IN THE SUPREME COURT OF FLORIDA

.RUFUS E. STEVENS, Appellant,	)	
v.	)	Nos. 68,581 & 69,112
STATE OF FLORIDA, Appellee.	)	

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

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. PRELIMINARY STATEMENT

We respond below on behalf of Appellant Rufus E. Stevens to those arguments advanced in the State's Answer Brief[1] which require specific refutation. To the extent that we do not comment concerning certain arguments raised by the

1. Page references to the State's Answer Brief will be preceded by "SAB"; parenthetical references preceded by "AIB" are to the appropriate pages of Appellant's Initial Brief; parenthetical references preceded by "R" are to the appropriate pages of the record on Appeal No. 68,581; those preceded by "RDA" are to the record on the direct appeal, No. 57,738; 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.

prosecution, it is because we believe that those points have been sufficiently answered in Appellant's Initial Brief.[2]

II. ARGUMENT

POINT ONE

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

A. Introduction

The State, which has launched a barrage of procedural and substantive attacks on Stevens' motion to disqualify Judge Santora, claims time and time again (see, e.g., SAB 14, SAB 17, SAB 37, SAB 49, SAB 51) that Stevens' "motion for disqualification was prompted by a desire to judge-shop" (SAB 8). While not a single fact is advanced to support that bald

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2. One problem which exists throughout the prosecution's brief --- in violation of Rule 9.210(b)(2) and (c), Fla. R. App. P. --- is a close-to-total absence of page references supporting assertions of what the record supposedly contains. We will try to correct such distortions and misstatements of the record as are material.

assertion, the State seems to believe that constant repetition of its claim will bestow validity upon it.[3]

B. The State's Procedural Claims

In considering the prosecution's various procedural claims, it is noteworthy that --- as the State concedes (SAB 20) --- not one of these arguments was raised in the trial court. Those claims have thus not been preserved for review. See Davis v. State, 461 So. 2d 67, 71 (Fla. 1984), cert. denied, 473 U.S. 913 (1985); Jones v. State, 449 So. 2d 253, 263 (Fla. 1984), cert. denied, 469 U.S. 893 (1984). It particularly ill-behooves the State, which routinely seeks to deprive criminal defendants of important constitutional rights and even of their lives based upon their lawyers' failures to raise issues properly, to waste this Court's time with numerous procedural arguments never advanced to the court below. In the event that this Court disagrees with us as to

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3. The prosecution seems to think it significant (SAB 49) that, in the event Judge Santora had recused himself, we had requested a random selection of the replacement judge either from among the other Fourth Circuit judges or from among those judges assigned to Duval County (R 221), rather than from among those judges assigned to criminal divisions. Had that issue been raised below, the State's current suggestion of the appropriate pool would have been perfectly acceptable to us. Our only concern, as our papers clearly show (R 219-21), was that the replacement judge be randomly selected.

the requirement that the State have raised its procedural claims below, we refute those contentions immediately infra.

Most remarkable --- and most indicative of the State's desperation on this topic --- is its request that this Court overturn a court rule, a statute and recent precedent of this Court to invalidate Stevens' disqualification motion (SAB 20, SAB 23-27). The State asks this Court to invalidate the amendment (Ch. 83-260, Laws of Fla.) to §38.10, Fla. Stat., and to retroactively reinstate the prohibition against affidavits in support of disqualification motions being made by "kin to defendant or counsel for the defendant."

Not only does the prosecution denigrate the clear legislative intent expressed in Chapter 83-260, but it completely ignores the Court Rules and case law promulgated by this Court. Rule 3,230, Fla, R. Crim. P., originally promulgated by this Court in 1967 and re-promulgated in the 1972 revision of the Rules of Criminal Procedure, makes clear that the two affidavits required to be submitted in support of a disqualification motion may be from anyone. Moreover, this Court has recently reaffirmed that no affidavits are required in support of a motion to disqualify a judge in a civil case. In re Amendments to Rules of Civil Procedure, 458 So. 2d 245, 247 (Fla. 1984); see Rule 1.432, Fla. R. Civ. P. Finally, the prosecution ignores the considered holding of this Court in Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983), that

there are no restrictions on the persons who can submit the required affidavits in criminal cases and that:

> the technical requirements of the contents of the affidavits need not be strictly applied but, rather, they will be deemed sufficient "[i]f taken as a whole, the suggestion and supporting affidavits are sufficient to warrant fear on the part of" a party that he will not receive a fair trial by the assigned judge.

This Court, having so clearly and recently spoken on this issue in both its rule-making and adjudicative capacities, should give short shrift to the prosecution's plea for a retroactive change in procedure.

In further total disregard of the dictates of Livingston as quoted above, the prosecution makes much (SAB 20-23, SAB 27-28, SAB 35-36) of the fact that Stevens and his counsel --- who drafted the affidavits in support of the disqualification --- rely upon the technically hearsay admissions of John Forbes as to his friendship with Judge Santora and the statements of others to the same effect (R 226-27, R 229-30, R 501-02[4]). Query: can anyone other than

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4. The State's claim (SAB 35) that the Supplement to the Motion to Disqualify was defective in form because it contained only one affidavit is meritless. As the title of that pleading indicates and as the State admits (SAB 35-36), it was a supplement to the principal motion and was never meant to stand on its own. It certainly is ironic that the prosecution complains about the form of the Supplement because it is stated in that pleading (R 498) that it was drafted and filed

the persons involved know for certain, on a non-hearsay basis, that two persons are friends? In any event the affidavits rely not only on third-party statements but also on Forbes' own admissions. Cf. Gieseke v. Grossman, 418 So. 2d 1055, 1057 (Fla. 4th DCA 1982) (affidavits in support of disqualification motion based only partially on personal knowledge are legally sufficient).

C. The Grounds for Disqualification

1. The Judge's Extrajudicial Communication

In trying to negate, as one basis for disqualification, the fact that Judge Santora advocated a denial of clemency for Stevens, the State persists in ignoring (SAB 30-33) that this was an extrajudicial communication not required by his judicial duties which related to a judicial matter he had to know would soon be before him. As such, Judge Santora's communication appears to have been a violation of Canon 3(A)(6) of the Code of Judicial Conduct and clearly required his disqualification.

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to try to obviate later arguments by the State that the new facts presented orally to Judge Santora on November 8, 1984 were not properly sworn to. As to the prosecution's rather intemperate other claims (SAB 34-36) concerning the Supplement to the Motion to Disqualify, they are sufficiently irrelevant and baseless as to require no answer.

2. The Judge's Relationship with Forbes

The State argues (SAB 28-30) that the friendship between Judge Santora and John Forbes was not a ground for disqualification. Obviously, by itself, a judge's friendship with an attorney for a party is not generally a ground for disqualification, See, e.g., Erwin v. Collins, 85 So. 2d 833 (Fla. 1956); but see, Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); Caleffe v. Vitale, 488 So, 2d 627 (Fla. 4th DCA 1986). The rules with respect to when a judge must disqualify himself, however, do not turn upon rigid classifications of relationships but, rather, whether in all the circumstances of the case "a litigant may reasonably question a judge's impartiality." Livingston v. State, supra, 441 So. 2d at 1086.

In the case at bar Forbes was clearly an interested party. He perceived --- according to his own testimony--- that his reputation was at stake (T 241) and he admitted that "one of the nicer words" he used with respect to Stevens' present counsel was that he was an "adversary" (T 240). While he refused to meet with Stevens' counsel (T 239-40),[5] he

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5. The prosecution charges (SAB 38-39) us with having "mis-stated" the record when we asserted that Forbes wanted Stevens' ineffective assistance claim to be denied and refused to help the defense. We stand by our statements. Forbes testified that Stevens' present counsel requested that "we [Forbes and present counsel] cooperate, that we work together to assist Rufus" (T 543). Based upon that reasonable and

admitted that he had spent several hours in the State Attorney's office before he was called as Stevens' witness at the post-conviction hearing (T 236). In addition to having a significant interest in the proceeding, Forbes was the major witness at the hearing and his credibility was definitely at issue. In such circumstancs it was far from unreasonable for Stevens to question the impartiality of a judge who was Forbes' longtime social friend. Since Stevens had "a well-grounded fear that he [would] not receive a fair trial at the hands of" Judge Santora, the recusal motion should have been granted. See Livingston v. State, supra, 441 So. 2d at 1086; State ex rel. Brown v. Dewell, 131 Fla. 566, 179 So. 695, 697-98 (1938); cf. McKay v. McKay, 488 So. 2d 898, 899 (Fla. 3d DCA 1986) (where it was held improper for a judge to have made an administrative decision unrelated to the merits of a case where one party was his former social companion).

Judge Santora's long friendship with Forbes caused him impermissibly to desire to protect Forbes by excluding evidence of substantial relevance to the ineffectiveness issue. Prominent among the relevant evidence improperly excluded by Judge Santora was proof that, only three months

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proper request, Forbes testified that he "assumed" that he was being asked to perjure himself. That Forbes could make such an assumption from the request to help a former client whose life is at stake is a potent indication of the depth and breadth of his animus for those who had accused him of rendering ineffective assistance of counsel.

before Forbes began representing Stevens, Forbes had such a severe drinking problem that he customarily neglected clients and their cases, as a result of which he was sued for malpractice (eventually settling the claim for $60,000).[6]

Ignoring the Florida law cited by Stevens (AIB 22-26), the State argues (SAB 43-46) based upon two federal cases[7] that not only was it proper to have excluded such evidence but also that it was proper to have refused to hear proffers concerning such evidence. Neither case upon which the State relies held that evidence of alcoholism was irrelevant or inadmissible, but rather, as a factual matter, that the attorneys' overindulgence in alcohol was not shown to have affected the representation they provided. We submit that it was extremely relevant --- albeit not conclusive--- that three months before he began representing Stevens Forbes habitually neglected clients because of his alcohol problems. Human experience tells us that, unless there was evidence of some significant intervening circumstance, such a serious condition which existed three months before Forbes began representing Stevens still existed three months later.

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6. Stevens would have proven these facts through Forbes' former secretary who had previously so testified at a deposition in the malpractice case and through documents which had been filed in court.

7. Fowler v. Parratt, 682 F.2d 746 (8th Cir. 1982); Clark v. Louisiana State Penitentiary, 520 F. Supp. 1046 (M.D. La. 1981).

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

The prosecution concedes with commendable candor that Judge Santora's ruling against disqualification on the ground of his close friendship with Forbes --- i.e., "Rubbish. Absolutely no merit" (R 250) --- was "an expression of judicial annoyance" at the motion to disqualify (SAB 36). Such expressions of annoyance are not permissible responses to motions for disqualification and are in themselvs adequate grounds for the judge's recusal. See Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978).

D. Conclusion

There can be little doubt that Stevens had reasonable and justifiable reasons to question Judge Santora's impartiality. In such circumstances disqualification was mandatory. Livingston v. State, supra, 441 So. 2d at 1086-87.

POINT TWO

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

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

1. The Concession of Inadmissibility

The critical evidence which linked Stevens to actual involvement in the killing --- as opposed to the robbery, kidnapping and rape --- was the testimony of Nathan Hamilton as to Scott Engle's statement[8] that after Kathy Tolin was abducted, "Rufus went crazy and started saying she's going to identify us" (TT 578). The State now concedes that the admission of this evidence was in violation of the Florida Evidence Code (SAB 53, SAB 55).

Surprisingly, however, the State continues to maintain (SAB 54, SAB 55) that the admission into evidence of Engle's statement did not violate Stevens' right of confrontation as enunciated in Bruton v. United States, 391 U.S. 123 (1968). We say that it is surprising[9] because this Court recently held in Nelson v. State, 490 So. 2d 32, 34 (Fla.

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8. The prosecution argued in summation that this statement by Engle was "the one statement that gives you the most accurate picture of what happened" (TT 1127).

9. The explanation may lie in the State's desire to criticize us for our "pointless and ill-informed" "hectoring of Mr. Forbes" based upon our allegedly mistaken reliance on Bruton (SAB 54), or it may lie in the State's effort to show that Forbes was not ineffective for allowing Judge Santora to consider the Bruton evidence at sentencing (see SAB 73-77).

1986), with respect to statements of a separately-tried co-defendant which implicated both the defendant and himself in a murder, that:

> ... [T]he requirements set out in Bruton v. United States ... make it clear that the admission of this tape would violate Nelson's sixth amendment right to confront witnesses against him. ... The admission of a confession of a co-defendant who does not take the stand deprives a defendant of his rights under the sixth amendment confrontation clause.

There is thus no doubt that the "Rufus went crazy" statement violates the Bruton rule.

2. The Incredible Nature of Forbes' Supposed Strategy

In our principal brief (AIB 44-51) we discussed in great detail why Forbes' "reasons" for his supposedly deliberate decision to allow the "Rufus went crazy" statement into evidence, despite its inadmissibility under the Bruton rule, were incredible. We briefly summarize those reasons as follows:

> (I) Engle's statement was objectively very unhelpful to Stevens' case and Forbes' supposed reasons for wanting its admission make no sense (see AIB 45-46);

> (2) If Forbes had truly thought that part of Engle's statement was helpful (as he maintained at the post-conviction hearing), he would have relied --- as he in fact did not --- on that statement in one of his two summations, his sentencing remarks, or his arguments on the direct appeal to this Court (AIB 46-47);
>
> (3) Forbes clearly had no knowledge of the Bruton rule and he, beyond any doubt, perjured himself on this subject (AIB 47-49); and
>
> (4) He did not object to the admission, in violation of the Bruton rule, of five other statements made by Engle (AIB 49-50),

We submit that no fair and objective factfinder could have found on the record in this case that Forbes made a deliberate tactical decision to allow Engle's statement into evidence because it was helpful to Stevens. In the face of such "a clear showing of error,'' this Court should conclude that Judge Santora's ruling on this issue was not "supported by competent, substantial evidence." Cf. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Johnson v. Mayo, 40 So. 2d 134, 136 (1949) (trial court finding presumed correct only if supported by credible evidence).

The State has chosen not to respond or even discuss any of our four well-documented bases for disbelieving Forbes other than to claim that Engle's statement was "generally

helpful" (SAB 56).[10] The prosecution reached this conclusion based upon factual premises and reasoning which are totally erroneous.

The claim (SAB 56) that, to the extent the "Rufus went crazy" statement inculpated him (an implicit concession of our position), the Engle statement was cumulative of other evidence is wrong. There was no properly-admitted evidence which linked Stevens to the actual killing and the State is able to point to none. The claim (SAB 56) that Engle's statement showed that he was "the one in charge" is nonsense. That simply is not a rational reading of Engle's statement. The State's claim (SAB 56) that the admission into evidence of "Rufus went crazy and started saying she's going to identify us" was helpful to the goal of avoiding a death sentence because the statement described Stevens "as 'crazy,' not in control" ignores not only all logic and common sense but also that this was the sole evidence upon which Judge Santora (quite predictably) based his finding that one aggravating factor[11] had been established.

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10. The prosecution does spend a good deal of space (SAB 56-57) "rebutting" an argument we never made: that Forbes' testimony concerning the "Rufus went crazy" statement should not be believed "because at trial he tried to impeach Hamilton's testimony" (SAB 56). This, we submit, illustrates one of the dangers of the prosecution's failure generally to use page references. See n. 2, supra.

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

Instead of discussing the compelling issues we raised, the State chooses to make desperate and cynical arguments such as the following:

> Indeed, even where, as Stevens says happened here, counsel "fabricates" a reason for poorly thought out action at trial, if the reason is a plausible strategy it may validate his choice in an objective sense. It would be quite possible for a court to find in a case that counsel's reason for his conduct was invented to make himself look better and so not entitled to heavy deference as a matter of trial strategy, but to then go on to find that the conduct was within the range of effective representation.

That the Attorney General of the State of Florida thinks that that is a proper argument --- albeit a fallback position--- upon which a murder conviction and a death sentence should be upheld is truly offensive. We are confident that this Court would not even consider reaching a conclusion so antithetical to our system of justice --- which seeks to base decisions (even of far lesser moment) upon what the truth is rather than what the prosecution can get away with.

Equally untenable is the argument (SAB 53-54) that there is "a strong presumption" that Forbes' testimony was credible. No such rule exists. Even if it did, on this record Forbes' testimony would still have to be rejected as incredible.

3. The Prejudice

Three times during its discussion of this issue (SAB 53, SAB 54, SAB 59), the prosecution argues that Forbes' failure to make the proper objections to have the "Rufus went crazy" statement excluded did not prejudice him because of the other evidence of guilt. The fact is that there is not any properly-admitted evidence linking Stevens to the actual killing, as opposed to the robbery, kidnapping and rape. Because there is none, the State in its brief simply says that this evidence exists and then is unable to point to any such evidence.

Nor does the State even try to explain away the following argument in the trial prosecutor's summation (TT 1127):

> What is the one statement that gives you the most accurate picture of what happened? When Scott Engle says ... Rufus went crazy. (Emphasis added.)

In his very next sentence the prosecutor argued that the "Rufus went crazy" statement "tells you more" than Stevens' entire confession to the underlying felonies (TT 1127). The State does not try to explain away the above argument because it is correct. The "Rufus went crazy" statement was the most devastating evidence against Stevens. Had it been excluded,

as it should have been, there was certainly a "reasonable probability" that Stevens would not have been convicted of murder in the first degree.

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

Stevens argued in his initial brief (AIB 51-60) that Forbes was ineffective for failing to seek the suppression of Stevens' confession to the robbery, kidnapping and rape on two separate Fourth Amendment grounds. The first of those grounds was Stevens' unconstitutional arrest in his home without a warrant. The State now claims (SAB 60) that we "acknowledged" that the point of law on which we rely was not established until the United States Supreme Court decided Payton v. New York, 445 U.S. 572 (1980) --- which was decided after Stevens' trial.

A review of our brief (AIB 54-56) shows that we "acknowledged" no such thing. To the contrary we pointed out, inter alia, (a) that the constitutional principle upon which we rely was stated in Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971), eight years before Stevens was tried (AIB 54-55); and (b) that the United States Supreme Court in United States v. Johnson, 457 U.S. 537, 552-54 (1982), held that Payton had neither overruled precedent to the contrary nor

overturned a consensus view of the federal circuit and state courts on the subject, but rather was based on "long-recognized principles of Fourth Amendment law and the weight of historical authority." There simply is no change in the law upon which we are relying in this claim of ineffectiveness. Cf. Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980). Since the "change in the law" argument is the State's sole one on this point, we submit that we have clearly established that Forbes was ineffective for failing to challenge Stevens' confessions as a fruit of his unconstitutional arrest.

The second Fourth Amendment basis upon which Forbes should have sought suppression of the confession was that there had been no probable cause for Stevens' arrests (see AIB 57-60). The State in no way disputes our contention that this grievous deficiency on the part of Forbes deprived Stevens of effective assistance of counsel. Since the prejudicial impact of Stevens' admission of participation in the robbery, kidnapping and rape cannot be controverted --- indeed, without the confession the State would have been left with a very weak circumstantial case --- this fundamental error, standing alone, entitles Stevens to a new trial. See United States v. Cronic, 466 U.S. 648, 657 n.20 (1984).

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

There are two basic flaws in the State's argument (SAB 63-64) that Forbes properly decided not to attack Hamilton with readily-available impeachment material.

First, the basic premise --- that Hamilton was a helpful witness to Stevens and that his credibility thus ought to be shored up[12] --- is patently ridiculous. This Court has already found --- quite correctly --- that Hamilton (whose name was not mentioned in the opinion) was one of the two principal witnesses against Stevens. Stevens v. State, 419 So. 2d 1058, 1061 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983). As we have previously shown (AIB 45-46 and pp. 13-14, supra), the contention that Engle's "Rufus went crazy" statement, elicited from Kamilton, was helpful to Stevens is likewise absurd. Indeed, this Court on direct appeal specifically quoted the "Rufus went crazy" statement in its four-paragraph summary of the evidence against Stevens.[13] Stevens v. State, supra, 419 So. 2d at 1061. The reason underlying these absurd premises --- as we have shown (AIB 44-51, AIB 61-

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12. Forbes testified that this was the reason he did not seek to impeach Hamilton in certain significant ways (T 341-42).

13. Out of the entire 1,400-page trial record this was the only testimony quoted by this Court in its opinion.

65) --- is that Forbes felt compelled to fabricate tactical reasons to try to cover up his deficiencies in these areas.

Second, realizing the corner into which it has been painted by Forbes' ridiculous assertions, the State has tried to advance an alternative hypothesis (SAB 63) that Forbes deliberately impeached Hamilton "only as his testimony bore against Stevens." While creative, this hypothesis is (a) not what Forbes testified at the post-conviction hearing that his tactics were[14] and (b) belied by the trial record.[15]

This Court should reject both the fabricated tactical reasons advanced by Forbes and the State's newly-advanced hypothesis as being totally unsupported by any credible evidence.

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14. Forbes testified unequivocally that he wanted to build up Hamilton's credibility (T 341-42).

15. For instance, Forbes questioned Hamilton about whether he had been convicted of a crime (TT 579), referred in summation to the fact that he had been so convicted (TT 1038), and argued (absurdly) to the jury that Hamilton had fabricated his testimony as part of an effort to help a friend extricate himself from a driving while intoxicated charge (TT 1060). None of these attacks on Hamilton's credibility was focused in the evidence solely against Stevens as opposed to the evidence against Stevens and Engle. Moreover, even the State in its memorandum submitted following the post-conviction hearing failed to perceive this hypothesis, arguing instead (R 625): "In the mind of Mr. Forbes, any attempt at impeachment of Nathan Hamilton may have been fatal ...."

D. Forbes Failed To Object to the Jury Instructions That Premeditation Is Presumed As a Matter of Law and Made Up Yet Another Cover Story for His Deficiencies

The State's contention (SAB 64-65) that the presumption-of-premeditation instruction --- to which Forbes failed to object, despite its violating the rule enunciated in Sandstrom v. Montana, 442 U.S. 510 (1979) --- "was not one which could have come into operation on the facts of this case" is simply not true. It cannot be disputed that the homicide occurred during the course of a kidnapping. Furthermore, despite the State's claim (SAB 65) that the robbery and rape had been completed --- thus implying that the felony murder doctrine did not apply --- the courts have held that the felony murder doctrine applies to a killing in the chain of events which began with a designated felony. See, e.g., Johnson v. State, 486 So. 2d 657, 658-59 (Fla. 4th DCA 1986); Mills v. State, 407 So. 2d 218, 221-22 (Fla. 3d DCA 1981) (felony murder based on robbery which had been completed 24 hours earlier).

As for our arguments (a) that Forbes fabricated his tactical reason for not objecting --- i.e., that the instruction might confuse the jury --- and (b) that Forbes obviously had no knowledge of the law in this area, the State relies (SAB 65) solely on the ipse dixit that Forbes' explanation of

his tactical reasons were "quite plausible." We submit that that ipse dixit is a totally unsatisfactory response to our detailed rendition of the unlikelihood of Forbes' contention on this point (see AIB 66-67).

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

The State responds to this point in pertinent part as follows (SAB 65-66):

> Stevens' claim here is spurious.... [Forbes'] demand for discovery ... included a query for "any tangible papers or objects which were obtained from or belonged to the accused" (RDA 7).... [T]he State amended its response to include "one knife" (RDA 20).
>
> Where is the State's supposed discovery violation? Stevens would have us believe now that the State was supposed to provide the details of how the knife was acquired by the State. Not so. The defense query did not ask for that and the State was not obliged to provide it in response. (Emphasis added.)

For reasons best known to it the State has chosen to ignore what we made very clear in our initial brief (AIB 68). We said there, and we now repeat, that included in Forbes' demand for discovery was the following: "Whether there has been any

search or seizure and any documents relating thereto" (RDA 8, Par. 9) (emphasis added). The prosecution was required by Rule 3.220(a)(1)(ix), Fla. R. Crim. P. to provide this information. See Potts v. State, 399 So. 2d 505, 507 (Fla, 4th DCA 1981); State v. Oliver, 322 So. 2d 638 (Fla. 3d DCA 1975).[16] Despite the clear mandate of the Rules, the State ignored it.

Had the State fulfilled its statutory obligation, Forbes would have known how the knife was acquired and would have been in a position to make the appropriate motion to suppress. When Forbes learned at trial --- just as the knife was being introduced (TT 677-80) --- that it was the product of a police seizure, he should, at the very least, have demanded a Richardson inquiry for the State's failure to comply with Rule 3.220(a)(1)(ix), Fla. R. Crim. P. Had he done so he would have learned the unconstitutional manner in which the knife was seized (see AIB 142-43). That knowledge would have allowed him to make the appropriate arguments for suppression. The failure to demand a Richardson inquiry denied Stevens his right to effective assistance of counsel.

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16. The instant case is a fortiarari to Potts and Oliver, since in both of those cases the stated facts show that the search and seizure was almost definitely known to defense counsel. In the instant matter, Forbes was unaware of that fact (T 404).

F. Forbes Generally Failed To Prepare Properly

We respond here only to one point made by the State: i.e., that Judge Santora's "appraisal of Mr. Forbes' credibility is not subject to review here" (SAB 69). That simply is not true because Judge Santora's findings --- which in general adopted Forbes' contentions at the post-conviction hearing no matter how unbelievable those contentions were--- are not supported by substantial credible evidence. In such circumstances this Court has an obligation to set aside the factual findings made below. Cf. Jent v. State, supra, 408 So. 2d at 1028; Johnson v. Mayo, supra, 40 So. 2d at 136.

We recognize that the State is an advocate in this proceeding, but we fail to understand how it can maintain with a straight face that Forbes' testimony concerning his notes and their destruction was attributable to a "lapse in memory" (SAB 69). While we certainly agree that various facts can be forgotten over a five-year period, we submit that a lawyer cannot truthfully describe his general practices concerning the taking and destruction of notes in such fundamentally contradictory ways as Forbes did here (see AIB 73 for a chart showing the direct contradictions between Forbes' deposition testimony and his hearing testimony eleven days later). While the State accuses us of being "purblind" on this subject, we submit that there is no possible objective view of the

evidence other than that Forbes blatantly lied on the subject of his notes. That he so blatantly lied on this point calls into question the truthfulness of his entire testimony. Fafsus in uno, falsus in omnibus.

POINT THREE

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

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

The State makes the astounding argument (SAB 71-72) that total inaction by defense counsel at sentencing on capital cases is the norm in this State and that therefore Forbes was not ineffective. While the prosecution has an overview of all the capital cases in the State --- which we do not --- we find it impossible to believe (a) that total inaction is the norm and (b) that this Court would find that such inaction comports with the constitutional guarantees of effective assistance of counsel.[17]

17. The State also inappositely analogizes (SAB 72) the situation Forbes was in when Judge Santora told him that he planned to sentence Stevens to death to that of counsel before this Court who are denied a stay of execution with a written order and opinion to follow. Without going into all the

The prosecution claims (SAB 71-73) to be unable to figure out what Forbes should have done either in responding to the State's "Brief ... Demanding ... Death" or in representing his client at the sentencing. In both instances Forbes should have, inter alia, presented the available mitigating evidence (see AIB 96-114), argued strenuously and cogently to exclude from the court's consideration the numerous items of unconstitutionally-obtained or -admitted evidence upon which the prosecution and Judge Santora relied so heavily (see AIB 89-96, AIB 114-22), and argued the great weight which Judge Santora should have accorded (but did not) to the jury's life recommendation (see AIB 80-85).

B. Forbes Failed To Object to the Bruton Evidence

We note initially that we have shown conclusively at pp. 11-12, supra, that Engle's "Rufus went crazy" statement admitted through the testimony of Hamilton violated the rule of Bruton v. United States, supra. See Nelson v. State, supra, 490 So. 2d at 34.

The effort by the State (SAB 74-77) to overturn this Court's decision in Engle v. State, 438 So. 2d 803 (Fla.

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dissimilarities, the crucial difference is that counsel before this Court has (or should have) presented all the arguments then available prior to this Court denying the stay. Forbes, on the other hand, had presented nothing to Judge Santora.

1983), cert. denied, **465 U.S. 1074** (1984), is misplaced. We are confident that this Court carefully considered its opinion in Engle while that case was sub judice. Moreover, the conclusion reached in Engle --- which is equally applicable here --- is mandated by the Sixth and Fourteenth Amendments to the United States Constitution.

There can be no doubt that Stevens was denied his right of confrontation by the admission of Engle's statement through Hamilton. How could Stevens confront Engle concerning his accusation that it was Stevens, not he, who was responsible for the murder? The answer is clear: there is no way such confrontation could occur with respect to the single most critical --- or as the prosecutor said in summation, "most accurate" --- evidence in the **case.**[18]

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18. The State argues (SAB **75-76)** that the Bruton rule has been modified by Lee ***v.*** Illinois, **476 U.S.** _____, 90 L.Ed. 2d **514 (1986). If** that were true, Forbes' effectiveness would have to be judged by the law as it existed in **1979** at the time of the sentence --- see Strickland v. Washington, **466 U.S. 668, 689-90 (1984) --- for** it would violate due process and equal protection of the laws to deny Stevens the benefit of positive changes --- see Witt v. State, supra--- and then saddle him with the consequences of negative changes. It is clear, in any event, that Lee strongly reinforced the Bruton rule, stating at **530** that "there is no occasion to depart from the time honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation" (emphasis added; footnote omitted). Obviously, Engle had every reason to blame Stevens for the actual killing while talking to the person who he knew was the only person (besides Stevens) who could link him to the homicide. Furthermore, since Engle's statement to Hamilton clearly does not "interlock" with Stevens' statements, it certainly cannot be said to contain such indicia of

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

The State's first defense (SAB 78) to our claim that Forbes was ineffective in failing to seek the exclusion of the psychiatric evidence obtained and introduced in violation of Stevens' constitutional rights is that Estelle v. Smith, 451 U.S. 454 (1981), the leading case in the area, created a change in the law. It has already been determined, however, that Estelle v. Smith did not change the law. Battie v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981); cf. Berkemer v. McCarty, 468 U.S. 420, 429 (1984) (placing Estelle v. Smith in a long line of decisions which have reaffirmed Miranda's "central principle"). Moreover, the change-in-the-law issue is academic because Forbes testified that he was aware at the time of sentencing of the law upon which we rely on this issue (T 494-95).[19]

The State's second defense (SAB 78-79) --- of waiver of Fifth Amendment rights --- is equally invalid. It is true that, before he was psychiatrically examined, Stevens gave

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reliability as can overcome the presumptive unreliability of one suspect's accusations against another. See Lee v. Illinois, supra, 90 L.Ed. 2d at 528-30.

19. The claim (SAB 78) of a procedural default is obviously inapplicable to this ineffective-assistance-of-counsel claim.

notice that he intended to rely on a defense of insanity (RDA 28). He never, however, presented such a defense in the guilt or the penalty phases of the trial. In the absence of the introduction of evidence on his psychiatric condition or the actual conducting of a psychiatric defense, there is no waiver of the applicable constitutional protections. Booker v. Wainwright, 703 F.2d 1251, 1256-57 (11th Cir.), cert. denied, 464 U.S. 922 (1983); Battie v. Estelle, supra, 655 F.2d at 702. No case holds to the contrary. The principal case relied upon by the prosecution --- Riles v. McCotter, 799 F.2d 947, 952-54 (5th Cir. 1986) --- simply does not stand for the proposition that there is a waiver in the circumstances of this case. What Riles did hold (rather unsurprisingly) was that there is a waiver of the privilege at the guilt phase when defendant presents an insanity defense.

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

We make the following brief points with respect to these issues:

1. The State claims (SAB 80) that Forbes' strategy of moving quickly to the penalty phase, to take advantage of the jury sympathy he sensed, cannot now be questioned. The State is wrong on two counts. First, because that strategy

was based on a total misunderstanding of the law, it was so patently unreasonable that no competent attorney would embrace it. See Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir.), vacated, 468 U.S. 1206, 1212 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1208 (1985). Second, the non-existent or next-to-non-existent investigation done before Forbes embarked on his fatally-flawed strategy made his decision professionally unreasonable. See Strickland v. Washington, supra, 466 U.S. at 690-91.

2. That Forbes did not properly investigate is demonstrated conclusively by his documented failure to determine the correct, minor nature of Stevens' prior involvements with the law. The State, obviously having no justification for Forbes' clear ineffectiveness in this regard, has chosen--- with the exception of one sentence[20] --- to remain silent on our detailed discussion concerning this point (see AIB 105-10).

3. The prosecution fails to understand (see SAB 81-83) that one of the significant aspects of the mitigating evidence which should have been presented was the terribly violent treatment Stevens had received from his parents (see

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20. That one sentence (SAB 89-90) refers to Forbes' baseless contention (T 452-53) that the presentence investigation report omitted some derogatory information concerning Stevens' prior record. In fact, the PSI did exactly the opposite of what Forbes testified: it made Stevens' record worse than it really was and it omitted nothing.

AIB 100-01, AIB 104 n.111). Obviously it therefore is extremely unlikely that Stevens' parents would be called as mitigation witnesses. That hardly justifies the State's conclusion (SAB 83) that "there is little point in pursuing friends and more distant relatives as mitigating witnesses where the family cannot prudently be called as witnesses."

4. The claim (SAB *85)* that Stevens' looking in on Jeanne Allen, the owner of the grocery store adjacent to the trailer park where he lived, at times when she was alone at her store (see T 217), had some sinister connotation is not a fair inference from the record. In fact, it is a cheap shot.

5. That Forbes obtained a jury recommendation of life which was unsupported and unsupportable by facts[21] is no "vindication" (SAB 86) of his strategy; rather, that there is no evidence in the record to support the jury's recommendation is proof of the bankruptcy of his strategy. Cf. Porter v. Wainwright, 805 F.2d 930, 935-36 (11th Cir. 1986).

6. Judge Santora refused to consider nonstatutory mitigating circumstances in imposing sentence (see AIB 113-14). In light of Hitchcock v. Dugger, ___ U.S. ___, 41 Cr.L. 3071 (dec. April 22, 1987), this Court should grant a new sentencing proceeding before another judge --- both because

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21. This Court concluded as follows: "The recommendation of life was not based on any valid mitigating factor discernible from the record." Stevens v. State, supra, 419 So. 2d at 1065 (emphasis added).

this was a matter of fundamental error and also because Forbes was ineffective in failing to object to this clear constitutional error.

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

Forbes claimed to have "invited" September Jinks' testimony (T 59). The State now labels that "strategy" as "successful" (SAB 89). It is hard to tell whether Forbes or the prosecution has less understanding of the law on this topic. Success is defined in terms of what the judge or this Court does with respect to sentence. By definition, a hollow jury recommendation is no success. Moreover, as cannot be disputed, the Jinks testimony created detrimental evidence relied on by both this Court (419 So. 2d at 1064) and Judge Santora (TT 1304).[22]

22. The State does not contest our contentions (AIB 117-18) that Jinks' testimony was excludable if Forbes had made the proper objections.

POINT FOUR

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

We discussed in detail in our principal brief (AIB 131-34) why our claim that Stevens' constitutional rights were denied 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 was cognizable on a motion for post-conviction relief. The State agrees (SAB 92) with Judge Santora that this claim should have been raised on direct appeal, but does not explain how such a claim could actually be heard. Since defense counsel was responsible for this deprivation, which thereby made inevitable that there was no record on the point, we can only conclude that the State is asking this Court to hold that claims such as Stevens, made pursuant to the rule enunciated in Gardner v. Florida, 430 U.S. 349 (1977), are barred from consideration in the Florida courts. At a minimum, we submit that Stevens' claim should be cognizable on a post-conviction motion because the attorney on direct appeal was also the trial attorney, thereby precluding the issue from being raised on direct appeal.

The State erroneously claims (SAB 91) that "Forbes testified that he had discussed the contents of both reports with Stevens."[23] In fact, the record is clear --- from both Forbes' (T 492) and Stevens' (T 896-97) testimony --- that at best Forbes discussed with his client only the ultimate conclusions of the psychiatric report. Since the damaging contents of the psychiatric report were not its general conclusions but rather several of its historical factual allegations (see AIB 129-30), the record uncontrovertedly demonstrates that Stevens was not given an opportunity to review that damaging report. Judge Santora's finding on this point is not only not based on substantial evidence, it is based on no evidence.

The State's argument that our Gardner claim is based upon a change in the law is meritless. Obviously the point of Gardner was to effectuate the rights of the defendant --- not of his counsel (who has no Eighth and Fourteenth Amendment standing in this context). As this Court stated in Brown v. State, 473 So. 2d 1260 (Fla. 1985), cert. denied, 106 S. Ct. 607 (1985): "The purpose of the requirement that presentence investigation reports be supplied to capital defendants is to allow them [obviously meaning "capital defendants"] to explain or refute any inaccurate or misleading information contained in the reports" (emphasis added). For the State to argue that

23. As usual, no page references are provided.

Gardner mandates disclosure only to defense counsel of information upon which the sentencing judge is relying is simply an incorrect reading of Gardner. Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980), which makes the holding of Gardner explicit in this respect, is hardly a charge in the law. In any event, since this claim did not ripen until after Forbes no longer represented Stevens, the change-in-the-law issue is snoot since Raulerson was decided in 1980 and Forbes represented Stevens until 1982.

POINT FIVE

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

Even apart from Judge Santora's sudden unwillingness to believe Forbes, it is extremely difficult to see how an objective factfinder could have found the testimony of the trial prosecutor, Henry Coxe, to have been persuasive with respect to how and where the police found the dull knife. After all, the most definite Coxe ever became in stating that he disclosed that information to Forbes was that he was sure that he "must have," but could not specifically recall having done so (T 807). In light of the facts (a) that Coxe did not comply with Stevens' discovery demand concerning searches and

seizures despite the dictates of Rule 3.220(a)(1)(ix), Fla. R.Crim. P., (b) that Coxe claimed (T 813; see R 538-39) to have revealed to the defense, pursuant to the discovery demand, all of Stevens' statements but in fact had not included the statements which directly led to the discovery of the knife (see RDA 20) and (c) that both Forbes and the State misinformed this Court on direct appeal concerning the facts pertinent to this point (see AIB 140-41), there is certainly little reason to give credence to what Coxe thought five years after the event that he "must have" said.

The State's claim (SAB 98) that this point is not covered by the reach of Brady v. Maryland, 373 U.S. 83 (1963), is based upon an exceedingly narrow reading of that case which explicitly states that it applies to "evidence favorable to an accused." Id. at 87 (emphasis added). Information which would have allowed the defense to obtain the knife's suppression is certainly "favorable." The demands for discovery concerning Stevens' statements and any search and seizure were ignored with respect to the information which would have disclosed how and where the knife was found. The United States Supreme Court has held that a prosecutor's failure to respond to such specific demands for material information "is seldom, if ever, excusable." United States v. Agurs, 427 U.S. 97, 106 (1976). Considering the prejudice to Stevens from the introduction of the knife (see AIB 151-53), this surely was

not one of those rare occasions in which such prosecutorial suppression can be excused.

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. In light of the fact that in capital cases "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence"' --- Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1, 6 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) --- the State's rejection (SAB 101) of the additional mitigation witnesses and of their significance, without ever having heard them, is obviously constitutionally erroneous. We note that the prosecution does not quarrel with our analysis (AIB 158-59) of Florida law which demonstrated that Judge Santora had both the statutory and inherent power to direct payment of the travel expenses for the witnesses Stevens wished to call so that he might fully present his case.

B. The State's attack on Stevens' expert, Robert Dillinger, for an alleged "sham" (SAB 101-02) is totally

unwarranted. Dillinger spent 38 hours in time and more than $400 out of his own pocket to testify, from his significant experience, concerning effective representation in a capital case.[24] While the State may have its reasons for disagreeing with us as to the enlightening and helpful nature of Dillinger's testimony, that disagreement hardly justifies the prosecution's not-so-veiled accusation of fraud.[25]

C. If Stevens' claims are colorable,[26] the State concedes (SAB 100) that his current pro bono counsel are "perhaps" entitled to reimbursement of expenses.[27] To set the record straight, present counsel first volunteered to represent Stevens in 1982 after Forbes, who had said he would file a motion for a rehearing of this Court's affirmance on direct appeal, failed to do so. Counsel sought certiorari from the United States Supreme Court. Stevens v. Florida, 459 U.S. 1228 (1983). Thereafter, Judge Santora appointed us, at the request of the Office of Executive Clemency, as clemency counsel (R 104-05). Stevens' motion for post-conviction

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24. We have relied upon his testimony quite a number of times in presenting our arguments to this Court. See AIB 77-78, AIB 81 n.83, AIB 37-98, AIB 115-16, AIB 119 n.123.

25. The fact of the matter is that, with the exception of one very brief witness whose schedule had to be accommodated, Dillinger was present at the hearing only for his and the majority of Forbes' testimony.

26. We would certainly be surprised if this Court did not conclude that a good number of our claims are more than colorable.

27. Concurrently with filing this brief counsel are filing a motion for reimbursement of the expenses they have incurred in representing Stevens before this Court.

relief was filed in March of 1984, at the time of the clemency hearing (upon which there has been no ruling to date). Far from "ousting" the Capital Collateral Representative from representing Stevens, as the prosecution alleges (SAB 100), counsel undertook this matter almost three years before the Capital Collateral Representative's office was established. See Ch. 85-332, Laws of Fla., eff. June 24, 1985. Having shown the State's factual premises to have been absolutely faulty, "perhaps" the prosecution will now concede this point, as it suggested (SAB 100) it might.

III. CONCLUSION

For the foregoing reasons and those set forth in Appellant's Initial Brief, we request the granting of the appropriate relief, as is particularly set out at AIB 170-71.

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. Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301 (Att: Kenneth Muszynski, 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 20th day of May, 1987.

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