IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	)	Case No. 70,958

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,
Petitioner,
v.
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,
Respondent.

Case No. 70,955

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION AND STATEMENT OF JURISDICTION

1. This amended petition for a writ of habeas corpus invokes the original jurisdiction of this Court pursuant to Art. V, §3(b)(1), (7) and (9), Fla. Const., and Rules 9.030(a)(3) and 9.100, Fla. R. App. P.

2. Rufus E. Stevens brings this petition before this Court to demonstrate that he was denied effective assistance of counsel on appeal by the performance of his appellate (and trial) attorney, John R. Forbes. That appeal, Stevens v. State, was Case No. 57,738 before this Court. The decision affirming Stevens' conviction and sentence is reported at 419 So. 2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983).

3. Stevens' initial petition for a writ of habeas corpus was filed with this Court on August 7, 1987. The amendments deal with what occurred at the oral argument on Stevens' direct appeal.

4. Concurrent with the filing of his initial petition, Stevens filed a motion seeking to consolidate this matter with pending Case No. 68,581, which is an appeal from the denial of his motion for post-conviction relief. Such consolidation will allow this amended petition to cross-refer to Stevens' already-filed appellate brief, thereby eliminating the

unnecessary duplication of facts and legal arguments. Consolidation will also eliminate the need for a lengthy appendix in this matter by relying upon the already-filed record.

5. The relevant procedural history is set forth at AIB 1-5.[1] An overview of the facts is presented at AIB 5-7. Such additional facts as are necessary to establish our claims are pleaded below.

6. Forbes was appointed by Judge Santora on August 23, 1979 to represent Stevens on his direct appeal. RDA 110. According to Judge Santora, Forbes, who had never before handled a capital appeal by himself (T 8, T 247), did not want to handle Stevens' appeal because of a lack of time to do so. Judge Santora, however, prevailed[2] upon him to do so (T 1004).[3]

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1. Parenthetical references preceded by "AIB" are to the appropriate pages of Appellant's Initial Brief in Case Nos. 68,581 and 69,112; references preceded by "SAB" are to the State's Answer Brief in those cases; those preceded by "ARB" are to Appellant's Reply Brief in those cases; references preceded by "R" are to 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 "BDA" are to Forbes' brief on Stevens' direct appeal to this Court: 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.

2. This Court has cautioned trial judges not "to appoint appellate counsel without due recognition of the skills and attitudes necessary for effective appellate representation. A perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its significance are all factors which must be in the court's mind when an appointment is made." (Emphasis added.) Wilson v. Wainwright, 474-So. 2d 1162, 1164-65 (Fla. 1985).

3. Present pro bono counsel agreed to represent Stevens shortly after this Court affirmed his conviction and sentence on September 14, 1982. That agreement was made with the understanding that Forbes would file a petition for rehearing in this Court and that, if that petition were unsuccessful, present counsel would seek a writ- of certiorari in the United States Supreme Court. Despite having represented that he would seek a rehearing, Forbes in fact did not do so.

11. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. The Legal Standard

7. A criminal defendant is guaranteed the right to effective assistance of counsel on appeal by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 16 of the Florida Constitution. See Evitts v. Lucey, 469 U.S. 387 (1985). This Court enunciated the following two-pronged test in Johnson v. Wainwright, 463 So. 2d 207, 209 (Fla. 1985):

> A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance, and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

We will demonstrate below that there were two instances relating to Stevens' conviction and seven instances relating to his sentence which satisfy both prongs of the ineffectiveness on appeal standard.

B. Ineffectiveness Relating to the Conviction

8. There were but two items of circumstantial evidence which even tended to show some connection between Stevens and the actual killing of Eleanor Kathy Tolin. One of

those items[4] was a dull knife found under Stevens' trailer (TT 677-78), which the medical examiner testified was consistent with a bruise found on Tolin's back --- caused by an apparent attempt to stab her.[5] The knife was discovered as a result of a clearly-unconstitutional interrogation of Stevens following an aborted polygraph test (see generally AIB 137-53).[6]

9. Stevens alleged in his motion for post-conviction relief that he was denied due process of law under the federal and state constitutions because the prosecution failed to reveal the circumstances in which the dull knife was seized--- circumstances which, if known, would have provided the defense with the basis for obtaining the suppression of the illegally-seized knife. In his decision on the post-conviction motion Judge Santora found no violation of the rule of Brady v. Maryland, 373 U.S. 83 (1963), because, inter alia, at the time of trial Forbes "was informed regarding how the knife was located" (R 635 Par. 2). In the appeal pending before this Court the State argues strenuously that Judge Santora was

4. The other piece of evidence which linked Stevens to the killing was the statement of his co-defendant Gregory Scott Engle --- testified to by Nathan Hamilton in violation of the rule of Bruton v. United States, 391 U.S. 123 (1968) (see AIB 39-51) --- that ". .. Rufus went crazy and started saying she's [Tolin] going to identify us ..." (TT 578).

5. The critical nature of the dull knife is shown by the fact that the prosecutor referred to it eleven times in his summation (see AIB 151-53).

6. This Court found on direct appeal that these statements would have been admissible on the prosecution's case because they had been spontaneously blurted out. 419 So. 2d at 1062. That finding was based, however, upon the misleading (to say the least) representations made below concerning what happened when Stevens appeared for the polygraph examination. As was discovered in 1984, what had been represented to this Court in 1980 as "spontaneous" statements in fact were the product of two to three hours of interrogation in the absence of counsel (see AIB 138-45). Because this Court was not provided with even a reasonable facsimile of the actual events, its factual and legal conclusions do not address what we now know to have occurred.

correct and that his finding that Forbes knew how the knife was found should be adopted by this Court (SAB 94-98).[7]

10. Stevens has argued vigorously that the record shows that Forbes was not informed of crucial facts concerning the post-polygraph interrogation and that the Brady rule was thereby violated (AIB 137-53; ARB 35-37). We adhere to that position. In the event, however, that this Court finds that we are wrong and that Forbes indeed was informed of the necessary facts, we then submit that he was ineffective for failing on direct appeal to seek reversal of Stevens' conviction upon the ground that one of the only two items of evidence tending to connect him to the killing was seized in violation of Stevens' rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution (see AIB 151 n.165).[8] Failure on appeal to seek the reversal of Stevens' conviction upon the ground that one of the two most critical pieces of evidence in the case was unconstitutionally obtained would clearly have been seriously deficient performance to Stevens' severe prejudice. Thus, in the event that this Court finds that Forbes knew all the pertinent facts concerning how the dull knife was seized --- and only in that event --- Forbes was constitutionally ineffective for not pursuing the suppression of the knife on appeal.

11. The second issue relating to Stevens' conviction which effective counsel would have raised on direct appeal concerns the prosecution's suppression of evidence favorable to the defendant in violation of the rule of Brady v. Maryland, supra, and its progeny. September Jinks, a teenage runaway, testified at the penalty stage that in January of 1979 Stevens

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7. Why the prosecution would have fully informed defense counsel concerning the unconstitutional interrogation and then have misled this Court on the direct appeal is not explained.

8. In such circumstances Forbes would also have been ineffective --- not to mention unethical --- for having misrepresented to Judge Santora the facts relevant to this issue (see TT 12-30; see also BDA 6-7).

raped her at knifepoint in the back seat of his car (TT 1204-09). Forbes elicited on cross-examination (TT 1228-30) that Jinks had been hidden by the prosecution to prevent the defense from interviewing her.[9]

12. On appeal Forbes should have argued to this Court that, had the prosecution not suppressed Jinks' evidence until she appeared on the stand at the penalty stage, he would have had evidence to rebut the forensic evidence which tied the rape of Kathy Tolin to the back seat of Stevens' car. Serologist Stephen Russell Platt testified at trial (TT 817-18) that semen stains were found on the rear seat of Stevens' car. Platt conceded (TT 858) that such stains could be identified one year after having been made. The prosecutor argued in his summation (TT 1115) that, despite the absence of semen in the victim, the jurors should find that a rape occurred because "we did find semen on the back seat of [Stevens'] car."

13. At the guilt stage of the trial the prosecution never revealed that it possessed --- indeed was actively hiding from the defense --- evidence of an incident of sexual intercourse in Stevens' car just two months before Tolin was killed. Obviously, the intercourse with Jinks could have been the source of the semen stains testified to by Platt. Despite this knowledge the prosecution deliberately led the jury to believe that the stains had to have resulted from the rape of Tolin. Neither the jury nor the defense was advised of this favorable evidence until after the jury had convicted Stevens. This clear Brady violation would have been argued on appeal by effective counsel.

14. The failure to raise the two points discussed at Pars. 8-13, supra, was particularly egregious because the points that Forbes chose to raise on appeal were quite weak. During the course of oral argument Forbes conceded the weakness

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9. As noted at AIB 117-18 this deliberate prosecutorial misconduct violated Stevens' federal and state rights to due process of law.

of two of his three points challenging the conviction. Indeed, following questioning by members of the Court, one could come to the conclusion that Forbes had virtually abandoned those two points.

15. The first point Forbes had raised concerned Judge Santora's refusal to grant the motion in limine in full --- i.e., to preclude the use on rebuttal and cross-examination, if Stevens took the witness stand, of the statments he gave at the time of the polygraph examination (see BDA 6-9). In response to questioning by a member of the Court,[10] Forbes conceded that there was no way for this Court to determine whether there had been any prejudice to Stevens from Judge Santora's failure to grant the motion in limine in full because he had failed to make a proffer in the court below as to what Stevens would have testified to at trial. Without the proffer there was no way to determine whether the polygraph statement would have been inconsistent with Stevens' trial testimony.[11] Even when this subject was extensively raised at oral argument, Forbes was unable to specify what Stevens would have testified to at trial, or that it would have been inconsistent with the statements made at the time of the polygraph examination. Thus, even at the time of argument Forbes was unable to show that the initial issue in his brief raised more than a theoretical error.

16. The second point raised by Forbes --- that it had been error for Judge Santora to preclude Dr. Miller from giving alcohol to Stevens to show that his confession was involuntarily made (see BDA 10-14) --- was totally negated by Forbes' own concession at oral argument. He graphically

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10. Unless Forbes or Raymond L. Marley, the attorney who argued this matter for the State, mentioned the judge's name during the course of his answer, we are unable to identify which memnber of the Court raised a particular issue.

11. Forbes further conceded that his inaction alone was responsible for the lack of a proffer.

conceded the weakness of this point, responding as follows to questions by Justice England:

> To be perfectly candid, Mr. Justice England, I'm not prepared to say that this was reversible error.
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> * * *
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> I am not prepared to suggest to the Court that it go that far to say that it was reversible error.... The third point I will seek to raise ....

Forbes thereby conceded that there had been no reason to raise this point since the Court was certainly not going to grant a new trial or other relief for error which did not infringe on a fundamental right in a prejudicial manner. There simply is no justification for Forbes having failed to raise issues as to which relief could and would have been granted and at the same time relying upon issues which he conceded (if not in those words) were not meritorious.

C. Ineffectiveness Relating to the Sentence

17. In correctly arguing to this Court that the mitigating circumstance of "no significant history of prior criminal activity" --- §921.141(6)(a), Fla. Stat. --- was applicable to Stevens' case, Forbes alleged in his brief that his client had been convicted of "a Class D felony in Kentucky for which he served one year in the county jail" (BDA 38). On the following page Forbes again referred to Stevens' felony conviction (BDA 39). Forbes also referred to Stevens' prior "Class D felony conviction" twice during his oral argument.

18. We conclusively proved through documentary and testimonial evidence at the post-conviction hearing that Stevens had no prior felony convictions and had never received a jail sentence --- much less a one-year jail sentence --- on his three prior misdemeanor convictions (see AIB 107 and the

portions of the record cited therein). We also proved through documentary evidence (R 547-48) that Stevens told the probation officer while the presentence investigation report was being prepared the correct information concerning his record (see AIB 109). Had Forbes simply asked his client[12] --- not to mention, had he performed the required investigation into the indisputably pertinent facts --- he would not have made this gross error.

19. There can be no argument that there is a world of difference between a prior conviction for a misdemeanor resulting in a non-jail sentence and a felony conviction which resulted in a one-year jail sentence. A person is unlikely to have a one-year jail sentence imposed upon him unless the crime is relatively serious, or he has a significant history of prior criminal activity, or both. A misdemeanor resulting in a short probationary sentence, on the other hand, is entirely consistent with the crime being quite minor, or the defendant having no significant history of prior criminal activity, or both. Forbes' absolutely inexcusable error sabotaged Stevens' strong claim to this Court that the mitigating circumstance of no significant history of prior criminal activity applied to him. Cf. Salvatore v. State, 366 So. 2d 745, 748, 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Songer v. 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).

20. Not only did Forbes sabotage Stevens' claim of mitigating circumstances but he also failed to point out to this Court that two of the aggravating circumstances relied upon by the State and found by Judge Santora were based in whole or in large part on unconstitutionally-admitted evidence. As a result of Forbes' seriously deficient performance in

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12. Forbes never inquired of Stevens concerning his prior criminal record (T 894-95).

failing to argue these points, this Court rejected Stevens' claims that those aggravating factors were not established. In addition, that unconstitutional evidence was also used to negate various mitigating circumstances. Had Forbes' handling of these issues been effective, the minimum relief that Stevens would have received from this Court would have been a remand for resentencing. See Elledge v. State, 346 So. 2d 998 (Fla. 1977).

21. This Court ruled on Stevens' direct appeal, 419 So. 2d at 1064, as follows:

> That the murder was committed for the purpose of avoiding arrest for crimes already committed was established by testimony about appellant's own statement to his accomplice expressing fear of detection and apprehension and insisting on the need to eliminate the victim as a possible identifying witness.

Earlier in its opinion, 419 So. 2d at 1061, this Court had quoted the testimony of Nathan Hamilton[13] which contained the evidence upon which the Court relied in making the above finding:

> "I [Hamilton] asked him [Engle] why they [Engle and Stevens] did it and he [Engle] 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...." (Emphasis added.)

Not only was Engle's statement to Hamilton the sole basis upon which this Court found that the "avoiding arrest" aggravating circumstance --- §921.141(5)(e), Fla. Stat. --- but it was also the sole basis for Judge Santora's similar finding (TT 1300, TT 1301).

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13. Hamilton, who was not named in the Court's opinion, was correctly labeled as one of the State's two main witnesses. 419 So. 2d at 1061.

22. Engle's statement, which Hamilton testified to, was admitted into evidence in violation of Stevens' rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 16 of the Florida Constitution. See Bruton v. United States, 391 U.S. 123 (1968); Nelson v. State, 490 So. 2d 32 (Fla. 1986).[14]

23. No reasonably effective attorney would have failed to argue to this Court that reliance upon Engle's statement either by Judge Santora or by this Court was improper.[15] The governing statute, §921.141(1), Fla. Stat., explicitly stated that, while the rules of evidence did not apply to penalty proceedings, constitutional protections did. Engle's attorney had successfully moved for a separate sentencing proceeding for exactly this reason: i.e., to avoid the judge's reliance on Stevens' statements in the sentencing of Engle.[16] Even if for some inexplicable reason the plain words of the statute and Engle's motion in the trial court had made no impression, Engle's appellate brief, which raised this issue, would have alerted a conscientious advocate to the importance and strength of this issue.

24. Having never before handled a capital appeal on his own, one would have expected Forbes to seek advice, suggestions and ideas from others more experienced than he. One obvious source was the experienced appellate public defender who represented Engle. Engle's initial brief was filed with this Court on April 1, 1980, a few days before

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14. Extended discussions of the inadmissibility of this evidence and of Forbes' ineffectiveness for failing to object to its admission both at trial and at sentencing may be found at AIB 39-51, AIB 89-92, ARB 11-17 and ARB 26-27.

15. On appeal Forbes virtually conceded the applicability of this aggravating circumstance. See BDA 33. In the trial court Forbes failed to oppose in any way the State's argument that Judge Santora should rely upon this factor. See AIB 88-89.

16. Forbes' motion for attorney's fees (R 556) shows that he "receive[d] and review[ed]" Engle's motion before Stevens was sentenced.

Stevens' reply brief would have been due.[17] Contained therein was a well-drafted, well-thought-out argument that Judge Santora's reliance on Stevens' statements violated Engle's constitutional rights. Had Forbes examined Engle's brief and realized that he should raise this issue, this Court surely would have accepted a supplemental brief from Forbes raising this point.

25. The merit of the point is not a matter of speculation. In Engle v. State, 438 So. 2d 803, 813-14 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), this Court held that it was a denial of the constitutional right of confrontation for a sentencing judge to rely upon the statements of a co-defendant in determining whether to impose a sentence of life or death. Because Judge Santora had done so, this Court ordered another sentencing hearing for Engle. Had Forbes but raised this issue, Stevens would also have been granted a new sentencing hearing. At the very least this Court would not have relied upon Engle's statement to Hamilton. In the absence of such evidence, the "avoiding arrest" aggravating factor definitely would not have been found to have been established. Moreover, the mitigating circumstances of relatively minor participation in the crime and acting under the substantial domination of another --- §921.141(6)(d) and (e), Fla. Stat. --- would not have been found to have been negated in part by Engle's statement to Hamilton. See 419 So. 2d at 1064. Forbes' deficiency on this point was inexcusable and the prejudice to Stevens both certain and severe. As this Court stated in Wilson v. Wainwright, supra, 474 So. 2d at 1163-64,

17. We say "would have been" because Forbes filed no reply brief, a fact which this Court has noted in another case in holding that appellate counsel was ineffective. Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984). Nor did Forbes file even a single notice of supplemental authority despite the more than two and one-half years which elapsed between the time he filed his brief and the Court's decision in this matter. See Par. 29, infra, where it is noted that Forbes failed to file such a notice despite a favorable United States Supreme Court decision on a critical issue in Stevens' case.

dealing with a different issue --- but one no more significant in the context of that case:

> The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case.. .. To have failed to raise so fundamental an issue is far below the range of acceptable performance and must undermine confidence in the fairness and correctness of the outcome.

26. Forbes also ineffectively failed to raise a challenge on appeal to this Court's and Judge Santora's reliance upon the unconstitutionally-obtained psychiatric report (RDA 37-41). This Court held, 419 So. 2d at 1065, in finding that the mitigating circumstances of relatively minor participation in the crime and acting under the substantial domination of another --- §921.141(6)(d) and (e), Fla. Stat. --- had not been established, that:

> In statements made to the court-appointed psychiatrist, appellant conceded that the robbery and kidnapping was originally his idea. He also admitted to mutilating the victim's vagina. Therefore there was sufficient evidence for the court to refuse to find that appellant's role was minor or that he was dominated by Engle.

In finding that the capital felony was especially heinous, atrocious or cruel --- §921.141(5)(h), Fla. Stat. --- Judge Santora relied heavily upon the same portion of the psychiatric report (TT 1302). While this Court does not identify the source for its discussion of how the strangulation and stabbing played a part in its determination that Judge Santora's finding of this aggravating circumstance was supported by the evidence, the logical conclusion is that the unconstitutional psychiatric report played at least a significant role.

27. As is more fully set forth at AIB 92-94, the interview by the court-appointed psychiatrist violated Stevens' rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 16 of the Florida Constitution, in that the interview occurred without Miranda warnings and without a knowing and intelligent waiver of Stevens' right to counsel. These principles were definitively applied to the prosecution's use of psychiatric reports in capital penalty proceedings in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd. 451 U.S. 454 (1981).[18]

28. In addition to the fact that Forbes should have challenged Judge Santora's reliance on the psychiatric report in his initial brief, he was given a clear indication at oral argument of the applicability of Smith v. Estelle to Stevens' case. Yet he still failed to submit a supplemental brief or communication to this Court addressing this most important issue. During the State's oral argument, a member of the Court raised Smith v. Estelle (by name) and asked Assistant Attorney General Marky what effect it had on Stevens' case. In the course of the colloquy with several justices, Marky identified the psychiatric report as crucial evidence which would explain why Judge Santora had imposed a death sentence when the jury had recommended life. Marky argued that the jury had been proceeding upon the misapprehension that Stevens had not been involved in the homicide, while the psychiatric report showed that he had been. One justice correctly noted that the psychiatric report had been the basis for Judge Santora's finding that the homicide had been "heinous, atrocious or cruel."

29. Despite the very significant attention given the issue of the propriety of Judge Santora's reliance on the psychiatric report, Forbes --- knowing that he had missed this

18. Forbes testified at the post-conviction hearing that he had been familiar at the time of sentencing with the principles discussed in Smith v. Estelle (T 494-95).

issue in his brief --- never did anything to argue it to the Court. Even when the Supreme Court affirmed the Fifth Circuit --- Estelle v. Smith, 451 U.S. 454 (1981) --- sixteen months before Stevens' appeal was decided, Forbes did **nothing.**[19]

30. While justices of this Court had identified the issue, the spotting of the issue is not the equivalent of competent advocacy on behalf of a litigant. Cf. Herring v. New York, 422 U.S. 853, 863 (1975). It is unreasonable to expect that a court --- burdened as it is with hundreds of cases--- will be able to identify all the pertinent facts and the prejudice which are germane to a given legal issue in a record as voluminous as Stevens' without the aid of a competent brief. Despite the Court's extensive questioning of the State's counsel, Forbes did absolutely nothing to argue to the Court that Stevens had been sentenced to death based upon the unconstitutionally-obtained psychiatric report. In the absence of such an argument, this Court not only upheld Judge Santora's reliance on the psychiatric report, but also itself relied heavily upon that report to establish aggravating factors and to negate mitigating factors. See Par. 26, supra. Forbes' deficient performance on this point had a devastating impact on Stevens' effort to overturn his death sentence.

31. The failure to alert this Court to the unconstitutionality of the Bruton and the psychiatric evidence which was relied upon by the sentencing judge and by this Court to sustain aggravating circumstances and to negate mitigating circumstances indubitably constituted ineffective assistance of counsel. No conceivable strategic reason excused the failure to

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19. During colloquy with the State's counsel, a member of the Court questioned whether the psychiatric report should have been considered by Judge Santora because the State deliberately withheld that evidence from the jury despite its admissibility at the penalty phase. Not satisfied with the State's answer, the justice made it clear that he believed that the State had an obligation to put its evidence relevant to sentencing before the jury or not have it considered at all. Forbes, of course, did nothing to follow up on this helpful view.

raise these issues. Forbes' deficiencies in this regard certainly undermine confidence in the correctness of this Court's affirmance of Stevens' death sentence.

32. Stevens maintained in his motion for post-conviction relief and his pending appeal from the denial of that motion that he had not been given an opportunity to review the presentence investigation report or the court-ordered psychiatric report or to rebut the prejudicial errors contained therein (see AIB 125-36). The deprivation of such opportunities denied Stevens his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 17 of the Florida Constitution. See Gardner v. Florida, 430 U.S. 349 (1977).

33. In rejecting this claim Judge Santora ruled that it was not properly brought in a motion for post-conviction relief (R 635 Par. 1). The State has argued to this Court that Judge Santora was correct in so ruling (SAB 92). If Judge Santora and the State are in fact correct in this regard --- a proposition we have vigorously disputed (AIB 131-34; ARB 33) and continue to dispute --- then Forbes was ineffective for failing to raise this issue on direct appeal. While we submit that it would be unreasonable to require the very attorney who was responsible for the constitutional error to raise that issue on appeal, if that in fact is the law as this Court sees it, then Forbes was clearly deficient in not raising this claim on appeal. Such a conclusion is buttressed by the fact that Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980), a case very much in point (see AIB 135-36), was decided prior to the oral argument of Stevens' appeal.[20]

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20. In addition to his normal obligation to be current in the relevant areas of the law, Forbes undoubtedly was aware of Raulerson because of the publicity the decision received in Jacksonville, where he lived and worked. Among other things, the Raulerson decision generated an intemperately critical "point of view" newspaper piece by the State Attorney. See 508 F. Supp. at 385, 387-90.

34. The prejudice to Stevens from the erroneous reports is thoroughly discussed at AIB 127-30. Judge Santora and this Court relied upon the presentence investigation and the psychiatric reports in imposing and upholding the sentence (see, e.g., Par. 22, supra). If the appropriate forum for this claim was this Court on direct appeal, then Forbes was ineffective for failing to advance it.

35. Forbes should have objected on appeal to this Court's relying, as Judge Santora did (T 1304),[21] on the testimony of September Jinks, the State's penalty-stage witness. The grounds for such an objection (see also AIB 117-18) were: (a) the constitutional unreliablity of Jinks' testimony; (b) the deliberate due process violation committed by the prosecution in hiding Jinks; and (c) the fact that the testimony was improper anticipatory rebuttal. The failure to make the latter of these arguments, standing alone, was found in Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986), to be grounds for the granting of a new penalty proceeding. In the absence of Forbes advancing the above three claims on appeal --- claims which this Court would have been extremely hard put to discern without having them brought to its attention --- this Court relied upon Jinks' testimony to negate the "no significant prior criminal history'' mitigating circumstance. 419 So. 2d at 1064. Obviously Stevens was prejudiced by Forbes' deficiencies in this regard.

36. An additional way that Forbes was ineffective with respect to sentencing issues was his failure to argue to this Court that the prosecution had improperly relied in its

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21. Forbes represented to this Court on oral argument that Judge Santora had told him in chambers after Jinks had testified that he (Judge Santora) had not believed her. Yet Forbes never argued Jinks' unbelievability to Judge Santora before sentence and he stood mute when Judge Santora relied on Jinks' testimony to negate a mitigating circumstance.

"Brief ... Demanding ... Death" upon two aggravating factors[22] which it had specifically disclaimed reliance upon before the jury (TT 1249-50).[23] Judge Santora and this Court later relied upon those two aggravating circumstances. In doing so Stevens' rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§9 and 17 of the Florida Constitution were violated. See Bullington v. Missouri, 451 U.S. 430 (1981). Subsequent reliance upon aggravating factors upon which, reliance had specifically been disclaimed before the jury, unconstitutionally distorts the tripartite Florida sentencing process.[24]

37. The final way that Forbes was ineffective with respect to sentencing issues was that he utterly failed to argue in his brief[25] the multitudious non-statutory mitigating factors which existed (see AIB 99-102) and to challenge the fact that Judge Santora certainly considered solely the mitigating circumstances set forth in §921.141(6), Fla. Stat. (see TT 1286, TT 1303). Had Forbes established at least one mitigating circumstance (there were several which should have been proven), Stevens would have been entitled to a new sentencing hearing, particularly when it was determined that two of the aggravating circumstances were founded upon unconstitutional evidence. See Elledge v. State, supra.

38. Both individually and collectively the above seven instances of erroneous or omitted arguments (see Pars.

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22. 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.

23. The "Brief ... Demanding ... Death" was submitted to Judge Santora a week before the sentence and several weeks after the jury had recommended a life sentence.

24. Support for this proposition was voiced by a member of the Court at oral argument. See n.19, supra.

25. At oral argument Forbes barely touched upon mitigating circumstances, mentioning only the "no significant history of prior criminal activity" circumstance --- concerning which he argued the insignificance of Stevens' "felony" conviction. See Par. 17, supra.

17-37, supra) demonstrate performance well below the professional norms --- in certain instances scandalously below those norms. There is no doubt that this Court was misled concerning, and not made aware of, critical issues which would have negated aggravating circumstances and established mitigating circumstances. Forbes' failures were so gross that he misrepresented to this Court that Stevens had a felony conviction when he did not and failed to challenge reliance upon unconstitutional evidence which was the sole basis for Judge Santora's and this Court's findings that the "avoiding lawful arrest" aggravating circumstance had been established.

39. There can be no doubt that this Court's determinations both as to existence of certain aggravating circumstances and also as to the non-existence of mitigating circumstances would have been different had the proper facts and arguments been presented to it. If an effective appeal had been presented to this Court, Stevens would in all likelihood have been resentenced to life imprisonment --- or, at the very least, had his case remanded for resentencing. In such circumstances a conclusion of constitutional ineffectiveness is mandated. See Smith v. Wainwright, 484 So. 2d 31 (Fla. 4th DCA 1986), review denied, 492 So. 2d 1336 (Fla. 1986). As this Court so aptly put it in Wilson v. Wainwright, supra, 474 So. 2d at 1165:

> Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined. (Emphasis in original.)

111. CONCLUSION

40. Stevens therefore requests that this Court issue a writ of habeas corpus. With respect to the issues relating to the conviction, the Court should also direct that a new trial be held. With respect to the issues relating to the sentence, the Court should direct that Stevens be resentenced to life imprisonment. Alternatively, the Court should direct that Stevens be allowed to file a new appeal so that he may fully brief the issues which should have been raised upon his original direct appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing amended petition for a writ of habeas corpus has been furnished by United States mail to Hon. Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301 (Att: Bradford L. Thomas, Esq.), and Hon. T. Edward Austin, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202, this 26th day of August, 1987.

Patrick M. Wall
Attorney for Petitioner