2d at 910. Indeed, it is clear from both the sentencing findings and the post-conviction opinion that Judge Santora assigned absolutely no weight to the jury's recommendation. Had he given it even a little, there would have been some analysis in either the findings or the opinion as to how "the facts suggesting death [were] so clear and convincing that virtually no reasonable person could differ." See Tedder v. State, supra.

The fundamental error Judge Santora committed in ignoring the jury's recommendation was compounded by the personal standard he employed in determining whether Forbes' failures created a reasonable probability --- or "a probability sufficient to undermine confidence in the outcome"--- that the resulting sentence would have been different. Judge Santora clearly analyzed the effect of the mitigation Forbes failed to present only in subjective terms --- what "this Court" would have done. See, e.g., R 633-34. His analysis was squarely at odds with the objective standard demanded by Strickland v. Washington, supra, 466 U.S. at 694-95. See also, Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir.

1982), cert. denied, 464 U.S. 1002 (1983). Had Judge Santora "reasonably, conscientiously and impartially" applied the Tedder standard, in the context of the additional available mitigation evidence discussed below, he would have concluded that the jury's recommendation of life imprisonment had been supported by the record.[86]

D. Counsel's Ineffectiveness

1. Forbes Stood Mute at Sentence and Neglected to Answer the Prosecution's Brief Demanding Death

Forbes literally spoke not one word on Stevens' behalf at the time of sentence.[87] He did not ask the judge to

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[86] In light of the great uncertainty in the constitutionally-admitted evidence as to which of the two defendants was involved in the actual killing, the life recommendation may have been supported by residual doubt in the jurors' minds. Furthermore, the weakness in this crucial element of the proof makes it far more likely that Forbes' deficient performance affected the result. See Strickland v. Washington, supra, 466 U.S. at 696.

[87] The entirety of the proceedings of August 17, 1979, prior to the beginning of the judge's sentencing findings, are set forth below (TT 1298):

> THE COURT: State versus Rufus Stevens for sentencing. Have the defendant come forward, please. Do you wish to be heard on the Motion for a New Trial at this time?
>
> MR. FORBES: No, Your Honor. The Motion speaks for itself.

impose a life sentence, much less argue the numerous reasons that the judge should have done so. He did not even point out to the judge either the life recommendation or his understanding that this Court would essentially be bound to overturn any death sentence. Forbes' total abdication of his responsibility to be his client's advocate constituted a seriously deficient performance.

The fact that the judge had said that he had made up his mind was hardly justification for Forbes' having assumed that the judge's mind was entirely closed and that nothing he could say would make a difference. The Supreme Court has noted in holding that there is a constitutional right to sum up in a non-jury case that, while "[s]ome cases may appear to the trial judge to be simple --- open and shut --- at the close of evidence," there will surely be cases, among those "open and shut" matters, "where closing argument may correct a premature misjudgment and avoid an otherwise erroneous

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> THE COURT: The Motion will-be denied. Rufus Stevens, do you have any lawful reason to offer at this time why sentence of law should not be pronounced?
>
> MR. FORBES: NO, Your Honor.
>
> MR. STEVENS: No, sir.

Similarly, Forbes said nothing on Stevens! behalf at the conclusion of the judge's findings (TT 1307).

verdict." Herring v. New York, 422 U.S. 853, 863 (1975). The Court added that "there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel." Ibid (footnote omitted). The reasoning of Herring is directly in point. Had Forbes but effectively represented Stevens at sentencing, the result would probably have been a life sentence.

Among the other inexcusable omissions by Forbes was his total failure to respond in any way to the prosecution's 31-page "Brief ... Demanding ... Death," which was served upon him a week before sentence.[88] That brief made legal and factual arguments concerning the aggravating and mitigating factors the State thought applicable. Cf. Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984) (ineffective under circumstances to fail to file reply brief). While admitting that the prosecution's brief was "well-written" and "strong," Forbes testified at the hearing[89] that he did not respond to

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[88] The prosecution's brief was persuasive enough to Forbes that he spent two hours reviewing its 31-pages (see R 556) but the balance of the case ignoring it.

[89] At his deposition Forbes had claimed that the reason that he did not respond to the "Brief ... Demanding ... Death" was that Judge Santora had advised him not to respond (T 104). Apparently Forbes was unwilling to repeat such a claim to Judge Santora's face because at the hearing he denied receiving such advice from the judge (T 438-39). Forbes did admit, however, that he had made such a claim at the deposition (T 439). Recognizing that he could not call Judge Santora as a witness on this subject, Stevens requested that the judge make a specific factual finding as to the truth of this claim (R 575 n.6). Unfortunately, Judge Santora ignored our request.

it because Judge Santora "never indicated to me that that brief meant anything to him" (T 438, T 535).[90] That Forbes should require a judge to tell him to respond to the submission of his adversary is astounding. Despite the fact that the State's brief pointed out (17) that Forbes had not even attempted to offer any evidence of a single mitigating circumstance he was not moved to take action. Furthermore, the brief contained factual errors[91] which Forbes made no effort to correct.

The brief sought to persuade Judge Santora of the applicability of two aggravating factors which the State had disclaimed reliance upon before the jury (TT 1249-50).[92] Because the prosecution did not advance those two factors to the jury,[93] the defense never had an opportunity to argue

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[90] In fact, Judge Santora relied to a great extent on the prosecution's brief --- a conclusion which becomes readily apparent when one compares his sentencing findings (TT 1298-1307) with that brief.

[91] For example, the brief made Stevens' prior record more serious than it was (4-5). See pp. 106-108, infra.

[92] The two factors were that the murder "was committed for the purpose of avoiding or preventing a lawful arrest" and that it was "committed for pecuniary gain." §921.141(5)(e) and (f), Fla. Stat.

[93] Judge Santora's finding of, and the prosecution's reliance on, these factors violated Stevens' rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, §§9 and 17 of the Florida Constitu-

against their applicability. Nonetheless, although able to argue forcefully that the prosecution could not affirm to the judge what it had denied to the jury, Forbes remained mute.

2. Forbes Failed To Object to the Bruton Evidence

Noteworthy among the omissions of which Forbes was guilty was his inexcusable failure to have moved to exclude the evidence which violated Bruton v. United States, supra. The prosecution's brief (14, 22, 24, 27) --- and later Judge Santora in his findings (TT 1300, TT 1301, TT 1303) --- relied upon statements by Engle implicating Stevens. Such statements violated the Bruton rule and Stevens' rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§9 and 16 of the Florida Constitution.

With respect to one aggravating factor,[94] Judge Santora relied solely upon Engle's statements to Nathan Hamilton (TT 1301). As to another,[95] he relied substantially on Engle's statements (TT 1303). Without the unconstitutionally-admitted statement Engle made to Hamilton --- "Rufus went

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tion. See Bullington v. Missouri, 451 U.S. 430 (1981).

[94] That the capital felony had been committed to avoid or prevent an arrest. §921.141(5)(e), Fla. Stat.

[95] "Heinous, atrocious or cruel." §921.141(5)(h), Fla. Stat.

crazy and started saying she's going to identify us" (TT 578) --- Judge Santora would have been obliged to find that there was not sufficient evidence to support the aggravating factor that the capital felony was committed to avoid or prevent a lawful arrest, To find this circumstance applicable, the "dominant or only motive" for the murder, as shown by strong proof, must be the elimination of the witness. Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1978); Riley v. State, 366 So. 2d 19, 22 (Fla. 1978). Without Hamilton's testimony this standard surely could not be met. Furthermore, the quantum of evidence available to support the "heinous, atrocious or cruel" circumstance would have been diminished and thus that factor might well have been rejected.

Not only was the admission of Engle's statement constitutional error which seriously prejudiced Stevens, but it can be stated with confidence, as Dillinger did (T 606-07), that no reasonably effective attorney in 1979 would have allowed Engle's statement to be used against his client without objection. Separate sentencing proceedings had been ordered by Judge Santora, pursuant to a motion made by Engle.[96] Forbes' motion for attorney's fees (R 556) shows that he "receive[d] and review[ed]" that motion before the

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[96] The motion did not cite Bruton, relying instead on the substance of the rule (defendant's sentence must not be based upon "evidence inadmissible against him and which he has not had the right to confront, challenge and cross-examine"),

date of sentence. Thus, Forbes did not have to use any imagination or do any research. All he had to do was follow the lead of Engle's counsel.[97] What did he in fact do? Nothing.

Engle's attorneys, on the other hand, pressed the point before Judge Santora and on appeal. Based on the Bruton point and that alone, this Court vacated Engle's sentence and remanded his case for a new sentencing hearing. Engle v. State, supra, 438 So. 2d at 813-14. In light of the fact that Judge Santora considered and substantially relied upon Engle's statement in sentencing Stevens, just as he had considered and relied upon Stevens' statements in sentencing Engle, it can conclusively be shown that the result would have been different had Forbes but raised this issue at sentence and on appeal.[98]

Judge Santora's decision with respect to this point (R 634) is erroneous in two respects. First, he contends that evidence other than Engle's statement to Hamilton shows that

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[97] Forbes was unable to ascribe any reason for his failure to object to Judge Santora's reliance on Engle's statement in sentencing Stevens (T 95-96, T 477-78).

[98] We submit that this unusually clear-cut instance of ineffectiveness by Forbes is indicative of the entire manner in which he handled this case. This indisputable example of Forbes' ineffectiveness is persuasive evidence that his other grievous errors --- as to many of which Forbes has presented or concocted various justifications and excuses --- were not the product of tactical decisions but rather of lack of preparation and knowledge.

Stevens "was an active participant in a premeditated murder" (R 634). There simply is no such evidence and Judge Santora has not provided us with any hints concerning what he was relying upon. Second, while it is true that Stevens was at, or close to, the scene of the homicide, that hardly justifies sentencing him to death. See Enmund v. Florida, 458 U.S. 782 (1982).

3. Forbes Failed to Object to Inadmissible Psychiatric Evidence and to Retain a Non-Court-Appointed Psychiatrist

Judge Santora in his sentencing findings (TT 1302, TT 1304, TT 1305) and the "Brief ... Demanding ... Death" (12, 14-15, 22, 26, 27) relied heavily upon the constitutionally inadmissible report of a psychiatrist, Ernest C. Miller. Dr. Miller, who was court-appointed (RDA 31), had interviewed Stevens without first having administered Miranda warnings and without having obtained a knowing and intelligent waiver of his right to counsel, in violation of Stevens' rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 16 of the Florida Constitution. As with the Bruton evidence, Forbes made no effort to exclude this material.

The leading case in point is Estelle v. Smith, 451 U.S. 454, 461-71 (1981). That case, although decided two years after Stevens' sentence, simply applied Miranda v. Arizona, 384 U.S. 436 (1966), and right to counsel cases such as Moore v. Illinois, 434 U.S. 220 (1977), to the context of psychiatric evidence at the penalty stage. Because Smith made no new law it has been held to be retroactive. Battie v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981); see also, Booker v. Wainwright, 703 F.2d 1251, 1258 n. 13 (11th Cir.), cert. denied, 464 U.S. 922 (1983). In any event, Forbes testified that he was familiar at the time of the Stevens' case with the clearly applicable doctrine enunciated in Estelle v. Smith. In light of that knowledge, he was unable to explain why he had not objected to the use of Dr. Miller's report (T 96, T 494-95).[99]

The prejudice from Forbes' failure to object to Dr. Miller's report was substantial, Judge Santora's findings (TT 1302) concerning one aggravating factor[100] virtually tracked a

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[99] We are aware that this Court held in Hargrave v. State, 427 So. 2d 713, 715 (Fla. 1983), that Estelle v. Smith does not control circumstances where the defendant "both initiated the psychiatric examination and introduced psychiatric evidence" (emphasis added; footnote omitted). Stevens, of course, did not introduce such evidence; he simply initiated the examination. In such circumstances a defendant does not waive his Fifth and Sixth Amendment claims. Booker v. Wainwright, supra, 703 F.2d at 1256-57; Battie v. Estelle, supra, 655 F.2d at 702.

[100] "Heinous, atrocious or cruel." §921.141(5)(h), Fla. Stat.

portion of the psychiatric report which contained information not available to the court from any other source. Judge Santora also used evidence from Dr. Miller's report to negate in part two mitigating circumstances (TT 1304, TT 1305).[101] Had at least one aggravating circumstance found by Judge Santora not been sustained on appeal and had at least one mitigating circumstance been established --- as we will show below would have been done by reasonably effective counsel--- this Court would have vacated the death sentence on Stevens' direct appeal. See Elledge v. State, supra.

Forbes was ineffective in connection with the psychiatric evidence in another respect as well. He should never have had Stevens examined with respect to his sanity by a psychiatrist functioning as an agent of the court until he had had Stevens examined by a psychiatrist retained by the defense.[102] The findings and report of such a psychiatrist would have been privileged. Pouncy v. State, 353 So. 2d 640 (Fla. 3d DCA 1977). Forbes, however, was not familiar with

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[101] "No significant history of prior criminal record" and that the defendant was a relatively minor participant. §921.141(6)(a) and (d), Fla. Stat.

[102] Because he was indigent, Stevens was entitled to have the State pay for any experts necessary to his defense. Indeed, just three days after Judge Santora authorized the psychiatric examination by court-appointed Dr. Miller (RDA 31-32), he authorized Forbes to retain an investigator of his choosing (RDA 33). Thus, had Forbes asked for authorization to retain a non-court-appointed psychiatrist, his request in all likelihood would have been approved.

Pouncy (T 540-41), which two years earlier had made clear that a defense-retained psychiatrist's conclusions would be privileged. Other than his unfamiliarity with the case law which made clear the course he should have pursued, Forbes was unable to offer any explanation for failing to have had Stevens examined by a defense-retained psychiatrist.

Since Forbes immediately accepted Dr. Miller's finding that Stevens was sane, it is clear that he was just exploring the option of an insanity defense. Had he done that exploring through a defense expert, neither the prosecution nor the Court would have had access to any negative or damaging information elicited by the psychiatrist. Thus, not only were the statements Stevens made to Dr. Miller unconstitutionally obtained, but the entire interview would not have taken place if Stevens had received reasonably effective counsel.

Without the admissions related in Dr. Miller's report,[103] there was no constitutionally-obtained evidence which even suggested that Stevens killed, attempted to kill or intended that a killing take place. In such circumstances a death sentence violates the Eighth Amendment. Enmund v. Florida, supra. Thus, Forbes' failure to retain a psychiatrist whose report would have been privileged allowed the

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[103] Those statements, of course, were themselves unconstitutionally obtained. See Estelle v. Smith, supra.

prosecution to establish aggravating circumstances which otherwise could not have been established.

4. Forbes Failed To Investigate, Present and Have Considered Significant Mitigating Evidence

a. Introduction

Forbes' deficiencies with respect to the significant available evidence supporting mitigation were manifold. First, depending on whether his testimony on this subject is believed or not, Forbes either totally failed to investigate Stevens' background or conducted such a slipshod effort to identify potentially favorable information that it was the equivalent of no investigation at all. Second, with respect to the limited mitigation evidence Forbes did identify, some was never presented and some was presented in an incompetent and counterproductive manner.[104] Third, Forbes allowed Judge Santora without objection to consider only the statutory mitigating circumstances.

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[104] As we shall show, Forbes actually relied upon and argued "facts" which were substantially less favorable to Stevens than were the facts themselves.

b, The Failure To Investigate

i. Generally

Forbes made the decision to proceed immediately into the penalty phase of the trial after the guilty verdict was rendered (T 352-54).[105] As a result of that sudden decision Forbes was not prepared for the penalty stage. As he put it (T 61):

> We were limited somewhat [in establishing mitigation] by the fact that I had chosen to proceed rather rapidly with the mitigation phase, I think. We were kind of taking a chance in some regards by being not as prepared maybe as we would have been had we postponed the hearing and gone for some other stuff, but I was trying to get the verdict out of the jury. (Emphasis added.)

Defendant's expert witness Dillinger described in some detail the types of information a competent defense attorney in a capital case would gather well before trial in preparation for the possible penalty stage hearing: information from friends, relatives, neighbors, employers, schoolmates or teachers; records concerning schooling, jobs,

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[105] That decision was principally the product of Forbes' erroneous view that a life recommendation from the jury, even if unsupported by evidence, was the way to have a death sentence overturned on appeal. See pp. 78-80, supra,

military service, etc.; and a report from a defense-retained mental health professional (T 589-90). Forbes, however, did not even interview Stevens about his own background, except to ask him how much education he had received (T 894). Although he spoke on several occasions to Elizabeth Netherly, Stevens' aunt who lived in Jacksonville, he never asked her about Stevens' background (T 198-99). Forbes likewise never contacted (either personally or through someone working for him) numerous other persons who possessed mitigation evidence (Jeanne Allen, T 213-23; William T. White, R 146-47; Cheryl Rehm, R 177-78; Charles Fyffe, R 180; Arthur Wagner, R 181; Wick Harper, R 185).

Had Forbes conducted or arranged for a competent investigation into Stevens' background he would have found substantial mitigation. Netherly, Stevens' aunt, would have testified in 1979 as she did at the post-conviction hearing, about the abject poverty in which Stevens was raised, the abuse and life-threatening violence to which he was subjected by both his parents, Stevens' generally kind-and generous disposition and his severe drinking problem (T 181-98). Jeanne Allen, who in 1979 ran a grocery store which was located next to the trailer park in which Stevens had lived,[106] testified that Stevens helped protect her when she

[106] Allen's credibility in testifying for Stevens who was convicted of killing a convenience store clerk was heightened by the fact that while closing a Jiffy Store in 1980 or 1981

was alone at night in her store and that Stevens was a good family man (T 217).

Numerous other witnesses would have testified at the post-conviction hearing to significant mitigating circumstances had Judge Santora authorized governmental funds for their transportation from Kentucky.[107] Among the facts they presented in their affidavits were the following:

> --- William T. White stated that Rufus was a "very good worker" who was promoted to under foreman at one of his jobs (R 146);
>
> --- Charles Fyffe in about 1969 witnessed Stevens' mother fire one shot at Stevens from a .22 rifle (R 180);
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> --- Arthur Wagner in about 1974 witnessed Stevens' mother in two separate occurrences on the same day fire several shots at the car which Stevens was driving (R 181);
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> --- Wick Harper, the former sheriff of Elliott County, Kentucky, called Stevens "a good worker and dependable" (R 185).

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she had been robbed and beaten so badly that she required three operations (T 218).

[107] Stevens had lived in Kentucky (and Ohio as a child) until one year before his arrest for murder. Most of those able to give mitigation evidence on his behalf, therefore, lived in Kentucky. Their affidavits and letters were presented to the Circuit Court as part of the post-conviction motion. The error in denying Stevens governmental funds to produce them as witnesses at the hearing is discussed at Point Six (C), infra.

Among the other facts which could and should have been established at the penalty stage of Stevens' trial or at his sentencing in 1979 were the following:

> --- Stevens was hospitalized as an infant because his parents had hitchhiked from Kentucky to Ohio with him despite his being only six days old (R 150-51);
>
> --- Stevens smelled so badly and was so filthy when he went to first grade that the teacher sent a note home saying that she did not want him near the other children in the class (R 151);
>
> --- Stevens' father beat him severely from a very early age, necessitating medical treatment on at least one occasion (that beating occurred because Stevens, who had not eaten in some time, asked a neighbor for food) (R 152);
>
> --- The family often had no food, causing one of Stevens' siblings to die of malnutrition (R 153);
>
> --- When he was a teenager, Stevens' school still complained about how dirty he was; Stevens and his brothers were made to shower at school and the school system provided them with the only new clothes they ever received (R 153-54);
>
> --- When Stevens had trench mouth at the age of eight, the school had to urge his family to get him medical treatment (R 154);
>
> --- The family fled Ohio when Stevens was about fifteen to avoid having the children removed from the house for neglect (R 154);
>
> --- The year after Stevens moved to Kentucky at the age of fifteen, his family had him do farm labor for $5 per day (from

dawn to dusk), rather than sending him to school (R 155);

--- Stevens was honorably discharged following his first service in the Army (R 155), R 191);

--- While in the Army and afterwards, Stevens contributed substantially to the support of his parents and siblings (R 155);

--- Stevens' mother arranged an unsuccessful marriage for him to a thirteen-year-old girl (R 156);

--- Stevens went back into the Army, was assigned to a Special Forces unit where he was trained for assassinations of Vietcong cadres, went AWOL because of his opposition to assassinations, and was given a general discharge under honorable conditions (R 156);[108]

--- Stevens worked steadily and supported his (second) wife and two children up until the time of his arrest (R 157, R 162);

--- Stevens' parents often would shoot or try to shoot at each other (R 158-59);

--- On September 9, 1970 Stevens' father shot him in the back because Stevens wanted to move from his parents' house to his aunt's (R 159);

--- Stevens' parents always traveled with loaded guns in their home area of Kentucky;

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[108] In his penalty-phase summation, Forbes --- without having introduced any evidence on the subject --- stated that Stevens had received a dishonorable discharge (TT 1281). Not only did he make the general discharge under honorable conditions into a dishonorable discharge, but he also neglected to mention that Stevens had previously received an honorable discharge (see R 191).

--- Stevens had a serious drinking problem for a number of years; that problem worsened shortly before his arrest (R 162); and

--- Stevens on one occasion carried his cousin several miles to obtain medical treatment for her and gave more blood for transfusions for his cousin than was medically permitted (R 164).

All of the above mitigating evidence[109] was readily available to Forbes in 1979. The vast majority of it came from two sources: Stevens himself and his aunt who lived in Jacksonville. Neither was ever asked any questions by Forbes which would have elicited any of this information (other than Forbes' question to Stevens concerning the extent of his schooling). Judge Santora and this Court therefore were totally unaware of Stevens' generosity and kind-hearted qualities and of the terrible violence which had been perpetrated against him by his parents.[110] Had this evidence been presented there is a reasonable probability the results of

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[109] The numerous factors set forth above are clearly mitigating evidence. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982) (parental abuse); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (significance to be given to "relevant facets of the character ... [and] mitigating factors stemming from the diverse frailties of humankind"); Kampff v. State, 371 So. 2d 1007 (Fla. 1979) (alcohol problem); Shue v. State, 366 So, 2d 387 (Fla. 1978) (childhood of brutality and deprivation),

[110] Particularly stunning is the level of violence Stevens' own mother used against him. All but the most unusual person would have severe emotional and psychological scars from such maltreatment.

sentencing or review by this Court would have been different. See Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986) (relying, inter alia, on defendant's difficult home environment, the mental and physical abuse he received there and his favorable attitude toward work).

The Supreme Court in Strickland v. Washington, supra, 466 U.S. at 690-91, defined counsel's duty to investigate as follows:

> ... [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. (Emphasis added.)

Forbes' investigation in preparation for the penalty phase of trial and the sentencing proceeding --- which together with the guilt phase make the record reviewed by this Court in determining whether to affirm or reverse a death sentence --- fell way below the constitutional minimum established in Washington, even when one applies the required "heavy measure of deference to counsel's judgments." Id. at 691. It is undisputable that a "thorough investigation of law

and facts" was not made. Forbes himself admits that he was not particularly prepared for the penalty stage.

The questions therefore become whether Forbes made a reasonable investigation of the mitigating evidence and whether he made a reasonable decision not to investigate further than he did.[111] The answer to both questions is a resounding "no." No investigation concerning sentence could be considered reasonable which did not include inquiries to the defendant about his own background. Compare Johnson v. Kemp, 615 F. Supp. 335, 359-61 (S.D. Ga. 1985), aff'd on opinion below, 781 F.2d 1482 (11th Cir. 1986) (restricting investigation of mitigating evidence to defendant and his

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[111] Forbes testified that he had spoken to members of Stevens' family --- apparently his parents and/or siblings since there was a reference to their being "in town" for the proceedings --- and that he had decided not to call them as witnesses at the penalty stage because they had threatened violence "towards the Court ... the prosecutor ... [and] certain witnesses ... and one of them told me that they were going to go so far as to take care of the problem at the sentencing and ... some bullets and knives and other things were found in their possession ... before they came in the courtroom" (T 531-33). We do not quarrel with Forbes' tactical decision on this point. Indeed, the mitigating evidence set forth above shows what a significant problem violence was in Stevens' family in his formative years. Not surprisingly, nothing much had changed by 1979. Had Forbes performed a reasonable investigation into Stevens' background, he would have recognized the violence in Stevens' family as a significant mitigating factor and he would have presented evidence to the judge of the corroboration he had obtained concerning the Stevens' family's violent ways (i.e., the threats, the bullets, the knives of which he had personal knowledge). Even if Forbes had performed no investigation, he should have been alerted to the need for one by the family's obvious problems.

parents ineffective), Stevens was emphatic that Forbes asked him next-to-nothing on this subject (T 894) and Forbes did not contradict his former client.

The decision not to investigate further was equally unreasonable on two grounds, First, Forbes' entire sentencing theory was completely legally bankrupt from its inception in light of Tedder v. State, supra, and a plethora of other pronouncements from this Court prior to 1979. See discussion at pp. 84-85, supra. Second, Forbes did not make his decision to truncate his investigation until after the guilty verdict (T 352-54), a time at which he should long since have completed his investigation on his client's background. It simply is not reasonable to fail to perform an investigation and to later formulate a theory which, after the fact, justifies the former failure to investigate. The total failure to prepare and to obtain mitigating evidence, such as occurred here, is the equivalent of having no representation at all and may cause presumptive prejudice. Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir.), cert. denied, 106 S. Ct. 374 (1985).

ii. Stevens' Prior Record

Forbes' failure to investigate Stevens' prior criminal record is important for two reasons. First, such an

investigation was simple, discrete and mandatory (by any rational view). The failure to perform such an obvious and limited part of the overall investigation is evidence which strongly supports our already-weighty contention that Forbes did not perform any significant investigation relevant to sentencing. Second, it is absolutely clear that Forbes perjured himself in testifying about his investigation of Stevens' record. To the extent that much of the balance of Forbes' contentions rests on his credibility alone, instances of perjury such as this demonstrate that Forbes' word, even when sworn, is totally untrustworthy.

Forbes properly noted that he desired to show that Stevens had no significant history of prior criminal activity.[112] §921.141(6)(a), Fla. Stat. Forbes testified at the post-conviction hearing that either he or someone acting on his behalf had obtained all the information germane to Stevens' prior record (T 452-53). At his deposition, Forbes was even more specific, stating that his investigator had obtained "confidential records of various police sources" which were "[m]ore detailed ... than ... FBI rap sheets" (T 72-73). What later occurred demonstrates beyond doubt (1)

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[112] The fact that Forbes identified this mitigating circumstance as one which he wanted to prove makes his failure to obtain the appropriate factual information all the more reprehensible.

that Forbes lied both at the hearing and at the deposition and (2) that he never asked Stevens about his prior record.[113]

Stevens' prior criminal record consisted of three misdemeanors in Kentucky, all of which arose out of crimes against property and all of which resulted in probationary sentences (PSI 5, SR 42, SR 78). The first conviction was for theft and the sentence was ninety days probation (PSI 5). The second conviction was for receiving stolen property as a misdemeanor (T 456-61, SR 78) and the sentence was one year in the county jail --- which sentence was suspended (or probated, to use the Kentucky phraseology) on the condition that Stevens remain out of the county for a year (SR 42, SR 78). The third misdemeanor conviction was for criminal trespass and the sentence was two years probation (PSI 5).

During the penalty phase the prosecution asked a witness if he knew that Stevens had been sentenced to a year in the county jail on the latter two convictions. The witness erroneously agreed, apparently thinking that the prosecutor would not provide him with false information. Forbes, who supposedly had thoroughly investigated this subject, remained mute and allowed the prejudicially erroneous answers to stand uncorrected. Worse than that, Forbes compounded the error by

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[113] We would be able to prove these points yet another way had Forbes not destroyed all his file notes, which would have shown (by their absence) that he never did what he claimed to have done.

arguing in his penalty phase summation that Stevens had "served time in County Jail in Kentucky and I forget the other state"[114] (TT 1278-79).

The State in its "Brief ... Demanding ... Death" made the same errors (4-5). It contended that Stevens was sentenced to one year in prison on each of the two cases (4-5). Again, no correction from Forbes. As a result Judge Santora's sentencing findings made the identical mistake (TT 1300-01).

The coup de grace to Forbes' contentions that he investigated Stevens' record is found in his brief on the direct appeal to this Court. Discussing Stevens' three prior convictions, Forbes wrote: "two of the three are misdemeanors, and ... the third was a Class D felony in Kentucky for which he served one year in the county jail" (38). As if to emphasize his error, Forbes again referred to Stevens' "minor felony conviction" (39).

As untruthful as Forbes was in his testimony, so Stevens was truthful in his. Stevens testified that Forbes never asked him about (1) his prior criminal record, (2) whether he had a prior felony conviction or (3) whether he had

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[114] The other state in fact was Kentucky. Since Stevens had lived fairly continuously in Kentucky for the fifteen years prior to moving to Florida and since his three prior convictions were all in that state, it seems strange that Forbes, if he really had investigated these facts, could forget in which state the prior convictions occurred.

ever been sentenced to jail (T 894-95). We need not simply take Stevens' word that he knew the correct facts in 1979 because there is documentary proof manifesting that he did. The proof is two documents prepared by a probation officer who had interviewed Stevens for the presentence investigation and to whom Stevens gave accurate information about his record (R 547-48). All Forbes had to do was ask his own client and Stevens would have given him accurate information.

That Forbes did not speak even to his client concerning his record demonstrates vividly his unreasonable lack of investigation. This failure to perform played a key role in allowing Judge Santora to erroneously negate the mitigating factor of no significant prior record. Had Forbes presented the accurate facts, there is a reasonable probability that the mitigating circumstance would have been established.[115] In Salvatore v. State, 366 So. 2d 745, 748, 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), this mitigating circumstance was found applicable to a defendant with a conviction for burglary and an admission of stealing a boat. The seriousness of that record is certainly similar to the seriousness of Stevens' actual record. Cf. Songer v.

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[115] As to the other evidence upon which Judge Santora relied to negate this mitigating factor, the testimony of September Jinks should not have been admitted for reasons set forth at pp. 116-18, infra, and the window-peeping activity alleged in the psychiatric report should not have been admitted for reasons set forth at pp 92-94, supra.

State, 322 So. 2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977); Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

At least as troubling is the fact that Forbes' lies on this subject were pointed out to Judge Santora in quite some detail in defendant's post-hearing memorandum (R 569-72) for the express purpose of showing that Forbes was unworthy of belief not only as to this point but also as to much of the rest of his testimony. While ignoring our specific point, Judge Santora found Forbes' testimony to be "credible and believable ... warranting reliance upon it" (R 631 Par. 4). That the judge could not only ignore our detailed rendition of Forbes' untruths but also conclude that his testimony was credible (without limitation) demonstrates beyond cavil that Judge Santora was protecting his friend Forbes and that Stevens' motion was decided most unfairly, in disregard of the record.

c. The Failure to Present Mitigation-

Not only did Forbes fail to investigate to discover what mitigation evidence existed, but he also failed to present much of the relatively small amount of mitigating evidence he had managed to collect. These failures inevitably caused this Court to conclude on the direct appeal that: "The

recommendation of life was not based on any valid mitigating factor discernible from the record." 419 So. 2d at 1065 (emphasis added),

Forbes identified three types of mitigating evidence which he sought to present (T 72-75, T 447-55): Stevens' lack of a significant prior record, his alcohol problem and Engle's domination of Stevens.

As to the lack of a significant prior record, we have discussed in detail above how it was the State and not the defense which elicited information about Stevens' prior involvements with the law and how Forbes both passively allowed those involvements to be made more serious than they actually were and also actively distorted Stevens' record to his detriment. More serious deficiencies in counsel's competence would be hard to imagine in such a simple sphere.

With respect to Stevens' alcohol problem, Forbes could have presented evidence similar to that which was presented at the motion to suppress (see TT 37-44, TT 70-71, TT 84-85, TT 90-129). Such evidence, if properly developed, would have been a mitigating circumstance, See Gardner v. Florida, 430 U.S. 349, 352 (1977); Kampff v. State, supra: Songer v. State, supra, 322 So. 2d at 484, Forbes, however, made no effort to introduce such evidence at the penalty stage. When he tried to rely on that evidence in his direct appeal (Appellant's brief 40), the State correctly pointed out

that that evidence was not part of the penalty-stage record (Appellee's brief, p. 25) and thus cannot be considered support for the life recommendation. This Court held that "[t]here was no evidence to support" a finding of mitigation due to intoxication. 419 So. 2d at 1064.

As to Engle's domination of Stevens, Forbes' theory of proof with respect to this circumstance apparently rested primarily on Engle's statement to Hamilton that it had not been worth it to kill Tolin for a $50-robbery (T 73, T 450). As discussed at pp. 42-51, supra, Forbes' theory as to Engle's statement made not the slightest sense and seemed to be testimony tailored in an effort to explain away Forbes' failure to make an appropriate Bruton objection. While Forbes claimed that he was "relying heavily on" the domination factor (T 73), he never mentioned Engle's statement to Hamilton in either his guilt-phase or his penalty-phase summations.[116] To the extent that he touched on this subject in the penalty phase, Forbes stated in summation --- based solely upon his own knowledge --- that Stevens was not "too bright" (TT 1281). Rather than relying upon this improper manner for trying to get evidence into the record, Forbes could have presented evidence of psychological testing showing that Stevens was in the dull normal range of intelligence (see TT 96-98).

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[116] Forbes could not explain why he had not made this argument to the jury (T 451-51).

d. The Judge's Erroneous Standard

Judge Santora failed to comply with the Eighth and Fourteenth Amendment requirement that he consider non-statutory mitigating circumstances. Eddings v. Oklahoma, supra: Moody v. State, 418 So. 2d 989, 995 (Fla. 1982), cert. denied, 459 U.S. 1214 (1983). He charged the jury on this subject as follows (TT 1286): "The mitigating circumstances which you may consider, if established by the evidence, are ... [the factors set forth in the statute]." No mention was made of the possibility of considering non-statutory mitigating factors. In his sentencing findings Judge Santora referred only to the statutory mitigating factors, stating (TT 1303):

> I'm also required to consider mitigating circumstances passing sentence upon you. There are seven of those .... (Emphasis added.)

He thereupon analyzed the seven statutory circumstances.

There thus was not the slightest doubt that Judge Santora failed to consider non-statutory mitigating circumstances. Forbes failed to object to Judge Santora's clear error despite the fact that the law on this subject had been clear for more than one year. See Lockett v. Ohio, 438 U.S. 586 (1978). Had Forbes pointed out the Judge's error to him, Judge Santora could have considered such non-statutory mitigating factors as Hamilton's testimony that Stevens was

drinking heavily on the night of the crime (TT 567), and Hamilton's and Parmenter's testimony (TT 584-86, TT 948) that Stevens' alcohol problem was chronic.[117]

e. Conclusion

The very substantial mitigation which should have been present at sentencing in this matter, absent Forbes' deficiencies, would clearly have outweighed the aggravating factors --- particularly if those factors were limited to those which rested upon constitutionally-obtained evidence and constitutionally appropriate procedures. When one accords the required "great weight" to the jury's life recommendation, the case for a life imprisonment sentence becomes overwhelming.

5. Forbes Failed To Object to the Inadmissible Testimony of September Jinks

September Jinks, a teenage[118] runaway, was the prosecution's sole penalty stage witness. She testified that

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[117] In light of the fundamental error involved here, we also allege --- in addition to our ineffective assistance of counsel claim --- that Stevens' rights, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 17 of the Florida Constitution, were violated. See Jacobs v. State, 396 So. 2d 713, 718 (1981); see also, Washington v. Watkins, 655 F.2d 1346, 1367-77 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

[118] The record places her age as both thirteen (TT 1213) and fourteen (TT 1202).

in January of 1979 Stevens tricked her into riding with him in his car and then raped her at knifepoint in the same woods where Tolin was raped and killed (TT 1204-09). He then took her to a motel where he raped her again (TT 1209-11). Both Judge Santora and this Court relied upon Jinks' testimony to negate in part the lack of a significant prior record mitigating circumstance (TT 1304; 419 So. 2d at 1064).

Before discussing the various reasons that Jinks' testimony should have been excluded --- all of which trial counsel ignored --- we will consider the absurd position Forbes took with respect to this testimony. As with his other absurd theories, the explanation proffered here is an excuse to try to cover up for his performance deficiencies.

Forbes actually claimed that the defense had "invited that testimony" as part of its "theory" to demonstrate prosecutorial "overkill"[119] and that he "purposely wanted it to go in" (T 59-60, T 96). In fact, Forbes went so far as to contend that Jinks' testimony was indispensable to Stevens' obtaining the life recommendation (T 4-68). A more rational and believable view was expressed by Dillinger: "I fail to see how a reasonably competent attorney can view it as beneficial to put additional evidence before a jury when you

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[119] As will be seen below, Forbes had been prevented from interviewing Jinks. Thus, he did not know what she was going to say. Even Forbes would be hard put to explain how he could "invite" testimony, the contents of which were unknown to him. Obviously this is a Forbes' view in hindsight.

are talking about a guilt[y] verdict of a murder, kidnap, rape, robbery to put on additional evidence of a rape at knifepoint ..." (T 598) (emphasis added). Dillinger also pointed out the risks involved in such a "tactical" choice: i.e., that the judge and this Court would believe the witness (TT 598). That entirely foreseeable possibility is exactly what occurred.

We submit that Forbes fabricated a strategy at the post-conviction hearing to explain away his blunders at trial. But if this Court were to believe that Forbes truly thought Jinks' testimony would be beneficial to Stevens, we submit that it is another example of patently unreasonable strategy that no effective attorney would espouse.[120] Such a strategy should be given no deference. See Douglas v. Wainwright, supra.

There are three grounds upon which a reasonably effective attorney would have objected --- successfully, we submit --- to Jinks' testimony. Forbes was clearly aware of one such ground, but failed to make that or any- other objection to her testimony.

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[120] This aspect of Forbes' "strategy," like the rest of his sentencing strategy, focused solely upon obtaining a life recommendation from the jury, not on sustaining it with Judge Santora and this Court. It goes without saying that an effective strategy would not include the jury's recommendation as its ultimate goal.

First, a reasonably effective attorney would have argued that Jinks' testimony was not sufficiently reliable as required by the Eighth and Fourteenth Amendments to the United States Constitution and Gardner v. Florida, supra. Jinks had never even made a complaint to the police concerning the alleged rape, much less appeared in court to prosecute the case. Any evidence concerning criminal activity which had not reached even the level of an allegation to the police is simply too unreliable to be considered in determining whether a man should live or die. The failure to object on this ground is compounded by the fact that Forbes knew that Jinks had previously admitted that her accusation was a lie (see TT 1237). Moreover, it is constitutionally prohibited for the prosecution to call a surprise penalty-stage witness because the surprise calls into question the reliability of the sentencing proceeding. Smith v. Estelle, 602 F.2d 694, 698-703 (5th Cir. 1979), aff'd. on other grounds, 451 U.S. 454 (1981).

The second ground upon which Forbes should have objected involved the deliberate due process violation committed by the prosecution in hiding Jinks so that the defense would not be able to interview her. Forbes elicited from Jinks on cross-examination (TT 1228-30) that she had been hidden by the State Attorney's office and that she had been instructed not to talk to Forbes unless a prosecutor were

present. Forbes obviously knew these facts since he elicited this information, but either he did not know of the long-standing case law[121] which declared such prosecutorial conduct to be unconstitutional or he had reached the totally unjustifiable conclusion that testimony about another forcible rape would help Stevens' case.

The third ground upon which a reasonably effective attorney would have objected to Jinks' testimony was that it was improper anticipatory rebuttal. The only valid purpose of admitting Jinks' testimony was to attempt to rebut defense reliance on the no significant prior record mitigating circumstance. Since the defense had presented no evidence in support of that factor, Jinks' testimony was improper anticipatory rebuttal. See Maggard v. State, 399 So. 2d 973, 977-78 (Fla. 1981), cert. denied, 454 U.S. 1059 (1981); Fla. Std. Jury Instr. (Crim.), §921.141, Fla. Stat. (p. 80).

We have already mentioned the prejudice flowing from Forbes' unjustifiable failure to object to Jinks' testimony. Both Judge Santora and this Court used that evidence as part of the basis for finding the no significant prior record mitigating circumstance to be inapplicable. Had it not been for this testimony and had Forbes seen to it that accurate information concerning Stevens' prior minor brushes with the

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[121] Gregory v. United States, 369 F.2d 185, 187-89 (D.C. Cir. 1966).

law were available, there is a reasonable probability that either Judge Santora or this Court or both would have found that mitigating circumstance applicable. In the overall circumstances the death sentence would likely have been overturned, See Elledge v. State, supra.

6. Forbes Failed To Challenge the Grossly Inaccurate Presentence Investigation Report

Another serious dereliction in Forbes' performance was his failure to challenge the fairness and accuracy of the presentence investigation report.[122] Particularly since he had not investigated Stevens' background, Forbes had a duty to review the PSI for accuracy with his client.[123] Had he done so, Forbes would have learned that it contained numerous

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[122] We discuss at Point Four, infra, the related but separate point that Stevens was never advised of the contents of the PSI or the psychiatric report and thus-never had an opportunity to rebut the errors contained in those reports. We discuss the facts in more detail in Point Four; to the extent appropriate, we likewise rely upon that rendition of the facts here.

[123] Dillinger stressed the harm visited upon defendants, both at sentencing and appeal, when erroneous information is allowed to stand uncorrected. He noted that a reasonably competent attorney would go over the PSI with his client, obtain helpful information to rebut negative portions of the report and take steps to correct errors (T 602-05).

prejudicial errors.[124] Moreover, even without consulting with his client and without the benefit of specific knowledge concerning his background, any reasonably effective attorney would have perceived that the PSI was a "hatchet job."

The writer of the PSI clearly went far out of his way to try to show that Stevens was a sadist who thrived upon killing, whether it be Tolin or animals at the slaughterhouse. The probation officer also did his best to minimize Stevens' drinking problem, apparently because he believed that a serious alcohol condition might be viewed as a mitigating factor.[125] He also interviewed numerous persons in law enforcement who all predictably called for the death penalty (PSI 8-10). Forbes was the only person associated with Stevens who was interviewed concerning the appropriate sentence.[126]

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[124] Forbes testified that he had not been aware of any important inaccuracies in the PSI but, had he been, he would not have had any idea what to do about them (T 480-81, T 489). It is refreshing to note that Forbes, at least in this one respect, has admitted his deficient performance in representing Stevens, rather than concocting yet another falsehood.

[125] Since Stevens' alcohol problem was one of the few mitigating circumstances Forbes had identified (see T 447, T 455), his failure to challenge the PSI's arguments that Stevens had no such problem is particularly hard to justify.

[126] True to form, Forbes portrayed Stevens in a far more negative light than the facts warranted. Having not investigated his client's background, Forbes was unable to be accurate or even helpful to Stevens. Forbes commented that "this is the first time in [my] client's life that [my] client had a job and his family living altogether" (PSI 9). As was extensively testified to at the hearing by Stevens (T 913-17),

Based upon the patent unfairness of the PSI Forbes should have moved to strike the report and to have a new and fair PSI drafted, or at least to have the original report appropriately amended.[127] See Eutsey v. State, 383 So. 2d 219, 225-26 (1980); cf. Engle v. State, supra, 438 So. 2d at 814.

In conjunction with or as a prelude to such a motion Forbes should have deposed the probation officer or subpoenaed his file. Had he done so he would have discovered two copies of a State of Kentucky form explicitly stating that Stevens' job at the slaughterhouse was as "a night clean-up man" (R 544) (emphasis added). Even without talking to Stevens, Forbes would then have learned that Stevens' job was not "centered around the slaughtering of animals" (PSI 6), an

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both parts of that statement were incorrect. Stevens had worked steadily since his marriage in 1972, often at two jobs (T 916). He and his wife and children had always lived together, with the exception of one brief separation (T 914-16).

[127] When Forbes was being pressed about the accuracy of his statements in the PSI, he suddenly said that he had had a chambers conference about the PSI with Judge Santora and the prosecution (T 486). After it was brought out that he did not remember when the conference took place or what was discussed there, he admitted: "I don't recall there was a conference" (T 487), adding that he thought there would have been one based on his general practices (T 487). Coxe could not recall such a conference (T 813-15). We requested in our post-hearing memorandum (R 609 n.30) that Judge Santora make factual findings as to whether this off-the-record conference occurred and, if so, what was done at the conference. He ignored our request, we submit, because, while he knew that such a conference never took place, he did not want to make a finding negative to Forbes.

erroneous allegation upon which an abundance of negative innuendo was founded. Forbes would also have found documents in the Probation Department's file which would have shown that, insofar as the PSI indicated (5) that Stevens had a felony conviction and had been sentenced to one year in the county jail, that information was false.

The failure to challenge the presentence investigation report allowed Judge Santora to rely upon the erroneous information contained therein in determining to impose a sentence of death. Forbes' passivity in this regard constituted ineffectiveness. See Ryder v. Morris, 752 F.2d 327, 332 (8th Cir.), cert. denied, 105 S. Ct. 2660 (1985).

E. Conclusion

Had Forbes effectively represented Stevens in the sentencing process, the sentence in this case would have been one of life imprisonment.

Three of the four aggravating circumstances found by Judge Santora and sustained by this Court were so found because of Forbes' failure to function as a competent advocate for his client. Judge Santora's findings with respect to two of the aggravating circumstances[128] relied in whole or in

[128] "Avoiding or preventing a lawful arrest" and "heinous, atrocious or cruel." §921.141(5)(e), (h), Fla. Stat.

principal part on unconstitutionally-obtained evidence, the consideration of which Forbes ineffectively did not contest. Furthermore, one of those two aggravating **circumstances**[129] and one **other**[130] would never have been considered by Judge Santora had Forbes pointed out that it was unconstitutional for the court to consider them following the State's waiver before the jury of reliance upon those circumstances. Thus, with effective representation, Judge Santora would have found but one aggravating **circumstance.**[131] The jury's life recommendation alone would have gone far to outweigh that one aggravating circumstance. See McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982).

Effective representation would have provided Judge Santora with the evidence and arguments from which he could have found at least four of the statutory mitigating circum**stances,**[132] plus a tremendous number of non-statutory miti-

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[129] "Preventing a lawful arrest."

[130] "For pecuniary gain." §921.141(5)(f), Fla. Stat.

[131] That the crime was committed during a robbery, kidnapping and rape. §921.141(5)(d).

[132] "No significant history of prior criminal activity," "under the influence of extreme mental or emotional disturbance," "defendant was an accomplice ... whose participation was relatively minor" and "the capacity of the defendant ... was substantially impaired." §921.141(6)(a), (b), (d) and (f), Fla. Stat,

gating circumstances.[133] Such mitigation would far outweigh the aggravating evidence, even without consideration of the life recommendation --- which, of course, is entitled to "great weight." Additionally, had Forbes been an advocate for Stevens rather than a passive non-entity making a mockery of the adversarial testing process, he might well have been able to further persuade Judge Santora that he should sentence Stevens to life imprisonment.

In sum, Forbes' performance was shockingly deficient. His total lack of adversarial testing has undermined confidence in the outcome. Had Forbes performed effectively, Stevens would never have been sentenced to death.

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[133] See pp. 98-102, supra.

POINT FOUR

STEVENS WAS NOT GIVEN AN OPPORTUNITY TO REVIEW THE PSI AND PSYCHIATRIC REPORTS OR TO REBUT THE PREJUDICIAL ERRORS THEREIN

A. Introduction

Stevens was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 17 of the Florida Constitution by the fact that he was not given an opportunity before sentence to read or to review the presentence investigation report or the court-ordered psychiatric report --- upon both of which Judge Santora relied in imposing sentence.[134]

B. The Facts

Stevens testified that the first time that he saw either the PSI or Dr. Miller's psychiatric report, which accompanied the PSI, was in March of 1984 when present counsel

[134] We also contend that the deliberate or reckless errors and pervasive bias in the PSI, together with significant errors in the psychiatric report, deprived Stevens of due process of law.

provided him with copies of those documents (T 896-97, T 900-01).[135]

Forbes claimed to have reviewed the **PSI** with Stevens --- probably, based on his general practice, with each reading the report silently (T 490-91).[136] In addition to his having had a total lack of memory on this subject at the deposition, Forbes could not remember at the hearing how long before sentence he supposedly went over the **PSI** with Stevens, nor how long after he received the report, nor where the meeting occurred (T 490-91). Furthermore, the standard practice in Duval County was for counsel, sua sponte or at the Court's invitation, to state at the time of sentence that he had gone over the **PSI** with his client (T 491-92). Forbes could not explain why this had not occurred (T 492).

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[135] Nor was Stevens informed by Forbes of the contents of the reports, except that the psychiatrist had found him competent to stand trial (T 896).

[136] At Forbes' deposition, the following testimony was given on this subject (T *87):*

> Q Do you recall whether Stevens read [the **PSI]** himself or you read it to him?
>
> A NO, **I** don't.
>
> Q Do you recall whether you just generally discussed the report?
>
> A I don't recall it at all.
>
> (Emphasis added.)

As far as the psychiatric report was concerned, Forbes admitted that he had not gone over the entire report with Stevens and that they probably simply discussed the general conclusions of the report. He could not remember discussing any of the specific facts in the report (T 492).[137]

Judge Santora relied on both the psychiatric report and the PSI in imposing sentence. In finding the "heinous, atrocious or cruel" aggravating circumstance, Judge Santora's conclusions (TT 1302) virtually tracked Stevens' statements as set forth in the psychiatric report (RDA 37). In discussing Stevens' prior criminal record (TT 1300), Judge Santora relied on the PSI uhich stated erroneously, both that Stevens had a felony conviction and that he had been sentenced to one year in the county jail (PSI 5).[138] Had Stevens seen the PSI or discussed it with Forbes, he would have corrected these errors (T 931-02). His statement that he would have done so is corroborated by the fact that documents in the PSI file clearly show that Stevens had given the probation officer the correct information (R 547-48) and that that information had been recklessly disregarded by that officer when writing his biased report.

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[137] Forbes' testimony on this point was consistent with Stevens' testimony that he was simply told that he had been found competent (T 896-97).

[138] See discussion of Stevens' actual prior record at p. 107, supra.

A number of the other purported factual statements in the PSI are wrong. Most egregious among them was the claim that Stevens' employment at M [sic, should be Elm] Hill [Meat] Company "was centered around the slaughtering of animals" (PSI 6). In fact, Stevens was in charge of the nighttime clean-up crew at the meat company where all the slaughtering took place during the day (T 902-04).[139] The error in the PSI about Stevens' employment at the slaughterhouse became the false premise for the extremely prejudicial prediction that Stevens would again be involved in another similar violent crime (PSI 11). Each time the slaughterhouse employment is mentioned in the report (PSI 6, 8, 11), the reference to it is dripping with innuendo that Stevens is a sadist who enjoys killing--- whether it be cattle or human beings.

The unfairness of all of this --- and the reason why it was so crucial that Stevens have had an opportunity to see the PSI --- is that none of it was true. The probation officer never asked Stevens about his employment at Elm Hill (T 903-04); in fact, he accused Stevens of withholding this information (PSI 11). Moreover, right in the probation officer's file concerning Stevens were two copies of a State of Kentucky form which clearly stated that Stevens' work at

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[139] Stevens' testimony on this point was corroborated by an affidavit from his foreman (R 146-47).

Elm Hill was as "a night clean-up man" and that he was a conscientious employee (R 544).[140]

Other erroneous statements in the **PSI** include the following: an allegation that Stevens stole change from the soda machine at the motel where he was employed at the time of his arrest in this case **(PSI** 8); the clear implication that Stevens was involved in "peeping tom" activities at the motel **(PSI** 8); and the minimization of Stevens' drinking problem **(PSI** 11). Had Stevens had access to the **PSI** prior to sentence, he would have pointed out to Forbes all of these errors, of which he knew nothing until 1984, and would have told Forbes what the truth was (T 904-24). He would also have been in a position to correct (see T 913-17) Forbes' erroneous statement that while Stevens was in Jacksonville, for the first time he had had a job and his family living together **(PSI** 9).[141]

There are two false factual allegations of consequence in the psychiatric report. First, it alleges that Stevens "as a youngster ... peeped into windows for sexual excitement" (RDA 38). Stevens testified that that was false and that had he known about that allegation in 1979, he would

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[140] That the probation officer had these facts in his file but still chose to pillory Stevens with false allegations demonstrates why the **PSI** violated Stevens' federal and state constitutional right to due process of law.

[141] See p. 120 n.126, supra.

have told Forbes it was false. Judge Santora had specifically relied upon this erroneous information as part of the basis for declining to find the mitigating circumstance that Stevens had no significant history of criminal activity (TT 1304). The psychiatric report also alleged that Stevens "has in the past, in a sense, forced sex on a partner, tearing the girl's blouse, and with her later complying with his sexual importuning" (RDA **38**). Stevens stated that this allegation (particularly unhelpful considering the facts of this case) was untrue (T **899**). Because he knew nothing of its existence until almost five years after he was sentenced, Stevens was unable to rebut these negative statements presented to the court as facts.

In his opinion denying Stevens' post-conviction motion, Judge Santora found that his claim of a "lack of opportunity to review the presentence investigation and psychiatric report is not properly brought in a motion for post-conviction relief; moreover, in any event, [Stevens] did review it"[142] (R **635** Par. **1**) (emphasis added). Judge Santora

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[142] From the ruling it would appear that "it" means "them" or "both reports." If that is the case, the judge thereby ignored both Forbes' and Stevens' testimony that Stevens had at most been told the general conclusions of the report, such as that he had been found competent (T **492,** T **896-97**). On the other hand, later in his opinion, Judge Santora found simply that "trial counsel did review the presentence investigation report with [Stevens]" (**R 637** Par. **17**). Since in the preceding and succeeding parts of the sentence the judge was discussing both reports, it seems fair to conclude that rather than make a finding helpful to Stevens and negative to Forbes,

also found that the two "reports were **relatively**[143] inconsequential in view of the other compelling facts of the case" (R 637 Par. 17) (emphasis added).

C. The Procedural Point

Judge Santora was in error when he held that Stevens' claim --- that he had not reviewed the presentence investigation and accompanying psychiatric report and thus had not had an opportunity to rebut the prejudicially-erroneous material in those reports --- was not properly brought by a post-conviction motion. An analysis of the circumstances involved in this type of claim generally leads one inevitably to the conclusion that, if Judge Santora were correct, most such claims would not be available in any **forum.**[144] Because no record would exist as to what did not happen before

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Judge Santora simply omitted any finding concerning Stevens' review of the psychiatric report. Regardless of the judge's unwillingness to make a helpful finding, the record is uncontradicted that Stevens did not review the psychiatric report.

[143] What Judge Santora meant by "relatively" we are not sure. We do know that the psychiatric report was the principal basis for the findings with respect to one aggravating circumstance and that the two reports together provided a significant portion of the basis for the negation of a mitigating circumstance. Such an impact does not fit any definition of "inconsequential" or "harmless" of which we are aware.

[144] Stevens did not know of the contents of the presentence investigation or the psychiatric report.

sentence, the issue could not be raised on appeal. Thus, if a motion for post-conviction relief were to be barred, the right to due process of law discussed in Gardner v. Florida, supra, would be a right for which there would be no remedy. Application of Judge Santora's procedural view would make theoretical the legitimate concern for reliability in the capital sentencing process.

The case law supports our view that Stevens' claim is properly brought by a motion pursuant to Rule **3.850,** Fla. R. Crim. P. In Gardner v. Florida, supra, **430** U.S. at **361,** the Supreme Court held that the failure of defense counsel to request access to the full presentence report did not waive the constitutional error which had occurred when that entire report had not been disclosed. One of the bases for that conclusion which is certainly applicable here was that "there is no basis for presuming that the defendant himself made a knowing and intelligent waiver." Ibid.

A portion of the reasoning with respect to an analogous issue in Kimmelman v. Morrison, supra, **91** L.Ed. 2d at **321,** is germane here:

> A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance ...; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, when he consults another lawyer about his case. Indeed, an accused will

> often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. (Emphasis added.)

The general situation discussed in Morrison is exactly what occurred here. Stevens did not have the vaguest idea of the existence of all the erroneous information in the presentence and psychiatric reports until almost five years after he was sentenced.

In an analogous situation involving a violation of Brady v. Maryland, this Court, in Smith v. State, 400 So. 2d **956, 962-63** (Fla. **1981),** set forth the following reasoning which is equally applicable here:

> Since this challenge is based on the ground that judgment was entered in violation of the due process clause of the constitution, since Smith alleges that he did not have knowledge of the basis for this challenge prior to final judgment, and since it is within the peculiar province of the trial court to determine whether there was a Brady violation requiring a new trial, Smith's raising of this point in a motion to vacate judgment was appropriate. (Emphasis added.)

Determining **(1)** whether the claimed factual errors were actually erroneous and **(2)** whether they were prejudicial are likewise the peculiar province of the trial court. Thus, if one substitutes the particular findings held to be appropriate

in the trial court, the reasoning of Smith absolutely governs this situation. See also, Williams v. State, **438** So. 2d **781, 786** (Fla. **1983)** (ineffective assistance of counsel); State **v.** Barber, **301** So. 2d **7, 9** (Fla. **1984);** cf. Ford v. State, **407** So. 2d **907, 908** (Fla. **1981)** (barring post-conviction motion upon grounds known at conclusion of **trial).**[145]

D. The Constitutional Violation

The Supreme Court held in Gardner v. Florida, supra, **430** U.S. at **362** that due process of law is denied when a defendant is sentenced to death based, at least in part, on "information which he had no opportunity to deny or explain." The Court noted at **359:**

> The risk that some of the information [not disclosed] may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest.

Such errors and misinterpretations in fact did exist in this matter, unknown to Stevens until **1984.** The precise reason that Gardner declared the failure to disclose such reports to

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[145] It is worth noting in this connection that the contemporaneous objection rule does not apply to issues such as this one which arise out of sentencing proceedings. State v. Rhoden, **448** So. 2d **1013,** 1016 (Fla. **1984).**

a defendant constitutionally deficient is exactly why it was deficient in this case.

A case very much in point is Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980), in which counsel was provided a copy of the presentence investigation report but never showed it to or discussed it with his client. The Raulerson court stated, at 384:

> Obviously, if counsel did not review the report with Petitioner, counsel would have no way of knowing whether Petitioner had any corrections, additions or deletions to make to the report. That knowledge is peculiarly in Petitioner himself and "the defendant has a constitutional right to know and to test the accuracy of any statement in the presentence report upon which the sentencing judge relies.''

We submit that there is no distinction of any significance between this case and Raulerson. Cf. Proffitt v. Wainwright, supra, 685 F.2d at 1254 (upholding the right to cross-examine adverse witness at capital sentencing proceeding in order to ensure reliability of factfinding).

We recognize that this Court reached a different result in Raulerson's case. Raulerson v. State, 358 So. 2d 826, 831 (Fla. 1978), cert. denied, 439 U.S. 959 (1978). We respectfully suggest that there are two important distinctions between this Court's opinion in Raulerson and the instant matter. First, Raulerson did not refer this Court to any

portion of the presentence report "which he desire[d] to rebut or explain." Ibid. To the contrary, Stevens has identified numerous errors in the two reports involved --- some of which errors definitely prejudiced him and others of which probably prejudiced him. Second, Raulerson notes that defense counsel was provided with a copy of the presentence report and that "he discussed the matter of mitigation with the defendant prior to ... sentence." Ibid. In the case at bar it is undisputed that Stevens never reviewed the prejudicial psychiatric report and the credible evidence shows that he never reviewed the presentence investigation. For those two reasons this Court should find that Raulerson is not controlling. Rather, it should follow cases such as Harvard v. State, 375 So. 2d 833, 835 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), and Funchess v. State, 367 So. 2d 1007 (1979).

E. Conclusion

Since the presentence and psychiatric reports in this case, and the errors contained in them, had a significant impact on the court's finding of aggravating and mitigating circumstances, and since Stevens has never been able to rebut the false information contained in those reports, Stevens' right to due process of law at his sentencing has clearly been violated.

POINT FIVE

THE PROSECUTION WITHHELD EVIDENCE WHICH, IF REVEALED, WOULD LIKELY HAVE CAUSED SUPPRESSION OF IMPORTANT EVIDENCE

A. Introduction

The State denied Stevens due process of law under the Fourteenth Amendment to the United States Constitution and Article I, §9 of the Florida Constitution when it failed, despite defense requests for such information, to disclose material evidence favorable to Stevens. The disclosure of that evidence --- which concerned how the police found the dull knife allegedly used by Stevens in a vain attempt to stab Tolin --- might well have changed the outcome of the trial.

Judge Santora's decision with respect to this point is noteworthy because it credited Assistant State Attorney Coxe's testimony --- that Forbes had been informed regarding how the knife had been located (R 635 Par. 2). In so doing the Judge necessarily rejected the testimony of Forbes, who had testified to the contrary. In light of the fact that Forbes' testimony on this topic did not contain the inherent incredibilities and blatant perjury of much of the rest of his testimony, it is quite significant that Judge Santora refused to believe Forbes with respect to the only portion of his

testimony favorable to Stevens. Apparently the bias against Stevens, exhibited by the judge's extrajudicial advocacy of Stevens' execution,[146] temporarily outweighed his friendship for Forbes.[147]

B. The Facts

1. Information Known Prior to 1984

As part of plea negotiations between the State and Stevens, Coxe and Forbes agreed that Stevens would take a polygraph test (TT 12-13). When Stevens was taken to be tested, he made a number of statements incriminating himself (TT 13). On July 5, 1979 Forbes argued a motion in limine, which sought to preclude all use of those statements on the ground that the State had agreed not to use any of the statements Stevens made at the time of the polygraph (TT 13-14, TT 19).[148]

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[146] See pp. 15, 31-33, supra.

[147] That friendship manifested itself, however, in the fact that Judge Santora did not mention in his opinion that he had not believed Forbes on this point. Indeed, the only statement in the opinion concerning Forbes' credibility was that his testimony was "credible and believable" (R 631 Par. 4).

[148] Forbes noted that had he not had such an agreement he would have been present for the polygraph exam (TT 27).

Forbes described as follows how he understood that Stevens' statements had been given (TT **13**):

> Mr. Stevens was subsequently taken before a polygraph examiner and was in the process of the initial testing ....
>
> Mr. Stevens, at that point, made some statements which tend to incriminate him and, at that point, the polygraph examination ceased and he was returned to custody. (Emphasis added.)

Forbes said that Coxe had informed him orally and by an amended discovery response (**RDA** 20) of the statements Stevens had **made.**[149] Coxe described his understanding of what had occurred as follows: after the Miranda warnings from the polygraphist, Stevens made his statements (TT **20**). Coxe and State Attorney Austin conceded that there had been an agreement not to use any statements Stevens might make against him, but argued that that applied only to the State's case in chief and not to impeachment if Stevens testified on his own behalf (TT **22**, TT **23**, TT 30).[150]

At the post-conviction hearing Forbes testified that Coxe had not told him that the police had interrogated Stevens and that at the time of the trial it had been his impression

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[149] Those statements described how Stevens had strangled, stabbed and mutilated Tolin (**RDA 20**).

[150] Judge Santora ruled upon the motion in limine in accordance with the prosecution's position (TT 31).

from talking to Coxe that Stevens' statements had been made over a short period of time (T 401-02). Coxe, on the other hand, testified that he was sure that Forbes had known that Stevens had been questioned by the police (T **824).**

In the brief drafted on Stevens' direct appeal to this Court, Forbes stated: "While undergoing said polygraph examination, the appellant apparently made admissions to the examiner ..." (7). In its brief on direct appeal, the State noted that "the exact facts surrounding the giving of the statement [are] not in the record," and that Stevens "gave an incriminating statement prior to the polygraph after being advised of his rights" (7, **8).** No other facts of significance to the manner in which Stevens made his statements were brought to this Court's attention by either party.

Based upon the record and the above statements in each party's briefs, this Court made the following findings and conclusions, 419 So. 2d at **1062:**

> We conclude that the statement in question was not made in conection with plea negotiations. Although the polygraph examination was arranged so that appellant's version of the criminal episode could be substantiated and although this was agreed to so that the parties could proceed to reach a negotiated plea, appellant's spontaneous, unilateral statement was not connected to those negotiations in the sense contemplated by the rule of exclusion we are applying. The statement was not made during an actual polygraph examination nor was it

> made in response to any preliminary questions. Appellant made the statement spontaneously without any prompting or inducement. Appellant had no reasonable subjective belief that his statement was a part of the plea negotiations. Therefore, not only was the trial court correct in holding that the statement was admissible for impeachment, but the court could also have ruled the statement admissible for use in the state's case in chief. (Emphasis added.)

At no time following the release of that opinion in **1982** did the State inform this Court that Stevens' statements were not "spontaneous," not "unilateral" and not made "without any prompting."[151]

2. Information Learned in **1984**

Pursuant to a subpoena and an oral order by Judge Santora (**T 231-34**), Stevens' counsel at the post-conviction hearing was allowed on November **9, 1984** to examine the Florida Department of Corrections' file relating to Stevens' presentence investigation. In that file was an eleven-page hand-

[151] We do not suggest that the assistant attorney general who argued this matter deliberately misled this Court or deliberately allowed this Court's misapprehension to stand uncorrected. We are completely unaware of what he knew. It cannot be disputed, however, that the State, as opposed to the individual assistant, was fully aware of this Court's misapprehension. As the Supreme Court stated in Santobello v. New York, **404 U.S.** 257, **262** (**1971**), different parts of the prosecution team "have the burden of 'letting the left hand know what the right hand is doing' or has done."

written memorandum detailing the interrogation of Stevens on May 17, 1979, the day of the aborted polygraph examination, and subsequent interrogation at the county jail on May 18 and May 25, 1979 (R 518).[152] Stevens thereafter supplemented his Amended Motion for Post-Conviction Relief to allege that the State had violated Stevens' due process rights by suppressing the memorandum and its contents (R 515-21). Specifically, it was alleged that revelation of what had actually happened would have provided Forbes with the facts he needed to have made a successful motion to preclude the State's introduction into evidence of the dull knife recovered underneath Stevens' trailer.

Derrick Dedmon, the polygrapher for the Jacksonville Sheriff's Office, testified at the post-conviction hearing concerning how Stevens in fact had made his statements. After Stevens was brought from the jail to the polygraph suite in police headquarters, Dedmon advised him of the Miranda warnings.[153] Thereafter, something seemed to be bothering

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[152] A redacted form of that memorandum is set forth at R 530-37. The document was redacted so as to include only such matters as were needed to argue Stevens' Brady claim (R 518).

[153] Dedmon did not specifically recall administering the Miranda warnings to Stevens, but testified that he had done so based upon his customary procedures (T 883, T 884). Dedmon also said that Stevens would have signed a form which included acknowledgement of the Miranda warnings (T 874). The form should have been placed in the Sheriff's Office's file and a copy would normally have been provided to the State Attorney's office (T 874-75). The prosecution denied having a copy of the form (T 875). A subpoena to the Sheriff's Office elicited

Stevens. When Dedmon asked him what the matter was, Stevens indicated "very brief[ly]" that he had been involved in the killing. Dedmon then interrupted to go get Detective Parmenter since he was the case officer. At that point Dedmon no longer had any intention of administering a polygraph examination. Only eight to ten minutes had elapsed since Stevens had been brought into the polygraph room. Parmenter and Dedmon thereupon interrogated Stevens for two to three hours for purposes unrelated to the polygraph exam (T **878-81).**

Parmenter confirmed that he had interrogated Stevens on May **17** (T **766). He** also admitted that he had not administered Miranda warnings to Stevens that day or on May **18** or May **25,** when he had interrogated Stevens in the jail (**T 777-78).** During the interrogation Stevens told the officers that he had had a paring knife on the night of the crime and that he had hidden it underneath his trailer (R 530-31, T **766-68, T 881-82).** Later on May **17** Dedmon and Parmenter recovered the knife exactly where Stevens had told them it was (**T 768-69,** T **882).**

The memorandum found in the presentence investigation file consisted of Det. Parmenter's notes of the several-hour-long interrogation of Stevens, made either contemporan-

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the response that the form could not be located despite four reviews of the relevant files (**R 564).**

eously or later the same afternoon (T 760).[154] when Parmenter originally testified as a witness called by Stevens, he was unable to explain how his notes had ended up in the PSI file. He did know that he had no recollection of ever giving that

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[154] During the State's cross-examination of Dillinger it showed him and asked him questions based upon the official police report prepared from Parmenter's eleven pages of notes (T **647-48,** T **735-37,** T **741-53).** Despite the fact that Parmenter said that he would have corrected any errors in his notes (of which R **530-37** is a part) in the official police report and despite the fact that counsel argued that production of the official report was important to obtain all the facts relevant to the Brady claim and so as not to compound the Brady violation, Judge Santora denied counsel's several applications for production of that report (T **735-37,** T **741-51,** T **769-77).** Indeed, Judge Santora, who looked at but did not read the police report, denied counsel's application to have the report marked so that it would be identified for further proceedings such as this appeal (T **751-53**).

When counsel first sought the official police report, the State Attorney, who had personally used the report in his cross-examination of Dillinger, represented that a copy of the report was "in the court file" (T **648).** When the issue arose again, he asserted until corrected by his assistant that the prosecution had given the defense "everything we had" (T **736).** The prosecution next took the position that the report was "not discoverable" (T **736).** The State Attorney then again asserted that his office had given the defense "full discovery **...** everything they were entitled to, voluntarily gave them without discovery almost an open file, an open file" (**T 736).** The State Attorney subsequently argued that counsel was not "entitled to that [the police report which] I really inadvertently used today instead of the original notes that some detective had made" (T **747-48)** (emphasis added). He followed that by a claim to have had made "full disclosure in **... 1979"** (T **748).** Despite the prosecution's having made it painfully obvious that it did not have the vaguest idea of its constitutional obligation to reveal favorable evidence to the defense, Judge Santora neither read the police report before returning it to the State nor granted either of counsel's two applications for an in camera inspection of the prosecution's file for Brady material directly related to the claim then before the court (T **735,** T **750, T 752).**

type of notes to the probation department in any of his cases and that, if he had provided the notes to anyone, it would have been to members of the State Attorney's office working on the particular case (T **760-62**). After a recess the State recalled Parmenter who then remembered that, while normally he would only provide such notes to the prosecutors actually working on a particular case, "it's **possible**[155] that I gave [the probation officer in this case] a copy" of the memorandum (T **795-99**).

Coxe testified that he had no recollection of seeing the Parmenter memorandum until two days before he testified at the post-conviction hearing (T 800-02). If Coxe had seen the notes or a police report containing the same information, he would not have turned a copy of them over to Forbes even if he had determined that they contained Brady material because it was his invariable practice not to do so. He would, however, have provided, by way of discovery, the substance contained in the notes (T **802-04**).

3. The Dull Paring Knife

At the trial Parmenter testified that on May **17, 1979** he had found a knife with its point broken off hidden in

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[155] **A** motion to strike this conjectural testimony was denied (T **797**).

the grass under Stevens' trailer (**T 677-82**). Forbes moved to exclude the knife upon the ground that it had been found as a result of Stevens' statements at the polygraph examination---which statements the prosecution had conceded, and the judge had ruled, could not be admitted in the State's case in chief (TT **680-81**). Judge Santora denied the motion immediately after hearing Coxe's opposition (**T** 681).[156]

Forbes testified at the post-conviction hearing that the Parmenter memorandum and the information contained therein would have been helpful to him in trying to get the knife suppressed (T **396-97**). He said that the objection he did make was based upon speculation and not knowledge (T 397).[157] Forbes did not know that his limited waiver of Stevens' right to counsel had been violated. Both Forbes and Coxe agreed that the consent to question Stevens had been limited to the

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[156] Coxe's position, which is set forth below in its entirety, implies, inter alia, that the knife was not found as a result of Stevens' statements (T **681**):

> I want to say a couple of things: the understanding was, the hearing about the statement, we put that knife on discovery. There's no legal basis, agreement or anything about this knife.

In an amended discovery response the prosecution had stated without elaboration that it possessed "[o]ne knife'' which had been obtained from or belonged to the accused (RDA **20**).

[157] Obviously if Forbes had known what had really happened he would have been able to press his argument in a far stronger fashion. He might well have persuaded Judge Santora, particularly because Coxe's position would not have withstood scrutiny by one aware of the actual facts.

polygraph exam (T **403-04,** T **523,** T **818-20).** Furthermore, Forbes had not known that the knife had been recovered as the result of a search and seizure (T **404**).[158]

Coxe, on the other hand, said that, although he could not recall a specific conversation, he believed that he or a colleague had told Forbes how the knife had been found. He based that upon the fact that his reading of the trial transcript seemed to indicate that Forbes had known the origin of the knife when it was introduced (T **805-07**). Coxe also maintained that he included the substance of every statement Stevens made on May **17** in the amended discovery response (RDA **20).** That response, however, did not mention any statement Stevens had made with respect to the fact that the knife was hidden under his trailer. Coxe also made clear that, even at the time of the post-conviction hearing, he did not consider the evidence about the whereabouts of the knife to be Brady material (T **805).**

In finding that there had been no Brady violation, Judge Santora made the following findings:[159] (a) Stevens'

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[158] Forbes had specifically requested such information in his demand for discovery (RDA ***8*** Par. 9).

[159] Judge Santora took the position throughout the post-conviction hearing that this Court had already conclusively ruled that Stevens' statements on May **17** would have been admissible as impeachment or in the State's case in chief (T **693,** T **938).** We submit, however, that because this Court--- through no fault of its own --- ruled upon an incomplete and significantly distorted record, the conclusion previously reached is no longer correct. Indeed, the fact that the

Fifth Amendment rights had not been violated by the polygraph questioning: (b) Stevens was not prejudiced by the failure to receive the Parmenter notes: and (c) Coxe's testimony that Forbes had been informed regarding how the knife had been located was credible (R 635 Par. 2). As we shall see below, none of these conclusions is correct.

C. The Constitutional Violation

Addressing Judge Santora's finding that Forbes had been informed concerning how the knife had been found, that conclusion essentially rests upon a determination that Coxe should be believed and Forbes should not be. While we have made no secret of our skepticism, not to mention our total lack of belief, in much of Forbes' testimony, we are at a loss to explain why this is the only testimony Forbes gave which Judge Santora chose to **disbelieve,**[160] particularly considering some of the patently unbelievable positions the judge did accept.

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interrogation violated Stevens' Fifth and Sixth Amendment rights, as well as Forbes' agreement with the State Attorney's Office, compels the opposite result to that reached on direct appeal.

[160] As we suggested above, bias against Stevens seems to be the only rational explanation for the judge's selective disbelief of this one aspect of Forbes' testimony.

Both Coxe's documentary response to Forbes' discovery demands and his general practices and attitudes concerning Brady strongly suggest that the State had not disclosed the fact that it was Stevens' statements which led the police to the knife.[161]

In his discovery demand (RDA 8-9) pursuant to Rule 3.220(a), Fla. R. Crim. P., Forbes had sought the following, inter alia: the substance of any oral statements made by the accused and "[w]hether there has been any search or seizure and any documents relating thereto." Insofar as there was an answer to those demands in this connection, the prosecution set forth the substance of some of Stevens' statements, but nothing about the knife. The search for and seizure of the knife was never revealed.[162] Nor, of course, was the existence of Parmenter's memorandum. The State's apparently deliberate decision not to reveal the specifically-requested

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[161] If Forbes was in fact aware of this information, he surely was ineffective in not using it to obtain the exclusion of the knife, rather than restricting himself to the weak objections available in the absence of the facts suppressed by the State (TT 680-81).

[162] The discovery response listed "one knife" as being property which belonged to the accused (RDA 20). No information was given concerning how or from where it was obtained. We contend that the failure of the prosecution to disclose the Parmenter memorandum violated Fla. R. Crim. P. 3.220(a). See, e.g., Potts v. State, 399 So. 2d 505 (Fla. 4th DCA 1981); Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978). A Rules violation in this context requires a reversal of the conviction. See, e.g., Cambie v. State, 345 So. 2d 1061 (Fla. 1977); Richardson v. State, supra.

information in discovery certainly suggests that that information was not revealed, as Coxe believed, in informal conversation.[163]

Second, the fact that Coxe still did not recognize at the time of the post-conviction hearing that Parmenter's memorandum was Brady material and the fact that he had never turned over police notes to defense counsel suggest a serious blindness concerning a prosecutor's due process obligations. Such deep-seated attitudes are strongly at odds with the conclusion that Coxe would have complied with his obligation to reveal favorable evidence.

The information contained in Parmenter's memorandum was favorable to Stevens because it conclusively set forth the facts which presented two bases for the suppression of the dull knife: **(1)** it demonstrated without any ambiguity that the knife had been discovered as a direct fruit of the questioning of Stevens in circumstances which the prosecution

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[163] The prosecution's cavalier attitude toward its Brady obligations is also illustrated by the fact that at the guilt phase of the trial the State used a serological finding of semen on the backseat of Stevens' car to link it to Tolin's rape (TT **817-19).** At that time the State knew that it was going to call September Jinks at the penalty stage to testify, inter alia, that she and Stevens had had intercourse in the back seat of the same car (TT **1208-09).** Since the serologist testified that the semen stains would last for a year (TT **858)** and since Stevens and Jinks had sex in the car less than two months before its seizure (TT **1203-08**), the Jinks episode was unquestionably exculpatory with respect to the case upon which Stevens was tried. It should be remembered in this connection that the prosecution had unconstitutionally hid Jinks from the defense. See pp. **117-18,** supra.

had conceded[164] precluded it from using the information gained thereby in its case in chief; and (2) it showed clear violations of Stevens' Fourth, Fifth and Sixth Amendment rights.[165] Such a deprivation of crucial information, when attributable to the State, denies a defendant due process. Blake v. Kemp, supra, 758 F.2d at 532-33.

D. The Preiudice

The prejudice from the prosecution's failure to disclose favorable evidence could not have been clearer.

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[164] That concession was made at a time when the facts before the Court were far more favorable to the prosecution. The State Attorney himself stated that the basis for the concession was a statement he made to defense counsel "as an officer of the State of Florida" (TT 1198).

[165] The Fourth Amendment violation occurred when the police searched for and seized the knife on Stevens' premises without a warrant. See, e.g., Oliver v. United States, 466 U.S. 170, 180 (1984). The Fifth Amendment violation was a failure to give Miranda warnings and the failure to scrupulously honor Stevens' prior invocation of his right to remain silent. See Michigan v. Mosley, 423 U.S. 96 (1975). While Judge Santora found no Fifth Amendment violation (R 635), Parmenter admitted that when he began to interrogate Stevens, no Miranda warnings were administered (T 777-78). Furthermore, Dedmon had no independent recollection that Miranda warnings were given (he simply relied on his customary practice) and the waiver form which should have documented the administration of the warnings is nowhere to be found. Finally, the Sixth Amendment was violated because there was no valid waiver of the right to counsel under the facts of this case, where defense counsel for an indicted defendant and the State agreed upon a very limited waiver and the police totally ignored the agreed-upon strictures. See, e.g., Brewer v. Williams, 430 U.S. 387, 397-405 (1977); Massiah v. United States, 377 U.S. 201, 205-07 (1964).

Other than the Engle's "Rufus went crazy" statement to Hamilton, the only evidence even tending to connect Stevens to Tolin's killing --- or an intent to kill her --- was the dull knife, found most damningly under Stevens' house. The medical examiner testified that a bruise on Tolin's back might well have been caused by that dull knife (TT 800-01).

Nor was the importance of this testimony lost on the **State.**[166] Coxe in his summation relied heavily on the knife to link Stevens to the murder. He referred to the knife and the wound it caused at least eleven times in his argument (TT **1111**, TT 1115, TT 1118-19, TT 1121, TT 1128, TT 1128-29, TT 1129, TT 1130 (three times), TT 1138). Two of Coxe's arguments are quoted below:

> We found a dull knife, the one right over there on the table, under the defendant's trailer with a broken point and the testimony shows that the broken point of that knife matches perfectly, perfectly with the lower back wound in Kay Tolin (TT 1115); emphasis added).
>
> * * *
>
> ...[Forbes] can't get around the fact that the knife found under his client's trailer fits the lower back wound perfectly, according [to] the Medical Examiner doctor. He can't get around that fact (TT 1121; emphasis added).

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[166] Coxe characterized as "significant" the eliciting of the information about the dull paring knife after the aborted polygraph examination (T 809).

Coxe also argued that since Engle at all times carried his own knife --- which knife testimony showed caused the three stab wounds which penetrated the skin --- there would have been no reason for Engle, rather than Stevens, to use the dull knife found under Stevens' trailer (TT 1128-29).

E. Conclusion

With such clear prejudice, the unconstitutional failure to reveal the favorable evidence concerning the circumstances in which the dull knife was seized requires a reversal because a conviction for murder in the first degree likely would not have occurred. Furthermore, the violation here is a particularly serious one since Stevens made a specific request for the type of evidence suppressed by the prosecution. See Arango v. State, 467 So. 2d 692, 694 (Fla. 1985), vacated, 106 S. Ct. 552 (1985), adhered to, ___ So. 2d , 11 F.L.W. 511 (Fla. Oct. 2, 1986).

POINT SIX

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO DIRECT THE COUNTY TO PAY (A) TRAVEL EXPENSES FOR MITIGATION WITNESSES STEVENS WISHED TO CALL, (B) FEES AND EXPENSES FOR AN EXPERT WITNESS AND (C) PRO BONO COUNSEL'S OUT-OF-POCKET EXPENSES

A. Introduction

Although Judge Santora had authorized that Forbes be paid in excess of the statutory maximums for the representation he provided Stevens at trial and on direct appeal (T **143,** T **1003-04**), he denied all of Stevens' and his post-conviction counsel's applications for the payments of various expenses incurred or desired to be incurred during the post-conviction proceeding.[167]

B. The Applicable Law

An indigent criminal defendant is entitled, as a matter of due process and equal protection of the laws, to

[167] Among the motions denied by Judge Santora was Stevens' application to be provided with a copy of the transcript of the November **9, 1984** session of the hearing (R **511-14**). This ruling was particularly unfair because the State had obtained a copy of that transcript and was able to use it to advantage at the latter portion of the hearing and to rely on it in its post-hearing memorandum. See, e.g., R 622.

have the state pay such expenses as are necessary for him adequately to defend himself. Amend. XIV, U.S. Const.; Art. I, §9, Fla. Const. In a long series of cases the United States Supreme Court has held that the Constitution requires states to provide indigent defendants with the basic tools needed for an effective defense or appeal so that the poor as well as the rich will have meaningful access to justice. See Ake v. Oklahoma, **470** U.S. ___, 84 L. Ed. 2d 53, 61-62 (1985), and cases cited therein.

This Court has also consistently shown its concern that indigent criminal defendants be provided with access to counsel and sufficient funding to be represented properly. As this Court recently stated in Makemson v. Martin County, 491 So. 2d 1109, 1113 (1986):

> In order to safeguard [a criminal defendant's] rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.

In Graham v. State, 372 So. 2d 1363, 1365-66 (Fla. 1979), this Court held that an indigent defendant, who presents a colorable claim for post-conviction relief in the Florida courts, should be appointed counsel. While the trial courts have discretion as to whether to appoint counsel in such situations, all doubts must be resolved in favor of the indigent

defendant. Id. at 1366. See also, Adams v. State, 380 So. 2d 421, 422 (Fla. 1980) (reaffirming Graham); Graham v. Vann, 394 So. 2d 176 (Fla. 1st DCA 1981) (approving appointment of counsel in civil suit challenging prison conditions): Rule 3.111(b)(2), Fla. R. Crim. P. (authorizing assignment of counsel for post-conviction proceedings and appeals therefrom).[168]

The Legislature has also evidenced its concern in this area. Most specifically germane to this discussion is the recent legislation creating the Office of the Capital Collateral Representative. Ch. 85-332, Laws of Fla. The intent of the Legislature is enunciated in §27.7001, Fla. Stat.:

> ... to provide for representation of any person convicted and sentenced to death in this state who is unable to secure counsel due to indigency, so that collateral legal proceedings to challenge such conviction and sentence may be commenced in a timely manner ....

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[168] To the contrary is Songer v. Citrus County, Florida, 462 So. 2d 54 (Fla. 5th DCA 1984), which held that there was no statutory authority to require a county to pay attorney's fees for representation provided an indigent defendant in a post-conviction proceeding and appeal. Songer is clearly at odds with Graham v. State, supra, and is thus wrongly decided. We also note, as we did in the court below (R 214-15), that numerous trial courts have authorized the payment of attorney's fees and out-of-pocket expenses, including expert witnesses' fees and expenses, in post-conviction proceedings.

With the exception of the Office of the Capital Collateral Representative, the Legislature has generally required the counties to pay the costs of indigent criminal defendants. See, e.g., §§914.06, 914.11, 939.07, 939.15, Fla. Stat.

C. Travel Expenses for Witnesses Who Would Have Provided Mitigation Evidence

Stevens had moved to Jacksonville only one year before his arrest in this matter, having lived most of his life in Kentucky and a portion of his childhood in Ohio. Almost all those able to provide mitigation testimony at the penalty phase of the trial therefore lived in Kentucky. As discussed at pp. 97-112, supra, Forbes failed to investigate or present mitigating evidence. At the post-conviction hearing Stevens endeavored to show what mitigating evidence existed and should have been presented by Forbes in the penalty phase of the trial. As part of this effort Stevens called as witnesses at the post-conviction proceeding Elizabeth Netherly (T 179-212) and Jeanne Allen (T 213-23), both of whom lived in Jacksonville. Stevens had moved before the post-conviction hearing for the payment of the travel expenses of six witnesses from Kentucky who would have testified to mitigating evidence readily available to Forbes for presenta-

tion in 1979 (SR 7-11).[169] Without the payment of travel expenses the witnesses could not afford to attend the hearing and Stevens could not afford to produce them. Judge Santora denied the motion (SR 25 Par. 2).

Judge Santora's denial of the motion authorizing funds needed to produce witnesses who would have provided important testimony in support of Stevens' motion denied him due process of law, equal protection of the laws and the right to call witnesses on his behalf. Amends. VI, XIV, U. S. Const.; Art. I, §§2, 9, 16, Fla. Const. Dealing with exactly these same rights in the context of the fees and expenses to be paid witnesses, this Court held in Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978):

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice ....

We submit, however, that Judge Santora need not have involved the court's inherent powers because §914.11, Fla. Stat. specifically authorizes the payment by the county of an indigent criminal defendant's "cost of procuring the attendance of witnesses." Judge Santora's denial of travel

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[169] In the colloquy preceding his ruling upon this motion, Judge Santora indicated that he would have granted the motion to pay the witnesses' travel costs had the matter been before the court for sentencing (as was the case in 1979) (Supplemental 10/29/84 transcript 21, 23).

expenses --- which he had both statutory and inherent power to grant --- deprived Stevens of a large portion of the mitigation evidence he was entitled to present.

D. The Fees and Expenses of the Defense Expert

Stevens moved on October 23, 1984 that the fees and expenses of an expert witness, Robert H. Dillinger, of St. Petersburg,[170] be paid by the Consolidated City of Jacksonville (SR 7-11). Judge Santora granted that motion on November 6, 1984, three days before the hearing began (SR 25). Dillinger traveled from St. Petersburg to Jacksonville on November 9, 1984 --- both to testify, if he were reached, and to listen to Forbes' testimony so that he could make appropriate comments concerning it when he subsequently testified (T 224-29). Since Forbes' testimony had not been completed, Dillinger was required to return on the adjourned date of January 23, 1985.

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[170] Dillinger had spent six years trying capital cases for the public defender's office in Pinellas County and had written a capital case trial manual used by public defenders throughout Florida. In his then-three years in private practice he had continued to try capital cases when appointed by the court and was handling several capital appeals and death warrant cases (T 582-85). Stevens had tried to obtain an expert witness locally, but none of the attorneys from in or around Jacksonville who were contacted would agree to testify in this matter (R 8).

On November 15, **1984** the City of Jacksonville filed a motion for rehearing of the motion authorizing the payments to Dillinger, upon the ground that no statute specifically directed that the county reimburse such expenses (SR **26).** The motion did not come on for a hearing until January **23,** 1985--- the day Dillinger returned to Jacksonville --- and then was immediately continued until the end of the post-conviction hearing (T 382-85).[171] Dillinger gave his direct testimony (T 581-615) during the afternoon of January **23.** At the request of the State Attorney cross-examination was deferred until the following morning (T **614-15),** necessitating Dillinger's appearing in court for a third day on this matter. Oral argument on the City of Jacksonville's motion for a hearing was held on January **25** (T **959-1005).**

On March 1, 1985, in accordance with the November 6 order which had not been stayed, Dillinger filed a petition for the payment of his fees and documented expenses (SR 32-37), seeking **$422.77** in **expenses**[172] and unspecified fees for his **38** hours of work on Stevens' behalf. That very day Judge Santora denied the motion, not only for fees, but also for reimbursement of out-of-pocket expenses. No reasons were stated and the petition for rehearing was never mentioned (SR

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[171] The City had previously filed a notice of appeal (SR **30),** but then had voluntarily dismissed its appeal (see SR 31).

[172] The expenses were solely for transportation (SR 32).

38). Thus, after Dillinger had fully performed, Judge Santora ruled for the first time that he would not be reimbursed for either his time or money.

Dillinger thereafter prosecuted an appeal from Judge Santora's order denying his application to the District Court of Appeal, First District. Dillinger pointed out, inter alia, that he had relied upon Judge Santora's November 6 order in subsequently incurring $422 worth of transportation expenses. The District Court of Appeal dismissed the appeal to it upon the ground that such non-final orders are not appealable (SR **39).**

Dillinger's testimony was important to Stevens' case. He explained at length how counsel should have prepared for and conducted the penalty phase of Stevens' case (e.g., T **587-609)** and why Forbes' purported tactics were not entitled to deference (e.g., T 610-12, rejecting Forbes' explanation for "desiring" in evidence the "Rufus went crazy" statement). Dillinger was as important to Stevens' ineffectiveness claim as a psychiatrist would have been in Ake v. Oklahoma, supra.

Judge Santora was in error in refusing to authorize payment of Dillinger's fees and expenses. His testimony had been germane and most helpful to a resolution of the issues facing Judge Santora. Such a payment for an expert witness is specifically authorized by §914.06, Fla. Stat. Moreover, the amount paid must be reasonable. See Makemson v. Martin

County, supra at **1112-15.** Payment was particularly required because Judge Santora had originally ordered payment of Dillinger's fees and expenses and because Dillinger had relied to his detriment on that order. It simply was not fair to change the rules concerning reimbursement after Dillinger had already spent the money in reliance on a previous unstayed order.

E. Pro Bono Counsel's Expenses

On October **23, 1984** Stevens' present attorneys moved that they be appointed as counsel so that they might seek reimbursement of the necessary expenses of the litigation. Counsel specifically forswore seeking any fees for their services. Stevens' attorneys, members of a two-person firm in New York, had volunteered to represent Stevens because of the shortage of lawyers in Florida who were willing to undertake such representation (R **204-06).** Judge Santora granted that motion on November **14, 1984,** authorizing counsel to apply for reimbursement of their out-of-pocket expenses, from time to time as they deemed appropriate (R **495).**

On May **11, 1986** counsel filed a motion for the reimbursement of **$3,541.77** in itemized out-of-pocket expenses incurred since **1984** (RCA **1-5).** Judge Santora denied that

motion in a summary order dated July 9, 1986 (RCA 9). He was in error.

The Legislature made clear in 1985 that it believed it necessary to appropriate governmental monies to ensure the representation on collateral appeal of persons sentenced to death. One reason the Legislature created a new agency to perform such representation was so that collateral legal proceedings would be commenced in a timely fashion. S27.7001, Fla. Stat. Stevens' counsel had acted in conformity with that intent, having filed the motion for post-conviction relief on March 22, 1984, at the time of the clemency hearing before the Governor and the Cabinet.

That the Legislature wished counsel already representing a defendant in a collateral appeal to be paid, is persuasively shown by S27.51, Fla. Stat., which provides for continued public defender representation of inmates whose post-conviction proceedings those agencies were handling on June 24, 1985. Having presented far more than a colorable claim for post-conviction relief, counsel was entitled to reasonable fees. Makemson v. Martin County, supra, 491 So. 2d at 1112-13; Graham v. State, supra. Counsel having voluntarily waived those fees, even greater solicitude than normal should have been accorded their request for reimbursement of expenses.

F. Conclusion

The difference in the payments Judge Santora authorized for Forbes, on the one hand, and Dillinger and pro bono counsel, on the other, shows in a microcosm how the judge was far from fair to Stevens. Forbes, the judge's friend, was given extra compensation despite Judge Santora's candid admissions that it was not legally merited (T **143,** T **1003-04**). Present counsel and their expert witness, on the other hand, had to bear the brunt of the judge's bias and were thus given absolutely nothing.

POINT SEVEN

DEATH-SCRUPLED JURORS WERE IMPROPERLY EXCUSED

The manner in which the prospective jurors were questioned concerning their views on the death penalty violated the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§9, 16 and 22 of the Florida Constitution. Various venire members, who gave apparently disqualifying answers that their death penalty scruples would prevent their being impartial on the guilt issue (see, e.g., T 200, 203, 206, 208), did so without unequivocally indicating that they could not subordinate their

personal views and do their duty to follow the judge's instructions on the law. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970). This error was compounded by Judge Santora's refusal to allow defense counsel to voir dire such jurors before they were excused for cause (T 200).

POINT EIGHT

FLORIDA'S HOMICIDE AND DEATH PENALTY STATUTES ARE ADMINSITERED IN A DISCRIMINATORY MANNER

Stevens' rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§2, 9 and 17 of the Florida Constitution were violated by the discrminatory practices in the administration of, and prosecutions under, Florida's homicide and capital punishment statutes. Three unpublished studies we submitted to the Circuit Court --- Foley, Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases, Radelet and Pierce, Race and Prosecutorial Discretion in Homicide Cases and Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization --- show that younger persons, males, and those charged with killing white persons and females are

significantly more likely to be convicted of murder in the first degree and to have the death sentence imposed upon them. Because of this unjustifiable discrimination --- each category of which applies to Stevens --- Stevens' conviction and sentence were unconstitutionally obtained.

POINT NINE

THE LESSER INCLUDED OFFENSE JURY INSTRUCTIONS REQUIRED AT THE TIME OF TRIAL LED TO ARBITRARY RESULTS

Beginning in **1939** and continuing until October 1, **1981,** Florida law required the jury in all first degree murder prosecutions to be instructed on all degrees of homicide, regardless of the evidentiary basis for such instructions. **SS919.14, 919.16,** Fla. Stat., adopted as Rules **3.490** and 3.510, Fla. R. Crim. P. See Brown v. State, **106** So. 2d **377** (Fla. **1968).** On October **1, 1981,** this Court ended that practice by approving amendments to the Rules of Criminal Procedure which, inter alia, prohibited instructions on lesser included offenses unless such instructions were supported by the evidence. In Re: Florida Rules of Criminal Procedure, 403 So. 2d **979** (Fla. **1981).** Stevens' case was tried prior to October **1, 1981,** during the period in which lesser included offenses had to be charged even in the absence of evidence to

support them. Consistent with Florida law, the jury in his case was instructed on all degrees of homicide (TT 1172-83).

By requiring the jury to be instructed on lesser included offenses, where there was not even a scintilla of evidence to support verdicts on the lesser offenses, Florida law invited jurors to dispense mercy wherever they deemed mercy appropriate. Without question, in light of this invitation, Florida juries did grant "jury pardons" in capital murder cases prior to October 1, 1981. See, e.g., Killen v. State, 92 So. 2d 825 (Fla. 1959). Because the practice of instructing on lesser included offenses when there is no evidence to support verdicts on such offenses "inevitably lead[s] to arbitrary results," Hopper v. Evans, 456 U.S. 605, 611 (1982), the Florida death penalty scheme, as applied, violated the Eighth and Fourteenth Amendments to the United States Constitution. See also Roberts v. Louisiana, 428 U.S. 325, 335 (1976); Art. I, §17, Fla. Const.

POINT TEN

BASED UPON HIS CONVICTION ON A FELONY MURDER THEORY, STEVENS' SENTENCE VIOLATES THE EIGHTH AMENDMENT

The jury was instructed on the law of principals which allows an aider or abettor, whether present or not, to

be convicted of a crime (TT 1166-67). The jury was also instructed on the law of felony murder,[173] being told that if the perpetrator of various felonies (including the three Stevens admitted committing) caused the death of a non-participant in the crime during the course of the felony, there was sufficient evidence for the jury to convict of murder in the first degree (TT 1175, TT 1177-79). The instructions emphasized several times that Stevens could be convicted of capital murder without having had an intent to kill (TT 1175, TT 1177, TT 1178-79).

In Enmund v. Florida, 458 U.S. 782, 797 (1982), the Supreme Court ruled that the Eighth Amendment to the United States Constitution forbids the 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." It is absolutely clear that, based upon the constitutionally-admitted evidence, there is no proof that Stevens killed, attempted to kill or intended to kill. The jury was explicitly instructed that it could convict of capital murder without such proof and that is exactly what occurred. Stevens' death sentence

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[173] The prosecution had sought a conviction based upon a felony murder theory, arguing, inter alia: "just driving the car alone makes [Stevens] guilty of first degree murder" (TT 1124-25).

therefore violates the United States Constitution and Article I, §§9 and **17** of the Florida Constitution.

Judge Santora summarily stated, without any indication of upon what he was relying, that "there was abundant evidence that [Stevens] contemplated that lethal force be used, that [Stevens] intended to kill the victim, and that [Stevens] actually killed the victim" (R 636 Par. 7). Despite the judge's conclusory statement, there simply is no constitutionally-considered evidence that Stevens actually killed, attempted to kill or intended to kill Tolin. That Judge Santora could so conclude is most likely another manifestation of the judge's strong belief that no one is more deserving of being executed than **Stevens.**[174]

The answer here lies in the partial dissent of Justice McDonald, joined by Justice Overton, in the direct appeal of this matter, which discussed the jury's "rational" conclusion:

> The jury could have concluded that Stevens participated in the robbery and rape, but that Engle was the sole perpetrator of the homicide.

Stevens v. State, supra, **419** So. 2d at **1065.** Upon the constitutional evidence in this case, therefore, it must be con-

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[174] See pp. **15,** 31-33, supra.

cluded that Stevens did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed.

VI. CONCLUSION

For the reasons set forth in Points One and Six (C), the order of the Circuit Court denying post-conviction relief should be reversed and the matter remanded for a new post-conviction hearing before a randomly-selected judge other than Judge Santora.

For the reasons set forth in Points Two, Five, Seven, Eight and Nine, the order of the Circuit Court denying post-conviction relief should be reversed, Stevens' conviction should be vacated and a new trial should be ordered before a randomly-selected judge other than Judge Santora.

For the reasons set forth in Points Three and Four, the order of the Circuit Court should be reversed, Stevens' death sentence should be vacated and a resentence --- without the empaneling of a new advisory jury --- should be ordered before a randomly-selected judge other than Judge Santora.

For the reasons set forth in Points Six (D) and (E), the orders of the Circuit Court denying Dillinger fees and expenses, and Stevens' present counsel expenses, should be reversed, the expenses sought by each should be granted and

the question of the amount of Dillinger's fees should be remanded for appropriate findings by a randomly-selected judge other than Judge Santora.

For the reasons set forth in Point Ten, Stevens' death sentence should be vacated and a sentence of **25** years **to** life imprisonment imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished by United States mail to Hon. Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida **32301** (Att: Raymond **L.** Marky, Esq.), Hon. T. Edward Austin, State Attorney, **600** Duval County Courthouse, Jacksonville, Florida **32202**, and Gerald R. Schneider, Esq., General Counsel, City of Jacksonville, **1300** City Hall, Jacksonville, Florida **32202**, this 7th day of November, **1986.**

_____
Oren Root, Jr.
Attorney for Appellant