IN THE SUPREME COURT OF FLORIDA

CASE NO:

DAN EDWARD ROUTLY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida and RICHARD L. DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

PETITION FOR WRIT OF

HABEAS CORPUS AND FOR

OTHER RELIEF

SHUTTS & BOWEN
Richard M. Leslie, P.A.
Frank Valdes, Esq.
Thomas H. Buscaglia, Esq.
Counsel for Petitioner
1500 Edward Ball Building
100 Chopin Plaza
Miami, Florida 33131
(305) 358-6300

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Petitioner, Dan Edward Routly, an indigent proceeding in forma pauperis, by his undersigned counsel, petitions this Court, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100 (1986), to issue its writ of habeas corpus.

Petitioner states that he is being held under sentence of death in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States and under the Constitution and Laws of the State of Florida. Petitioner was denied his Sixth Amendment right to effective assistance of appellate counsel as a consequence of: (1) the specific, unilateral and deficient acts and omissions of appointed appellate counsel; (2) the trial court's and appellate counsel's disregard for their respective duties during the appointment process; and (3) state statutory interference. The state statutory limitation on compensation for appointed appellate counsel additionally deprived petitioner equal access to this Court on direct appeal in violation of the equal protection guarantees secured by the Fourteenth Amendment to the United States Constitution. Petitioner further states that the foregoing, individually and combined, additionally deprived him of his due process right to a fair and meaningful direct appeal in violation of the Fourteenth Amendment to the United States

Constitution. In support of the foregoing, petitioner states as follows.

I.

JURISDICTION

This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3), and Article V, Section 3(b)(9), of the Florida Constitution. This Court also has jurisdiction because the acts and omissions which form the basis of this petition occurred in proceedings before this Court. See, e.g., Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985); Knight v. State, 394 So.2d 997 (Fla. 1981).

As shown below, petitioner was denied effective legal assistance on appeal due to appellate counsel's specific, unilateral and deficient acts and omissions. During that appeal counsel failed to raise issues which, if raised and argued, would have required (1) the reversal of petitioner's conviction and death sentence, and (2) a new trial and sentencing hearing. Appellate counsel also failed to research, analyze and develop many of the issues he did raise; indeed, appellate counsel barely acquainted himself with the facts and record of this case, as well as the law applicable thereto. Appellate counsel thus did not have the requisite knowledge and information to function as an effective advocate before this Court on petitioner's behalf.

Moreover, the instant appellate counsel was unqualified and incompetent to mount an effective appeal before this Court when appointed to do so by the instant trial court. The trial court was presumably unaware of appellate counsel's lack of competence at the time of appointment because it never inquired into, nor considered, the contemplated appointee's qualifications prior to appointment. Appellate counsel similarly ignored his own incompetence when he volunteered for, and ultimately accepted, the instant appointment. The sequence of events culminating in the appointment of the instant appellate counsel to represent petitioner before this Court was thus

constitutionally deficient because it amounted to a merely formal or perfunctory appointment of appellate counsel.

Finally, state statutory interference denied petitioner and his appellate counsel access to resources necessary for the effective development of petitioner's appeal before this Court. That denial of necessary resources resulted from the economic limitations imposed on appointed appellate counsel by virtue of Section 925.036, Fla. Stat. (1985).[1/] Because the interference with the right to effective legal assistance created by the statute's unreasonable, unrealistic and arbitrary limitations significantly hampered instant appellate counsel's ability to be effective before this Court, it also denied petitioner his constitutional right to equal access to this Court. The foregoing, individually and combined, additionally denied petitioner his due process right to a fair and meaningful direct appeal before this Court.

1/ Petitioner addresses this Court's ruling in Makemson v. Martin County, 11 F.L.W. 337 (Fla. 1986) within Section X hereof, titled "Supplemental Authority: Resolution of Makemson's Certified Questions." That opinion was reported on the eve of petitioner's filing herein and petitioner was therefore unable to incorporate its analysis in the body of this petition. Petitioner apologizes for any inconvenience or redundancy resulting from the foregoing.

II.

NATURE OF RELIEF SOUGHT

Petitioner seeks an order of this Court vacating the judgment and remanding the case for a new trial based on the dispositive points regarding fundamental constitutional and statutory violations which are set forth herein. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Witherspoon v. Illinois, 391 U.S. 510 , 88 S.Ct. 1770, 20 L.Ed.2d 776, reh'g denied. 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186 (1968); Dumas v. State, 350 So.2d 464 (Fla. 1977).

Alternatively, petitioner seeks this Court's issuance of a writ of habeas corpus granting him a new appeal, on the merits, of his conviction and death sentence. This relief is appropriate under Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985), and Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984).

The proper means of securing this Court's consideration of the issues discussed herein is a petition for a writ of habeas corpus. Wilson, 474 So.2d 1162; Baggett, v. Wainwright, 229 So.2d 239 (Fla. 1969) cert. dismissed, 235 So.2d 486 (Fla. 1970); Powe v. State, 216 So.2d 446, 448 (Fla. 1968). Although a petition for a writ of habeas corpus may not be used as a routine vehicle for a second or substituted appeal, this Court has consistently recognized that the writ must issue where the constitutional right of appeal is substantially thwarted on crucial and dispositive points due to appointed counsel's deficiencies. See, e.g, Wilson, 474 So.2d 1162; Barclay, 444 So.2d 956; McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); State v. Wooden, 246 So.2d 755 (Fla. 1971); Baggett, 229 So.2d 239. Petitioner demonstrates below that (1) appointed appellate counsel's unjustifiably deficient performance, (2) the trial court's and appellate counsel's disregard for his incompetence during the appointment process and (3) the state statutory interference with petitioner's constitutional rights were so

significant, fundamental and prejudicial as to merit the relief hereby requested.

III.

PROCEDURAL HISTORY

Petitioner, Dan Edward Routly, was arrested in Flint, Michigan, at 12:45 A.M. on December 5, 1979. At 2:08 A.M. police recorded petitioner's out-of-court statement. He waived extradition to a charge of second degree murder at 2:17 P.M. that same day and was immediately transported to Marion County jail in Ocala, Florida.

Later that same day petitioner was formally charged with second degree murder, following his arrest, his waiver of extradition and his forcible return to Florida, by an information filed at 4:12 P.M. in Marion County on December 5, 1979. The following day, the Marion County Circuit Court ordered that the Marion County Grand Jury be recalled to consider petitioner's indictment. On December 18, 1979, the reconvened Marion County Grand Jury indicted petitioner on a charge of murder in the first degree for the homicide of Anthony A. Bockini.

On January 9, 1980, the trial court issued an order setting petitioner's case for trial on March 10, 1980. On March 25, 1980, the trial court again issued an order setting petitioner's trial for April 14, 1980. On April 21, 1980, the trial court issued a third order setting the trial for May 12, 1980. Each of the foregoing de facto "continuances" were caused by the prosecution's absolute control of the trial court docket and its failures to call petitioner's case for trial in accordance with the aforesaid trial court orders. Petitioner was at all times ready to stand trial, having never requested a continuance and having never caused a delay.

On April 25, 1980, the prosecution, for the first time, filed a motion for continuance and waiver of speedy trial rule. The prosecution's motion was based on Florida Rule of Criminal Procedure 3.191, et seq., and the pregnancy cramps allegedly experienced by Colleen O'Brien, petitioner's girlfriend and the only other person present during the events in

question. The trial court granted the prosecution the requested trial continuance and speedy trial extension at the conclusion of the hearing. That continuance and extension were, in turn, the basis for denying petitioner's motion for discharge upon expiration of the speedy trial period established by law.

Petitioner was finally brought to trial on July 14, 1980. Petitioner timely moved for a mistrial during voir dire due to the prosecution's explicit, extended references to his constitutional right to remain silent. The trial court denied petitioner's motion for mistrial.

On July 18, 1980, the jury returned a verdict of guilty of murder as charged. After a brief penalty hearing held approximately one hour after the guilt verdict, the jury issued a recommendation of life imprisonment. A timely motion for new trial was filed on July 24, 1980. The motion for new trial was denied, after hearing, on August 20, 1980.

Two sentencing hearings were held before the trial judge, the Honorable Carven D. Angel. The first hearing occurred on September 15, 1980 and the second on November 24, 1980. At the end of the second hearing Judge Angel overrode the jury recommendation of life imprisonment and sentenced petitioner to death.

Judge Angel based his jury override on his finding that no mitigating circumstances existed and that five statutory aggravating circumstances existed. The five aggravating circumstances found to exist were: (1) commission of the crime charged during commission of other statutorily enumerated felonies; (2) commission of the crime charged to avoid detection; (3) commission of the crime charged for pecuniary gain (4) the crime charged was especially heinous, atrocious and cruel, and; (5) the crime charged was committed in a cold, calculated and premeditated manner.

The initial notice of appeal was filed on December 19, 1980. An amended notice of appeal was subsequently filed on January 6, 1981. On February 3, 1981, pursuant to Section

27.51(4), Fla. Stat. (1985), the Public Defender of the Fifth Judicial Circuit designated the Public Defender of the Seventh Judicial Circuit to represent petitioner on direct appeal. On April 28, 1981, this Court intervened, ordering the Public Defender of the Seventh Judicial Circuit to withdraw as petitioner's appellate counsel due to that office's heavy capital appeals case load. In Re: Directive to the Public Defender of the Seventh Judicial Circuit of Florida; Case No. 60.514 (April 28, 1981).

On May 13, 1981, the Public Defender of the Seventh Judicial Circuit filed a motion to withdraw with the trial court in compliance with this Court's directive. Judge William T. Swigert of the Marion County Circuit Court granted the motion to withdraw. On June 1, 1981, James L. Richard of Ocala was appointed as petitioner's appellate counsel.

On July 10, 1981, Richard filed with this Court a motion for extension of time. In the alternative, Richard requested this Court's permission to withdraw in favor of more experienced counsel. On July 31, 1981, this Court granted Richard's alternative request to withdraw and relinquished jurisdiction to the Fifth Judicial Circuit Court for appointment of new counsel. On October 23, 1981, Raymond L. Goodman of Orlando was appointed by the Honorable Ernest C. Aulls, Chief Judge of the Fifth Judicial Circuit in and for Marion County, to represent the petitioner during the direct appeal before this Court.

On December 22, 1981, Goodman filed the Initial Brief of Appellant with this Court. Answer and reply briefs were thereafter timely filed. Unable to resolve the serious differences which had arisen due to the new appointee's course of conduct during the briefing stage of the appeal, petitioner filed with this Court on February 15, 1982, a pro se motion to remove Goodman as appellate counsel. This Court denied petitioner's pro se motion without hearing or opinion on April 18, 1982.

This Court, after hearing oral arguments, affirmed petitioner's conviction and death sentence on September 22, 1983. On December 12, 1983, this Court denied the motion for rehearing filed by appellate counsel on behalf of petitioner. A petition for a writ of certiorari was timely filed with the United States Supreme Court and subsequently denied on July 5, 1984.

IV.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: THE LEGAL STANDARDS

The right to a full and meaningful direct appeal, and to the effective assistance of counsel for purposes of that appeal, is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, Articles I and V of the Florida Constitution and Florida statutory law. See, e.g., Evitts v. Lucey, 469 U.S. ____, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973); Art. V., § 3(b)(1) Fla. Const.; § 925.035 et. seq., Fla. Stat. (1985). Just last year this Court again affirmed its long-held view that, "The basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985) (emphasis supplied).

A. The Washington/Wilson Standard: Specific Deficiencies and Actual Prejudice.

In Wilson, this Court applied the constitutional standard established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, reh'g denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984), for analyzing ineffectiveness claims regarding appellate representation:

> The criteria for proving ineffective assistance of appellate counsel parallel the Strickland standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Wilson v. Wainwright, 474 So.2d at 1163, citing Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). Washington/Wilson's two-pronged analysis therefore requires a showing of specific deficiencies and resulting prejudice.

In Adams v. State, 456 So.2d 888 (Fla. 1984), this Court likewise relied on Washington for assessing actual prejudice resulting from ineffective appellate representation. "To prove prejudice...the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 891 (emphasis supplied). Accordingly, to establish actual prejudice under Washington/Wilson's second prong, petitioner must show that, but for the specific acts and omissions of appellate counsel before this Court, a "reasonable probability" exists that the outcome of his direct appeal would have been different.

B. The Cronic and Progeny Standard: Presumptive Prejudice.

A showing of actual prejudice under Washington/Wilson's second prong is unnecessary whenever "there is an actual or constructive denial of counsel altogether, for what ever reason." Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985), citing Washington, 466 U.S. 668 (emphasis supplied). Likewise, "[p]rejudice can also be presumed if there is a fundamental breakdown in the adversarial process." Id. at 634; accord Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). These exceptions to the actual prejudice requirement are based on the principles established by the United States Supreme Court in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

In Cronic, the United States Supreme Court explained that, although a showing of prejudice is generally required, "[t]here are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect

in a particular case is unjustified." Id. at 658. Those circumstances occur when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," thereby making the "adversary process itself presumptively unreliable." Id. at 655. This presumption arises because "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Id. at 655, quoting Herring v. New York, 422 U.S. 853, 862 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

Moreover, "[i]t is that 'very premise' that underlies and gives meaning to the Sixth Amendment" right to effective assistance of counsel. Cronic, 466 U.S. at 655-56. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Id. at 656 (emphasis supplied). Consequently, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated" and presumptive prejudice arises. Id. at 657.

Cronic is rooted in the recognition that, "While a criminal trial is not a game in which the participants are expected to enter the ring with near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Cronic, 466 U.S. at 657, quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975). Under Cronic and progeny, therefore, "[p]rejudice is presumed...[and] the emphasis...is upon the circumstances under which counsel performed or whether counsel performed in a truly adversarial manner." J.L. Smith v. Wainwright, 777 F.2d 609, 620 (11th Cir. 1985) (emphasis supplied).

Cronic and progeny thus mandate presumptive prejudice when the proceeding in question has lost its confrontational character, "for whatever reason." Such a loss occurs, typically, in two basic situations, however: first, when appellate counsel was unilaterally deficient -- that is, failed to perform

"in a truly adversarial manner," J.L. Smith, 777 F.2d at 620, and; second, when external factors somehow interfered with appellate counsel's professional ability to be an effective advocate -- that is, "the circumstances under which counsel performed." Id. Accordingly, if appellate counsel's deficiencies constitute a constructive denial of legal assistance, the proceeding loses its essential adversarialness and prejudice must be presumed. Similarly, if external factors interfere with appellate counsel's effectiveness, thereby triggering a fundamental breakdown in the adversarial process, prejudice must again be presumed.

1. Constructive Denial of Counsel Resulting From Appellate Counsel's Unilateral Deficiencies.

The Cronic exceptions apply in the first basic situation where counsel's conduct "was a mere sham, amounting to no representation at all." Blake, 755 F.2d at 534. In other words, where "counsel's representation was...functionally equivalent in every respect to having no representation at all," presumptive prejudice arises. Balkcom, 688 F.2d at 739, n.1. The presumption arises in such a case because fundamentally deficient representation necessarily entails a loss of the subject procedure's confrontational character. Therefore, "the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658.

As this Court aptly noted in Wilson, moreover, both the written and oral phases of representation must be zealous and competent. Appellate counsel's unique duty is "to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process." Wilson, 474 So.2d at 1165 (emphasis supplied). Under Wilson and Cronic, then, presumptive prejudice arises

regardless of whether the fundamentally suspect deficiencies occurred during the written or oral phases of representation.

An omission which constitutes "a mere sham" and signals presumptive prejudice naturally includes counsel's failure to familiarize himself with the specifics of his client's case and to use "or even consider additional evidence which might have been available to support the defendant's case." Blake, 758 F.2d at 534. This omission is fundamental and presumptively prejudicial because "investigation and preparation are the keys to effective representation." Balkcom, 688 F.2d at 739, quoting Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979). Of course, on appeal the advocate's unique investigative duties focus on a review of the trial transcripts, the record on appeal and any other important records or documents material to the conviction and sentencing of his client; appellate counsel's unique duty to discover trial-level error and highlight such error for the appellate court necessarily depends on his grasp of the record on appeal. As such, gross unfamiliarity with the record renders appellate counsel fundamentally ineffective and constitutes a constructive denial of counsel giving rise to a presumption of prejudice.

Of course, appellate counsel cannot be considered incompetent or ineffective for failing to raise issues which were procedurally barred. Ruffin v. Wainwright, 461 So.2d 109, 111 (Fla. 1984). Petitioner must show that the omitted issue(s) was properly preserved at trial or constituted fundamental error. Id. This Court has similarly held that competent counsel need not raise every conceivable claim. See, e.g., Ruffin, 461 So.2d 109. When counsel makes a strategic, conscious choice to not argue a particular issue due to an unfavorable evaluation of the prospects for success after comparing the subject facts with prevailing law, "and his evaluation is reasonably accurate, reflecting reasonable competence, the omission cannot be characterized as ineffectiveness of counsel." Steinhorst v. Wainwright, 477 So.2d 537, 540 (Fla. 1985) (emphasis supplied).

Steinhorst , however, requires both a strategic, conscious choice and reasonable accuracy based on competent evaluation of the alternatives.

Moreover, "[s]ometimes a single error is so substantial that it alone cause[s] the attorney's assistance to fall below the Sixth Amendment standard." Balkcom, 688 F.2d at 744, quoting Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (emphasis supplied). Such "single errors" occur when counsel makes good faith but erroneous decisions which allow the prosecution's position to survive without "meaningful adversarial testing." See Blake, 758 F.2d at 535; Cronic, 466 U.S. at 659. Likewise, "[c]ertain defense strategies...may be 'so ill chosen' as to render counsel's overall representation constitutionally defective." Balkcom, 688 F.2d at 738, quoting Washington v. Watkins, 655 F.2d 1346, 1364 (5th Cir. 1981).

Consequently, the mere fact that counsel makes a conscious or strategic choice cannot obviate inquiry to determine whether such a choice was justifiable or deficient. This is true, as this Court explained in Steinhorst, when such a choice was not "reasonably accurate" or when it did not reflect "reasonable competence." This is likewise true when counsel's strategy "was utterly devoid of common sense." Balkcom, 688 F.2d at 744. Thus, even if instant appellate counsel chose to ignore, for instance, the fundamental issue of prosecutorial misconduct presented in petitioner's case, that "single error" would nonetheless constitute deficient representation under Steinhorst and Balkcom.

2. External Factors: State Interference Resulting From Systemic Defects.

The exceptions to the actual prejudice requirement established by Cronic and progeny similarly apply when the state causes external hardships which interfere with the right to effective representation. E.g., Blake v. Kemp. 758 F.2d 523

(11th Cir. 1985). Although state interference may be caused by a variety of state-sponsored external factors, the common and impermissible consequence is that the state is thereby able to obtain an unfair advantage which improperly vitiates against the proceeding's vital adversarialness. The presumption of prejudice compelled by state interference with the right to effective legal representation is based on the "state's obligation in a criminal case 'to assure that the defendant has a fair opportunity to present his defense'". Id. at 530, quoting Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct.1087, 84 L.Ed.2d 53 (1985).

External factors may, of course, affect only a particular case or many cases, depending on the situation. If, for instance, the state prevents reasonable access in a single particular case to the experts, materials or other resources which are essential to an accused's ability to mount an effective defense, prejudice must be presumed. Id. at 530-31. Thus, presumptive prejudice based on state interference occurs when the state "deprived [the] accused of services necessary to the preparation and presentation of an adequate defense." Balkcom, 688 F.2d at 739, quoting United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976).

Likewise, state interference compelling presumptive prejudice also "includes cases where counsel was appointed but was prevented by a 'systemic defect' from rendering services vital to effective representation." Balkcom, 688 F.2d at 739, n.1, citing Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). Systemic defects, of course, may arise in many forms, but their distinctive characteristic is their institutional nature which creates a tendency to cause interference in many, or a substantial class of, cases. A prime example is when a state statute significantly impedes defense counsel's professional capacity to operate effectively during the course of adversarial criminal proceedings. E.g., Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed. 593 (1975).

C. Capital Proceedings: Unique Considerations Resulting From Proportionate Harm.

Finally, this Court has established that, "Death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981) (addressing a claim of ineffective assistance of appellate counsel in a death penalty case). This "difference" stems from the utter finality and qualitative uniqueness of capital punishment relative to all other forms of punishment. E.g., Gardner v. Florida, 430 U.S. 349, 360, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Accordingly, this Court must critically evaluate the instant appellate counsel's conduct, the trial court's conduct and the effects of the state statute on, and during, petitioner's direct appeal, with a conscious, continuing and vigilant regard for the gravity of "these circumstances."

The harm caused by deficient representation, moreover, is proportionate to the exposure for criminal liability which is present in the particular proceeding in question. E.g., Blake, 758 F.2d at 533. Lack of preparation during an appeal is therefore proportionately more prejudicial because the defendant is held to carry the burden of proof. Moreover, facts are judicially viewed in a manner most favoring the state. Naturally, it takes more preparatory effort to carry the burden of proof than to rebut an adversary's effort to do the same, especially when factual doubts are consistently resolved in favor of the state.

Finally, and obviously, this rule applies with the greatest of force in a capital appellate proceeding because the capital appellant/defendant will literally be put to death if his appellate counsel fails to make the reasonably necessary preparations to carry the requisite burden of proof. Appellate counsel's specific deficiencies, coupled with the trial court's perfunctory appointment and the state statutory interference,

foreclosed appellate counsel's ability to carry the burden of proof before this Court. Greater prejudice, petitioner submits, would be impossible to show.

V.

SUMMARY OF ARGUMENT

Petitioner asserts three basic claims herein. First, petitioner asserts that appellate counsel's unilateral deficiencies denied him effective legal assistance and undermined the outcome of his appeal before this Court. Second, petitioner asserts that both the trial court and the instant appellate counsel disregarded their respective duties during the appointment process, consequently rendering the instant appointment perfunctory or a mere formality. Third, petitioner asserts that state statutory interference unreasonably limited the necessary resources for an effective appeal, made the appointment itself financially onerous and put petitioner at odds with his appointed advocate, ultimately contributing to appellate counsel's ineffectiveness and denying him equal access to, and equal justice from, this Court. Finally, the foregoing, individually and combined, additionally denied petitioner his due process right to a full and fair appeal.

A. Petitioner's First Basic Claim: Appellate Counsel's Unilateral, Specific Deficiencies.

The record of petitioner's direct appeal to this Court reveals that appointed appellate counsel was responsible for "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." Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985). Appellate counsel was ineffective because he unjustifiably failed to familiarize himself with the facts of this case and the law applicable to those facts for purposes of briefing, oral argumentation and motion for rehearing. Appellate counsel's lack of preparation and his resulting ignorance prevented him from "representing his client zealously within the bounds of the law" because he lacked the necessary tools -- knowledge and information -- to do his

job as defined by this Court in Wilson. This wholesale lack of preparation resulted in specific deficiencies which undermined the appeal's outcome. Moreover, appellate counsel was ineffective as a matter of law because his factual and legal ignorance caused him to improperly ignore "prominent and meritorious" issues which were "a fundamental and intrinsic part of his client's case." S.E. Smith v. Wainwright, 484 So.2d 31, (Fla. 4th DCA 1986).

1. Washington/Wilson and The Actual Prejudice Requirement in the Instant Case.

When Washington/Wilson's two-pronged analysis is applied to the instant case, it is clear that petitioner was denied the effective assistance of appellate counsel. First, errors occurred at petitioner's trial, such as the trial court's allowance of extended prosecutorial misconduct, which deprived him of his constitutional right to a fair trial by an impartial jury and which likely affected the outcome of the trial. Appellate counsel then failed to "discover and highlight" all such errors, either "in writing [or] orally in such a manner designed to persuade [this] Court of the gravity" of such errors. Wilson, 474 So.2d at 1165. Rather, appellate counsel handled this case with a minimal amount of interest, dedication and application of resources, as shown below.

The consequent prejudice to petitioner is vividly manifested in this Court's reported opinion affirming petitioner's conviction and death sentence. That opinion contains implicit and explicit conclusions based on appellate counsel's deficient acts and omissions. Conclusions arrived at by this Court to uphold petitioner's conviction and death sentence, based on such misconceived or unresolved issues, would have been averted if appellate counsel had competently presented key legal and factual points of petitioner's case for this Court's consideration. Those deficient acts and omissions were prejudicial

because, based on prevailing law discussed herein for the first time, they created more than a "reasonable probability that but for [appellate] counsel's unprofessional errors, the result of the [direct appeal] would have been different." Adams, 456 So.2d at 891.

This petition further demonstrates a dual prejudice to petitioner due to appellate counsel's deficient representation during the instant direct appeal. In the first instance, petitioner demonstrates herein that a competent, well-prepared appellate advocate would have made a difference because the outcome of petitioner's direct appeal would have been favorable based on controlling law. In addition to this "immediate" prejudice, petitioner has suffered long-term prejudice because appellate counsel's omission of meritorious issues may in the future be deemed to have barred all such issues from subsequent judicial review.

The integrity and fairness of all future proceedings have thus been substantially compromised by the probable procedural defaults which may be interposed to prevent all such prominent, meritorious and intrinsic issues from ever receiving judicial consideration on the merits. This dual prejudice flows from appellate counsel's deficiencies before this Court, moreover. Petitioner therefore seeks issuance of the writ to allow him a constitutionally adequate appeal of his conviction and sentence with effective legal assistance as required by the Sixth and Fourteenth Amendments to the Constitution of the United States, as well as the Constitution and Laws of the State of Florida.

2. Cronic and The Presumption of Prejudice in the Instant Case.

Although petitioner documents below appellate counsel's specific deficiencies and resulting actual prejudice to satisfy the Washington/Wilson test, petitioner must in any event be afforded a new appeal under Cronic and progeny. Presumptive

prejudice is in order because the instant appellate counsel's deficiencies were so numerous and so gross that they constituted a constructive denial of appellate counsel. Appellate counsel's unilateral acts and omissions ultimately failed to subject the prosecution's case to any meaningful adversarial testing.

Appellate counsel's wholesale appropriation of work-product from defense trial counsel, for instance, resulted in a mere, virtually mindless, regurgitation on direct appeal of arguments already proven unsuccessful at the trial level. In effect, appellate counsel's "legal assistance" during the briefing stage of petitioner's direct appeal consisted of reiterating the same material, usually verbatim, which defense trial counsel had previously prepared and which had already been judicially rebuffed. By no reasonable standard can such a drastic lack of preparation be deemed anything but presumptively prejudicial.

Additionally, earlier this year, the District Court of Appeal of Florida, Fourth District, confirmed Cronic's basic principle: that an advocate who "fails to raise a meritorious issue which is a fundamental and intrinsic part of his client's case is ineffective" as a matter of law. S.E. Smith v. Wainwright, 484 So.2d 31 (Fla. 4th DCA 1986), citing Washington, 466 U.S. 688. As noted by the court, this is particularly true when the omitted issue was "prominent and meritorious." Id. at 204. Petitioner's appellate counsel, as demonstrated below, failed to competently raise "prominent and meritorious" issues which were a "fundamental and intrinsic part" of petitioner's case on direct appeal: for instance, the egregious prosecutorial misconduct documented herein for the first time.

As shown below in full detail, the prosecution blatantly violated petitioner's constitutional right to remain silent with a series of direct and extended bad faith remarks calculated to destroy the presumption of innocence. The enormity of the prosecution's misconduct made the issue abundantly "prominent and meritorious." Appellate counsel's scant attention to this, and other, fundamental issue(s) constituted a

constructive denial of counsel which rendered his representation ineffective as a matter of law under both the Florida standard set forth in S.E. Smith and the Federal standards enunciated in Cronic and progeny.

Appellate counsel's oral argument similarly did not "require the prosecution's case to survive the crucible of meaningful adversarial testing", Cronic, 466 U.S. at 656, because his preceding, indiscriminate appropriation of his predecessors' work-product relieved him of any practical necessity to become familiar with the facts or the law of this case for briefing purposes. The resulting "argument" was a disgrace to this Court: appellate counsel, as shown below, was reduced within moments of beginning his oral presentation to self-contradiction, factual error and logical inconsistency, as he stumbled about in vain while trying to respond coherently to this Court's queries. Moreover, appellate counsel's reckless (and obviously unintentional) failure to reserve any rebuttal time allowed the state's assertions during oral argument to go unanswered.

Finally, the superficiality of appellate counsel's motion for rehearing before this Court also constituted a constructive denial of legal assistance. Appellate counsel's token motion failed to set the record factually straight, to provide substantive legal analysis in support of petitioner's case and to assert, even at the final opportunity, issues ripe during the direct appeal but never raised for this Court's consideration until now. Appellate counsel's lack of diligence throughout the entire appeal allowed the state's case, in the final analysis, to survive as a whole without meaningful adversarial challenge.

Appellate counsel, furthermore, must (or should) have known that the specific acts and omissions which his course of conduct necessarily entailed would foreseeably result in this Court's rejection of petitioner's direct appeal, much as it had resulted in the trial court's rejection of his innocence. Appellate counsel's unjustifiable, blind, near complete reliance on the unsuccessful work-product of his predecessors, moreover,

made it impossible for him to "discover", much less argue effectively, anything at all. Appellate counsel was, in short, and by choice, a mere spectator to the state's case before this Court: "Being merely a spectator to the state's presentation of evidence will not meet the standard for effective assistance of counsel." J.L. Smith v. Wainwright, 777 F.2d 609, 617 (11th Cir. 1985) (emphasis supplied).

B. Petitioner's Second Basic Claim: The Trial Court's and Appellate Counsel's Disregard for Appointee's Lack of Competence During the Appointment Process.

The record of this case further demonstrates that the appointment of the instant appellate counsel was constitutionally defective. The trial court and appellate counsel both failed to consider appellate counsel's skill, experience and positive appreciation for the advocate's role in a capital appellate proceeding during the instant appointment process, as required by this Court in Wilson. Consequently, the trial court appointed an attorney who was not competent to represent petitioner before this Court and who, furthermore, was unwilling to undertake the necessary time and expense to become competent. The instant appointment was thus rendered perfunctory, a meaningless formality in derogation of petitioner's right to competent and zealous appellate representation.

That perfunctory appointment, moreover, foreseeably set the stage for substandard representation during the appeal proper by the unqualified appointee. The faulty appointment process thus situated petitioner in an adversarial proceeding with an incompetent appointed counsel at his side. The prejudice resulting from that perfunctory appointment was borne out by appellate counsel's gross and numerous deficiencies after appointment and as documented throughout this petition.

C. Petitioner's Third Basic Claim: State Interference Based on a Statutory Systemic Defect.

Finally, the record of this case establishes state interference with petitioner's right to an effective appellate advocate. The primary source of external interference was the state law expressly prohibiting compensation exceeding $2,000 to appointed appellate counsel. § 905.036, Fla. Stat. (1985).[2/] This statutory scheme imposes an arbitrary and unreasonable limitation on appellate representation by unrealistically limiting the resources necessary to "require the prosecution's case to survive the crucible of meaningful adversarial testing." Cronic, 466 U.S. at 656. This compensation limitation fundamentally deters appointed appellate counsel's ability to devote time and resources to the preparation of an effective appeal unless the appointee is willing to personally finance the appeal -- an ulikely situation -- and in any event, unconstitutional. The duty to ensure the accused's constitutional rights rests with the state, as shown below.

The statute, moreover, discourages experienced, competent counsel from participating in the appellate process on behalf of indigent defendants and thereby fosters inordinate, if not exclusive, participation by inexperienced, incompetent attorneys. The statute thus sets the stage for faulty appointments, thus contributing directly to deficient representation during the appeal proper. As such, the statute's effects extend to both the appointment process and the appellate proceeding itself.

Finally, Section 925.036's unreasonable limitations also tend to create conflicts and disagreements between appointed appellate counsel anxious to keep the value or extent of their involvement to the statutory maximum and their clients,

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2/ As previously noted, this Court's recent ruling in Makemson v. Martin County is separately addressed in Section X hereof due to the filing deadline.

who are understandably anxious to exploit all meritorious issues regardless of the statute's economic constraints. Eventually, such differences erode the attorney/client relationship by injecting therein antagonistic financial considerations. The statutory limitation thus has an insidious internal influence as well as a prejudicial external impact.

In short, Section 925.036 interfered with petitioner's constitutional rights in three respects: it, (1) set the stage for deficient appellate representation by effectively inducing inordinate if not exclusive participation by relatively unqualified lawyers; (2) induced the unqualified appointee to ignore or discount potentially meritorious issues due to lack of funds thus undermining the appeal proper, and; (3) interfered with the relationship between the appointed appellate counsel and his client by interjecting financial considerations unilateral to the appointee, detrimental to the client and properly extraneous to the relationship. As shown below, the statute's insidious effects were fully realized in petitioner's case.

This statutorily mandated "systemic defect" constitutes an absolute and direct contravention of the right to effective legal assistance, equal protection of the law and due process in the context of complicated capital proceedings. Indeed, Section 925.036 virtually compels the impermissible scenario where the indigent accused of this state become "a sacrifice of unarmed prisoners to gladiators" financed by the state. See Cronic, 466 U.S. at 657. This impermissible scenario is realized in case after case because the absurdly low statutory maximum does not even allow the hope that an effective appeal can be prepared by a competent lawyer for anywhere near the amount allowed while the state deploys its full-time prosecutorial and appellate staffs to ensure its own triumph. As such, this arbitrary statutory limitation is a breach of "the state's obligation in a criminal case 'to assure that the defendant has a fair opportunity to present his defense.'" Blake, 758

F.2d at 530, quoting Ake v. Oklahoma, ___ U.S. _____, 105 S.Ct. 1087.

VI.

SPECIFIC ACTS AND OMISSIONS
WHICH RENDERED PETITIONER'S
APPELLATE REPRESENTATION INEFFECTIVE

In this section, petitioner outlines appellate counsel's actions and omissions before this Court during briefing, oral arguments and motion for rehearing with respect to issues which were procedurally preserved for appellate review by trial counsel or which otherwise constituted fundamental error. Rather than dissect or second guess appellate counsel's every move or strategic choice, petitioner will limit this section of the petition to specific acts or omissions which are substantive and substantial. Petitioner also directs this Court's attention to the extreme hesitancy, tentativeness and improvisation which marked appellate counsel's oral argument. This lack of force, clarity and persuasiveness was prejudicial because it derived from appellate counsel's lack of competence at the time of his judicial appointment as well as from his failure to ensure his competence by adequate preparation after accepting the appointment.

Petitioner demonstrates actual prejudice pursuant to the Washington/Wilson test by briefing this Court on applicable law and demonstrating the probable different outcomes based thereon but for appellate counsel's unilateral deficiences. Petitioner also demonstrates prejudice by illustrating, where appropriate, the result(s) of appellate counsel's deficiencies with references to this Court's reported opinion. Although petitioner briefs key issues and controlling law in this petition to demonstrate the requisite "reasonable probability," petitioner does not intend that the discussion hereby provided should be a substitute for the constitutionally adequate appeal requested herein after proper notice and hearing thereof. Petitioner demonstrates further, dual prejudice by reminding this Court that all issues omitted by appellate counsel will likely be deemed barred in any future judicial proceedings.

Finally, petitioner demonstrates below that appellate counsel's deficient acts and omissions throughout the direct appeal constituted a constructive denial of counsel. Appellate counsel's deficiences were so gross and pervasive as to amount to no representation at all thereby stripping the direct appeal of its requisite adversarialness. As a consequence, prejudice must be presumed, relieving petitioner of the burden to show actual prejudice under Washington/Wilson's second prong.

The appellant is referred to herein as "petitioner" and the appellee as the "state". References to the record on appeal are cited as [R.-] with the appropriate page number following the "R" in the brackets. This Court should note that there may be a discrepancy between reference page numbers in this petition and the state's response, paralleling the similar numbering discrepancy that existed at the time of the original appeal. The supplemental record on appeal is similarly cited as [S.R.-].

References to the certified transcript of oral argument during petitioner's appeal on the merits are provided to help identify discrete acts or omissions and are designated by [T.-] with the page number corresponding to the certified transcript of the argument inserted after the "T". References to petitioner's Initial Brief and motion for rehearing, as well as the deposition testimony of Officer Michael J. Hanna of Flint, Michigan, are cited in a self-explanatory manner. References to other documents or exhibits not contained in the record on appeal and contained in the attached Appendix of Exhibits are designated by the appropriate, self-explanatory citation thereto.

A. Specific Issue Ineffectively Briefed: Sustained Prosecutorial Misconduct.

The paradigm example of appellate counsel's substandard performance was his failure to address and argue the issue of prosecutorial misconduct "in such manner designed to persuade

[this Court] of the gravity" of the misconduct. Wilson, 474 So.2d at 1165. During the voir dire of the prospective jury the prosecution made repeated, direct and explicit references to the petitioner's "right to take the witness stand." [R.-469] As the result of the second such reference, trial counsel objected and, upon denial of the objection, moved ore tenus for a mistrial, thereby preserving this issue for appeal. [R.-469]. The trial court also denied the motion for mistrial. [R.-471].

Appellate counsel knew of the objection and motion for mistrial. (Initial Brief, p.4). Yet, in an Initial Brief containing 48 pages, appellate counsel devoted a total of one paragraph comprising three sentences to argue this "intrinsic and fundamental" issue. Moreover, he buried that single paragraph within a "kitchen sink" section of his Initial Brief titled: "The Defendant Was Not Given A Fair Trial Under The Circumstances." (Initial Brief, p.36). Appellate counsel's gross lack of competence with respect to this particular -- and dispositive -- issue was apparent at the conclusion of that section, when he erroneously asserted that: "Although any one of the foregoing trial court errors [a total of ten issues] standing alone might not have prejudiced the Defendant..." (Initial Brief, p.39).

In fact, the denial of the defense motion for mistrial, alone, constituted per se reversible error as a matter of well-established law. See, e.g., David v. State, 369 So.2d 943 (Fla. 1979); Childers v. State, 277 So.2d 594 (Fla. 1973); Trafficante v. State, 92 So.2d 811 (Fla. 1957). Appellate counsel thus failed to assert a position on his client's behalf which would have compelled a reversal of the conviction and, therefore, the death sentence as well: appellate counsel, if effective, would have obtained a new trial for his client on the basis of this issue alone. Rather, appellate counsel allowed the egregious prosecutorial misconduct to go entirely unchallenged. Appellate counsel's inexcusable failure to comprehend the dispositive nature of this issue or to develop it on direct appeal

therefore rendered his representation with regard to this issue "a mere sham," Blake, 758 F.2d 534, because it failed to put the prosecution's misconduct to "meaningful adversarial testing" Cronic, 466 U.S. at 656, 659.

Appellate counsel, furthermore, failed, either in the briefs, the oral argument or the motion for rehearing, to set forth the substance of the improper prosecutorial remarks so that this Court could appreciate their extremity. Additionally, appellate counsel omitted to alert this Court to the substantive controlling law regarding the trial court's improper denial of petitioner's timely motion for mistrial. He referred to only one case in his briefs, without appropriate analysis, and made no attempt whatsoever to set forth the applicable judicial standard governing prosecutorial misconduct of this type. In addition, appellate counsel omitted to even mention this crucial issue during oral arguments before this Court. In sum, appellate counsel's entire "representation" consisted of one paragraph and no argument for a preserved issue which he indisputably knew about and which constituted reversible error as a matter of law.

As illustrated below, the effect of the prosecutorial misconduct was to compel petitioner to take the stand and commit other detrimental actions during his trial which likely undermined the fairness of his trial and made it constitutionally defective. Thus, even absent the actual prejudice demonstrated herein due to appellate counsel's deficiencies on appeal, that sort of fundamental omission regarding a prominent and meritorious issue which was an intrinsic part of his client's case is properly governed by Cronic and progeny. See also S.E. Smith v. Wainwright, 484 So.2d 31, (Fla. 4th DCA 1986). Therefore, prejudice must in any event be presumed as a matter of law and the relief requested herein granted.

1. The Substance of The Prosecution's Misconduct During Petitioner's Trial.

The trial transcript shows that Marion County State Attorney Gordon G. Oldham artfully initiated the impermissible monologue insinuating that petitioner's constitutional right to remain silent, if exercised, would suggest guilt. After agreeing that the right to remain silent was the law, and was good law, State Attorney Oldham remarked:

> ... but, do you understand that he's [the defendant] got a right to take the witness stand. He is the only one that makes that decision. So he makes the decision whether he takes the witness stand. It's not the State; so the mere fact that he doesn't take it, you understand, he had the right to take it. We all understand that, don't we?
>
> Now, if he takes the witness stand, I think the Court will tell you that he would be subject to the same cross examination as any other witness, in other words where I can ask him questions, you know, about the circumstances. So does everybody understand that he hasn't got to take the witness stand you shouldn't hold it against him. I agree with that law, but he sure has got a right to take it if he wants to and be subject to cross examination. We all understand that, don't we?

[R.-408](emphasis supplied).

Those first, extended comments were unconstitutional. They amounted to a taunting challenge to petitioner before the prospective jury regarding his taking of the stand. That taunting challenge compromised petitioner's constitutional right

to stand mute before his accusers because petitioner's failure to take up the challenge would surely have been interpreted by the jury as an implicit admission of having "something" to hide. Of course, this is precisely the reason such remarks have long been prohibited, as explained in full below. Thus, petitioner's entire trial was thereafter infected with the unknown and continuing repercussions of the prosecution's misconduct at the very commencement of trial.

Although defense counsel did not object or request a mistrial immediately, the prosecution's initial comments constituted "such a substantial due process violation as to constitute fundamental error." Steinhorst, 477 So.2d at 539. Accordingly, competent and zealous appellate counsel would have raised and argued the issue. Reliance on this "fundamental error" standard, however, became unnecessary with defense trial counsel's response to the prosecution's second improper reference to petitioner's right to testify.

The State Attorney, personally again, attempted to conceal his ulterior and prejudicial purpose by beginning his second reference with a remark about the jurors' responsibility to consider the self-interest of a witness in determining each witness' veracity. [R.-469]. State Attorney Oldham once again violated petitioner's constitutional right to remain silent by stating:

> Now, the Defendant has the right to take the witness stand if he wants to but he hasn't got to, but if he takes the witness stand and testifies under oath you have a right to believe or disbelieve his testimony, the same as you would any other witness, and you should consider if he testifies the interest that he has in the outcome of this case. Do you understand that?... So he has

an interest in the case if he testifies, the same as everyone else. You understand that?

[R.-469](emphasis supplied). The prosecution's second reference triggered petitioner's timely objection and motion for mistrial. [R.-470].

The prosecution's response to the objection was that the defense had somehow "opened up" that discussion by referring to possible witness bias on account of immunity; yet defense counsel had made no reference to possible testimony by the petitioner. [R.-470]. The prosecution was improperly attempting to highlight the petitioner's ultimate decision regarding his proffering of testimony on his own behalf and, in so doing, to instill in the jurors' minds from the very beginning an unfair and unfavorable presumption of guilt if he failed to take the witness stand. Nonetheless, the trial court denied the objection. The defense then moved for a mistrial which the trial court also denied. [R.-471].

The prosecution's argument at trial regarding petitioner's self-interest in response to the defense objection, if judicially embraced, would compel the conclusion that any time the defense refers to the bias of potential witnesses, the prosecution may properly respond with unbridled references to the accused's constitutionally-guaranteed right to remain silent. Permitting such insinuations would lead to the complete destruction of the presumption of innocence and negate the prohibition against compelled self-incrimination mandated both by the United States Constitution and the Constitution of the State of Florida. Clearly, the trial court fundamentally erred in condoning the prosecutorial taunting by overruling the objection and denying the motion for mistrial; well-established law, as shown below, prohibited even less egregious remarks of that type.

The trial court's acquiescence to that prosecutorial impropriety emboldened Oldham, for his next improper reference to the right to remain silent was strident and straightforward:

> Did you hear a question I asked a couple of the jurors about the right of the defendant to take the witness stand; did you hear those?.... And, you know, if he doesn't take that witness stand you cannot hold it against him?.... But, if he took the witness stand, I think the Court would tell you that he's got to go under the same rules as everybody else.... You understand it's not my decision or the State's decision whether he takes the witness stand. It's his decision.

[R.-485](emphasis supplied). State Attorney Oldham's fourth and final reference to petitioner's "right to testify" was perhaps the most deplorable:

> Did you hear the question about the Defendant, that he has got a right to take the witness stand if he wants to; you understand that?.... and that decision is his and his attorney, not mine or yours, the Court's or anyone else?

[R.-534-35](emphasis supplied).

No reasonable person could deny that the not-so-subtle string of quotations set forth above was carefully calculated by the State Attorney to plant in the venire's collective mind an unconstitutional invitation to presume guilt from silence. Neither could any reasonable person deny that State Attorney Oldham actually knew that well-established law prohibited such remarks; he in fact acted in calculated bad faith. In essence, the State Attorney subverted petitioner's constitutional rights by virtue of the impermissible presumptions he was inviting the jury to indulge with his thinly disguised monologue. The above-quoted series of remarks by an experienced prosecutor -- Marion

County's chief prosecutor -- left no room for any reasonable doubt that they were merely a neophyte's over-zealous, innocent transgressions, moreover. This Court, unlike the trial court, cannot remain oblivious to the plain import of the State Attorney's bad faith monologue and must now vindicate petitioner's constitutional rights under well-established law.

2. Prosecutorial References To The Right to Remain Silent: Analysis of Controlling Law Then And Now.

The State Attorney's series of direct and increasingly flagrant remarks violated well-established consitutional law. Even though appellate counsel may have been inexperienced in this area of the law, a cursory review of controlling case law would have shown him that the prosecution need not stand before the jury and declare, "If this man does not testify, then he is guilty..." to support a finding of per se reversible error under prevailing law. For instance, this Court has explained that: "As early as Jackson v. State, 45 Fla. 38, 34 So. 243 (1903), this Court recognized that the prosecuting officer would not be permitted comment on the failure of an accused to take the witness stand even though he does so by innuendo under the guise of disclaiming any intention of doing so." Gordon v. State, 104 So.2d 524, 540 (Fla. 1958) (emphasis supplied). Similarly, this Court has held:

> In summary, our law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction.

Trafficante v. State, 92 So.2d 811, 814 (Fla. 1957) (emphasis supplied).

The extensive prosecutorial references to petitioner's testimonial rights violated Jackson, Gordon, Trafficante and a

host of other rulings by this Court because they were extremely susceptible of exactly the prohibited interpretation, especially given their direct, repetitive, and bold nature. Neither Oldham's artful initial attempts to disguise his bad faith impropriety, nor his spurious argument in response to the defense objection, would have deterred a competent appellate counsel from "fully, fairly and zealously" researching, briefing and arguing such a fundamental and clear-cut issue.

a. The Law Then: The Per Se Reversible Error Rule.

At the time of petitioner's direct appeal the reversible error rule governed improper prosecutorial comments regarding a defendant's right to remain silent: "Any comment which is 'fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error without resort to the harmless error doctrine." David v. State, 369 So.2d 943, 944 (Fla. 1979) (emphasis supplied). It is difficult to imagine comments more "susceptible" of being so interpreted than Oldham's challenging taunts as quoted above directly from the record on appeal. Consequently, it was reversible error for the trial court to deny petitioner's timely objection and motion for a mistrial.

As previously discussed herein, appellate counsel who "fails to raise a meritorious issue which is a fundamental and intrinsic part of his client's case is ineffective" as a matter of law. S.E. Smith, 484 So.2d at 31. This is particularly true for "prominent and meritorious" issues. Id. The egregious nature of the prosecutorial misconduct, coupled with the strict prohibitions found in well-established law, made that issue both "fundamental and intrinsic" as well as "prominent and meritorious" during the direct appeal.

Appellate counsel's failure to adequately brief (and his complete failure to even mention this issue during oral argument) was a significant deficient omission which as a matter

of law establishes the ineffectivess of his performance under S.E. Smith and gives rise to presumptive prejudice under Cronic and progeny . Even if prejudice is not presumed, appellate counsel's failure to research, develop and zealously pursue an issue which would have compelled a reversal of the conviction and the granting of a new trial based on prevailing law compromised the appellate process "to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, 474 So.2d 1162; Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

b. The Law Now: The Harmless Error Rule.

Two years after ruling on petitioner's direct appeal, this Court adopted the "harmless error" rule for prosecutorial misconduct. State v. Marshall, 476 So.2d 150 (Fla. 1985). Nonetheless, the viability and applicability of the per se reversal rule at the time of petitioner's direct appeal is unquestionably established by Harris v. State, 438 So.2d 787 (Fla. 1983). In Harris, decided only two weeks prior to the decision in petitioner's appeal, this Court emphasized: "We have recognized in Florida that such a comment requires the reversal of a conviction and that the harmless error rule does not apply." Id. at 794 (emphasis supplied) quoting David, 369 So.2d 943, and Trafficante, 92 So.2d 811.

Thus, a mere two weeks immediately before deciding petitioner's direct appeal, this Court unequivocally affirmed its adherence to the per se reversal rule for prosecutorial misconduct of this very nature. The subsequent change in the standard of review to a "harmless error" analysis thus only increased the actual prejudice caused by appellate counsel's deficiences because petitioner now may be held to a higher burden for demonstrating reversible error than existed at the time of his direct appeal. This Court, at the very least, must afford petitioner the opportunity to distinguish his case from Marshall by issu-

ing the requested writ and granting petitioner a new appeal on the merits.

This Court's adoption of the "harmless error" rule, as noted above, occurred in the context of improper prosecutorial comments made during closing argument. In petitioner's case, on the other hand, the improper comments occurred before the trial proper had even commenced: the trial court's error was in denying the motion for mistrial during voir dire, thereby allowing the prosecution's innuendo to ferment in the jury's mind throughout the entire trial. The entire subsequent proceedings were thus tainted by the unknown ripple effects which the blatant and incessant prosecutorial references had on petitioner's jury from inception. No doubt, that extended lapse of time colored the jury's perception of the testimony and other evidence throughout the entire trial and, probably, skewed their ultimate verdict. This Court has not considered the instant circumstances, either in or since Marshall; they require this Court's consideration after proper notice and opportunity for petitioner to be heard on this issue.

3. Prosecutorial Misconduct and State Law: Violation of Petitioner's Right to be Free From Compelled Testimony.

An additional, and independent, basis for this Court's issuance of the requested writ with respect to the foregoing issue is provided by the Constitution and Laws of the State of Florida. The quoted prosecutorial comments violated petitioner's rights under Article I, Section 9 of the Constitution of the State of Florida, as well as Florida Rule of Criminal Procedure 3.250 (1986). Both the Florida Constitution and the Florida Rules of Criminal Procedure prohibit the prosecution from compelling a defendant in a criminal matter to be a witness. Yet, as seen from petitioner's personal "opening statement" at trial, just such a compulsion was the actual,

forseeable and precise effect of the prosecution's unconstitutional remarks in the instant case.

The prosecution's relentless monologue was contrary to the Florida Constitution and Rules of Criminal Procedure because it was coercive, compelling petitioner's testimony and other conduct to his own detriment during his trial. As defense counsel cogently pointed out in moving the trial court for a mistrial, "He's [the State Attorney] placed the Defendant in the position of now having to testify or having to exercise his right to remain silent being held against him and the presumption of innocence destroyed". [R.-470-71]. Petitioner's coerced conduct in response to the State Attorney's taunting -- ultimately necessitated by the trial court's erroneous denial of the objection and motion -- was underscored by the opening of the defense.

a. Petitioner's Personal "Opening Statement" and Coerced Testimony.

At the commencement of his trial, petitioner insisted and was permitted by the trial court to make a personal opening statement so that he could to respond to the prosecutorial taunts. Referring directly to Oldham's comments in the initial moments of his "opening statement," petitioner stated:

> Mr. Oldham says that -- he implicates (sic) I won't take the witness stand, but that remains to be seen.

[R.-632](emphasis supplied). The coercion reasonably perceived by petitioner as a result of the prosecutorial misconduct was further established by the record:

> The State's Attorney suggested that I won't get on the witness stand, but he can't predict the future. He doesn't know what the future holds...

[R.-636] (emphasis supplied). It was obvious from that "opening statement" that petitioner actually and reasonably was unlawfully "compelled" to testify in order to answer Oldham's constitutionally prohibited monologue.

The seeds sowed by State Attorney Oldham's grossly improper innuendo and reaped by the trial court's erroneous denial of the timely objection and motion for mistrial came to fruition at the close of the petitioner's "opening statement." Petitioner, addressing himself to the State Attorney directly, committed himself at the trial's initial moments to taking the witness stand:

> ... and I'll tell Mr. Oldham right now that I will be taking the witness stand on my own behalf, for my own defense...

[R.-643] (emphasis supplied). The State Attorney had thus succeeded in his bad faith quest to unlawfully sully the fairness and integrity of the trial-level proceedings before the trial proper actually was under way. The State Attorney embarked on that improper course of action even though he surely knew that "the presumption of innocence, the state's burden of proving guilt beyond a reasonable doubt and the defendant's concomitant right to stand mute before his accusers without conceding guilt in any way are fundamental underpinnings of due process." State v. Kinchen, 10 F.L.W. 446 (Fla. 1985) (Ehrlich, J., concurring in part and dissenting in part, dissenting in Marshall) (emphasis supplied). His success, and the trial court's allowance of it, therefore constituted reversible and fundamental error under both Federal and Florida law.

Thus, before a single word of testimony, before the entry of even one exhibit into evidence, at a time when the law instructs that the accused must be securely cloaked in the constitutional presumption of innocence, the instant petitioner was in fact compelled to commit himself to testifying in his own defense as a direct result of the repeated, strident, calcu-

lated, bad faith remarks of the State Attorney himself. That compelled testimony was violative of petitioner's rights as guaranteed by Article I, Section 9 of the Florida Constitution and Rule 3.250 of the Florida Rules of Criminal Procedure, as well as by the Constitution of the United States. Accordingly, this Court must grant petitioner the relief herein requested.

B. Other Issues Ineffectively Briefed: Appellate Counsel's Appropriation of Work-Product Without Independent Review or Effort.

Appellate counsel submitted his Initial Brief to this Court on December 22, 1981. That Initial Brief consisted of 48 pages, including a one-page conclusion and another page devoted to the certificate of service. The first seven pages of the Initial Brief were devoted to a preliminary statement, a statement of the case and facts and a general introductory outline of the issues to be presented for review. The remaining 38 pages of the Initial Brief were devoted to the argument, 12 pages of which were dedicated to discussion of the record and other generalities. The remaining twenty-six pages were devoted to substantive legal argumentation.

Section I of the argument in the Initial Brief addressed the key issue of the suppression of petitioner's out-of-court statement. (Initial Brief, pp.8-15). Of the eight pages dedicated to this argument, five consisted of legal argument. Each and every page of this argument was taken almost verbatim from defense trial counsel's memorandum of law in support of the pre-trial motion to suppress. [R.-34-42]. Appellate counsel, in fact, indulged the liberty of omitting several legal authorities during his wholesale plagiarism of this section. (See, e.g., citation to Schneckloth v. Bustamonte and Alford v. State contained in the trial memorandum at R.-37 but omitted in the Initial Brief at page 13).

A comparison of the Initial Brief and the pre-trial

motion to suppress conclusively establishes that both the text and the legal authorities comprising this key legal argument were substantially appropriated by appellate counsel without substantially any independent review or effort on his part. Although petitioner recognizes that reliance on others' work-product to help prepare a case is not inherently suspect, appellate counsel's wholesale plagiarism goes beyond the bounds of all professional propriety. Moreover, the wholesale plagiarism involved herein is made even more outrageous by the fact that appellate counsel was substantially incompetent, as shown below, to represent petitioner at the time of his appointment. It was therefore essential for appellate counsel to conduct the basic legal and factual research necessary to educate himself about his client's case and the law applicable thereto. By failing to do so, appellate counsel foreclosed any possibility, however remote, that he would be able to conduct himself as an effective advocate throughout petitioner's direct appeal. Consequently, his plagiarism contributed to, and independently constituted, ineffective appellate representation.

Appellate counsel's lack of independent review or effort was underscored by his failure to even verify the citations and case names he appropriated from the motion to suppress. On page 13 of the Initial Brief, for example, appellate counsel repeated, identically, the misspelling of the appellant's name in the case of Bran[sic](Bram) v. United States. This same misspelling is found in trial counsel's memorandum. [R.-37]. Appellate counsel's identical "typographical" error with a landmark case such as Bram evidenced his indiscriminate appropriation of previous work-product without any substantial independent effort or informed review on his part.

Section II of the argument in appellate counsel's Initial Brief addressed the trial court's denial of defense counsel's motion for discharge. (Initial Brief, pp.16-25). Two of those pages were dedicated to an extensive textual quotation of the applicable rules. Of the remaining four pages of legal

argumentation, three pages were reproduced verbatim from defense trial counsel's memorandum in support of the motion to discharge. [R.-76-83]. Thus, appellate counsel only generated one page of substantive briefing with regard to that issue.

Appellate counsel's necessarily superficial briefing within that single page of work-product must be viewed as deficient because of the complex factual and procedural background regarding the pregnancy cramps allegedly experienced by O'Brien and which were at the core of that issue. O'Brien's pregnancy, of course, provided the basis for the prosecution's formal motion for a continuance and for extension of the speedy trial period in this case pursuant to Florida Rule of Criminal Procedure 3.191(f). That continuance was, in turn, the basis for the subsequent denial of petitioner's motion for discharge.

The precise factual circumstances and procedural background of O'Brien's pregnancy cramps were therefore critical to petitioner's appellate case because they were, in effect, the sole grounds for denying petitioner his constitutional and statutory right to a speedy trial in accordance with the time frame established by law. Appellate counsel's entire discussion of that specific matter, however, was limited to a bare descriptive account of the occurrences during the hearing on the prosecution's motion for the critical continuance and extension of speedy trial. (Initial Brief, p.19). Specifically, appellate counsel simply stated that, "At that hearing the State argued that its principal witness, Colleen O'Brien, was pregnant and expecting to deliver her child on May 28, 1980 which constituted 'exceptional circumstances' sufficient to extend speedy trial" and that, in response, petitioner had "strenuously objected to the motion for continuance and argued that the circumstances were not unforeseeable as contemplated by Fla.R.Cr.P. 3.191." (Initial Brief, p.19). That issue is substantively analyzed in detail later, during the discussion of appellate counsel's reply to the state's arguments, wherein he compounded his deficiencies in the Initial Brief.

Furthermore, appellate counsel plagiarized that section of his Initial Brief also. The first portion of that section he plagiarized from the preliminary notes which Richard, his predecessor, had prepared and later transmitted to the ultimate appointee. (See Composite Exhibit D, pp.8-11). A comparison of Richard's working notes and appellate counsel's finished brief shows that appellate counsel duplicated his predecessor's work-product substantially in its entirety, pausing only to tidy Richard's notes into a colorably presentable document. (See Composite Exhibit D, pp.8-11 and Initial Brief, pp.16-20). The substantive analysis, however, he appropriated from Richard altogether. Indeed appellate counsel inexplicably deleted from Richard's notes a substantial amount of important analytical detail and replaced it with a generalized legal discussion which he likewise appropriated from defense trial counsel's memorandum in support of the motion for discharge.

A comparison of the Initial Brief, pages 20-22, and trial counsel's memorandum, [R.-78-80], further illustrates appellate counsel's wholesale appropriation of his predecessors' work-product without any substantial independent review or effort. Appellate counsel, in essence, engaged in a mere "cut-and-paste" project wherein he strung together the work-product of his predecessors in order to relieve himself of the need to carefully review, research and analyze petitioner's case on appeal. Because appellate counsel failed to orally argue this issue before this Court, we cannot determine whether he was, in fact, familiar with the case law or again just blindly "used" Richard's work notes and trial counsel's memorandum.

In Section III of the Initial Brief appellate counsel addressed the trial court's override of the jury recommendation in favor of life imprisonment. The source of appellate counsel's argument in that section of the Initial Brief is left to one's speculation, as it cannot be compared to any equivalent work-product generated by defense trial counsel. Nonetheless, appel-

late counsel omitted to adequately brief the "arguments" asserted in that section of his Initial Brief, as demonstrated below.

That section of the Initial Brief first addressed the finding of the aggravating circumstance based on, among other things, the commission of burglary. Appellate counsel's "argument" with regard to burglary was only that, "There is simply no support in the record for this finding." (Initial Brief, p.26). Appellate counsel omitted to cite even a single authority to show why the record failed to support a finding that all the elements of burglary had in fact occurred. Moreover, appellate counsel never reviewed, much less briefed, the Florida burglary statute. This failure was compounded later, when he failed to analyze the burglary statute in reply to the state's argument in its Answer Brief. The burglary statute, and appellate counsel's ineptness with regard thereto, is substantively discussed in full below.

Appellate counsel then turned to the aggravating circumstance based on avoidance or prevention of arrest. Again, his "argument" was merely that, "There is simply no support in the record for that finding." (Initial Brief, p.27). Appellate counsel, however, failed to review the record in order to provide support for his assertion and demonstrate its persuasiveness to this Court. He likewise omitted any legal authority or analysis from the single paragraph he devoted to this point in the Initial Brief.

With regard to the next aggravating circumstance, that petitioner had acted for pecuniary gain, appellate counsel, in a single paragraph, once again sounded his simplistic refrain: "There is no support in the record for the finding that this homicide was committed for pecuniary gain." (Initial Brief, pp.28-29). Again, appellate counsel omitted to develop the facts of the case as established by the record on appeal to persuasively support his assertion. His only case citation, Provence v. State, 337 So.2d 783 (Fla. 1976), was not accompanied by any

analysis or other persuasive explanation regarding its applicability.

Appellate counsel then addressed the trial court's finding that petitioner's alleged crime was especially heinous, atrocious and cruel. Asserting once again that, "The record does not support that finding...." appellate counsel argued that the homicide was not committed in an extremely wicked or evil manner. (Initial Brief, p.29). Appellate counsel, however, again omitted to develop the facts of this case as established by the record to support his assertions regarding that aggravating circumstance.

Finally, appellate counsel discussed the trial court's finding that petitioner acted in a cold calculated and premeditated manner. Yet, once again appellate counsel asserted, simply, that, "There is no evidence in the record to support the finding...." (Initial Brief, p.31). Appellate counsel, however, failed to provide any legal authority or analysis based thereon to support his assertion that, "From the evidence presented at trial, it cannot be presumed that this was a premeditated homicide." (Initial Brief, p.32). Of course, the law prohibits a presumption of premeditation at any time because the state is charged with the burden of proving each and every element of a given crime beyond a reasonable doubt. Finding a citation to support his assertion would surely have required no more than a few minutes of appellate counsel's time. That relatively minor specific omission is most instructive in gauging appellate counsel's deep reluctance to devote sufficient time and resources to petitioner's case.

In the remaining three pages of that section, appellate counsel addressed the trial court's finding that no mitigating circumstances existed as well as the propriety of the trial court's jury override. With regard to the mitigating factors, appellate counsel asserted, but again failed to develop, the factual details of petitioner's breaking and entering conviction (school vandalism while petitioner was seventeen years old) and

escape conviction (petitioner rushed to his wife from a minimum security work camp upon her threat of imminent suicide) to demonstrate their mitigating influence. In sum, appellate counsel merely strung the assertedly mitigating factors together in a one-sentence paragraph which failed to explain or develop the mitigating nature of each such factor.

Finally, appellate counsel addressed the trial court's override of the jury advisory sentence. Although appellate counsel (astoundingly) included legal authority in that portion of the Initial Brief, his choice of authorities was transparently careless and grossly inadequate because of their obvious and fundamental inapplicability. For instance, appellate counsel relied on Taylor v. State, 294 So.2d 648 (Fla. 1974), for the proposition that a trial court cannot impose a death sentence "without weighing the aggravating and mitigating circumstances as required by the death penalty statute." (Initial Brief, p.33). Obviously, that was not the situation in petitioner's case, even remotely, because the trial judge issued written findings expressly, if erroneously, weighing the aggravating and mitigating circumstances as he viewed them.

Appellate counsel similarly relied on Slater v. State, 316 So.2d 539 (Fla. 1975), for two propositions. First, that a co-defendant's lesser sentence should mitigate against other co-defendants receiving capital punishment. Because there were no co-defendants in this case, appellate counsel's choice of legal authority was vulnerable to easy and correct distinguishment. The second Slater proposition was that the "jury was not limited to consideration of the statutory mitigating circumstances." (Initial Brief, p.33). There was no hint in this case that the jury was so limited, making Slater inapplicable altogether.

Finally, appellate counsel relied on Chambers v. State, 339 So.2d 204 (Fla. 1976), for the proposition that "a homicide resulting from a lover's quarrel" and the resulting "extreme mental and emotional conditions present in the relationship" should be utilized in mitigation. (Initial Brief,

p.34). Appellate counsel, however, neglected to develop the "lover's quarrel" involved herein. Moreover, appellate counsel failed to explain how the factual particulars of that quarrel justified it as a mitigating factor.

Thus, appellate counsel's briefing throughout Section III of the Initial Brief was little more than a cosmetic attempt to generate the trappings of appellate legal assistance. His inattention to factual detail, his cavalier choice of legal authority and his off-hand method of making conclusory assertions afflicted that entire section of his Initial Brief. Moreover, they caused him to ignore the important, and sometimes pivotal, factual and legal intricacies necessary for a fair and proper appeal of this case.

In Section IV of the Initial Brief appellate counsel put together a "kitchen sink" argument wherein he fleetingly mentioned a number of points (including the prosecutorial misconduct) which were meritorious and required significantly more development than a bare mention in order to present them in a "manner designed to persuade the court of [their] gravity." Wilson, 474 So.2d at 1165. For instance, in addressing petitioner's arrest, appellate counsel merely asserted that, "The defendant was arrested illegally... no warrant for his arrest was in existence nor was the arrest based upon probable cause." (Initial Brief, p.36). From that assertion, appellate counsel lept to the conclusion that, "Since the arrest was illegal, the trial court was without jurisdiction." (Initial Brief, p.36). Appellate counsel altogether omitted any legal analysis or authority in support of his assertion.

Specifically, appellate counsel failed to even mention the Uniform Criminal Extradition Act, adopted by both Florida and Michigan, which governed this issue. As shown below, the uniform statute would have compelled a finding that the extradition procedure employed in this case, as well as petitioner's purported waiver of his rights pursuant to the statutory procedure, were invalid. Accordingly appellate

counsel could have secured a different outcome but for his unilateral deficiency, thus demonstrating actual prejudice.

Similarly, appellate counsel referred to the improper prosecutorial misconduct quoted previously herein, but unlike the discussion herein, omitted to set forth the substance of the misconduct so that this Court could appreciate its offensive audacity. That entire section of the Initial Brief was fraught with the same lack of depth, analysis, legal authority and persuasive advocacy which are highlighted herein above. Petitioner invites this Court to re-visit the Initial Brief to satisfy itself of its gross inadequacy. Suffice it to say that the potpourri section of appellate counsel's briefing regarding the "fairness" of petitioner's trial provided a bare citation to a single case and was otherwise devoid of legal substance or advocacy.

Section V of appellate counsel's argument in the Initial Brief, arguing the unconstitutionality of the Florida death penalty statute, cannot be compared directly with any of trial counsel's work-product contained in the record on appeal. It is well known, however, that Section V was a basic "form" argument which routinely appeared in numerous capital appeals before this Court at the time of petitioner's direct appeal. Indeed, while attempting to absolve his lack of original or independent effort, appellate counsel admitted as much: "These issues are presented in summary form in recognition of the fact that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida Death Penalty Statute." (Initial Brief, p.45).

Petitioner recognizes that appellate counsel must acknowledge prevailing law. Petitioner further recognizes the duty of appellate counsel to assert good faith arguments for the "extension, modification or reversal of the law." CPR, Canon 7, Ethical Consideration 7-4 (1986). In making such good faith arguments, appellate counsel was under a duty to do so "both in writing and orally, in such manner designed to persuade the

court." Wilson, 474 So.2d at 1165. Petitioner, then, does not fault appellate counsel's recognition of existing law: the objection is to his attempt to use that recognition in order to alleviate himself of the duty to function as an effective advocate with regard to that issue, as shown immediately below.

Appellate counsel began his argument relating to the unconstitutionality of the Florida death penalty statute by dwelling on a historical, and unnecessary, review of basic law beginning with Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Appellate counsel's conspicuous attention to landmark cases which stand for abstract propositions with which today there is no real dispute is made particularly curious by his even more conspicuous neglect of more recent, and more factually similar, cases. Indeed, in that section, appellate counsel relied exclusively on the general propositions contained in the landmark (and easily cited) cases without attempting any persuasive and substantive analysis based on recent and factually analogous decisions concretely applying their fundamental propositions.

The most recent case cited by appellate counsel in Section V of the Initial Brief was the 1980 case of Williams v. State, 386 So.2d 538 (Fla. 1980). Even Williams constituted inadequate advocacy because appellate counsel merely cited it for the proposition that, "It is clearly improper to base a death sentence solely on information contained in the presentence investigation report." (Initial Brief, p.44) (emphasis supplied). Because the trial court in the instant case did not do any such thing, that proposition was absolutely irrelevant to petitioner's direct appeal. Thus, appellate counsel in that section of the Initial Brief glossed over the good faith, meritorious arguments which he could have advanced while unduly dwelling on older or inapplicable (but easily cited) cases.

1. Presnell: The Substantive and Procedural Unconstitutionality of Petitioner's Death Sentence Pursuant to Florida's Death Penalty Statute.

A primary argument which appellate counsel should have researched, developed and briefed in Section V was the unconstitutionality of the Florida death penalty statute based on Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1979). In Presnell, the United States Supreme Court held that, "Despite the fact that parts of the record might support the various elements" of various offenses, "the defendant was entitled to have the jury conclude that each element be found as part of a single offense actually charged and instructed." Prejean v. Blackburn, 743 F.2d 1091, 1097 (5th Cir. 1984). In essence, the United States Supreme Court determined that, absent a lawful conviction, an alleged offense cannot be used to supply an aggravating circumstance in order to justify imposition of the death penalty to punish a separate crime. Presnell, 439 U.S. at 16-17. Consequently, Florida's statutory scheme was -- and is -- unconstitutional as applied to the instant case.

It is axiomatic that an accused is constitutionally presumed innocent until the state, by competent evidence, has established beyond a reasonable doubt, and to the satisfaction of a jury, that the accused is guilty of each and every element of the crime actually charged. Consequently, petitioner cannot lawfully be convicted of a crime for which he was not charged and tried. Petitioner was never charged with, tried for, nor convicted of, burglary, robbery or kidnapping. The state cannot therefore take petitioner's life on the basis of a de facto bench "conviction" for alleged, uncharged, untried offenses thought by the trial judge to aggravate a separate offense. Yet, this was -- and is -- precisely the effect of the Florida death penalty statute as applied to this case, thus allowing the state to bootstrap its case for executing petitioner without due process of law.

Presnell's prohibition, moreover applies regardless of whether "evidence in the record supported the conclusion that petitioner was guilty of that [aggravating] offense" because otherwise, the statute would invite impermissible bootstrapping contrary to basic due process concepts. Presnell, 439 U.S. at 16. The prohibition flows from fundamental, constitutional due process considerations. See, e.g., Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948). Florida's death penalty statute, therefore, cannot be used to deprive petitioner of his right to trial by jury with respect to any alleged offense which the prosecution desires to rely on in justification of capital punishment. Rather, the prosecution must first charge and then convict petitioner of the alleged offenses before relying on such to dispatch petitioner to the executioner.

In the instant case, petitioner was charged by indictment with a single crime: first degree murder. The state tried him for, and the jury convicted him of, this crime only. The trial judge then relied on his unilateral conclusions that petitioner had committed other, uncharged crimes in order to justify his override of the jury and impose the instant death penalty. In effect, the trial judge's unilateral conclusions were -- and are -- the functional equivalent of convictions for each of the alleged offenses utilized to justify the imposition of capital punishment. The prosecution's fatal error, of course, was in failing to charge the underlying offenses in a timely manner.

Petitioner consequently remains incarcerated by the State of Florida under an unlawful sentence of death pursuant to an infirm sentencing procedure and in violation of his due process rights as secured by the Fourteenth Amendment to the United States Constitution. Furthermore, petitioner's incarceration and death sentence were affirmed by this Court as a consequence of appellate counsel's ineffectiveness in briefing and arguing the unconstitutionality of the Florida death penalty statute and in

violation of his Sixth Amendment right to effective legal assistance. Accordingly, this Court must grant petitioner the relief requested herein.

In sum, in an Initial Brief containing a total of 48 pages, only 26 pages -- barely half -- contained legal argumentation. Discounting the six "boilerplate" pages dedicated to the unconstitutionality of the death penalty statue, there are at most 20 pages of substantive legal argument in appellate counsel's Initial Brief. Of those pages, at least eight pages were appropriated verbatim from his predecessors. Likewise, of the forty-seven cases cited in the Initial Brief, at least twenty-three were appropriated from the sections plagiarized verbatim from trial counsel's memoranda. Appellate counsel's Initial Brief, in short, was essentially prepared, unsuccessfully, by his predecessors without the benefit of substantial independent review or effort on appellate counsel's part.

Appellate counsel's lack of diligence and his wholesale appropriation of others' work-product during the direct appeal was so unabashed, moreover, that it was transparent even to his layman client. When appellate counsel mailed petitioner a copy of the Initial Brief on or about December 28, 1981 -- after having already filed it -- petitioner complained:

> Mr. Goodman, the appeal brief is very weak. The issues you used, other than the death sentence issue, you obviously took from the transcripts. The wording is practically the same as when my trial lawyer filed on those issues, before I even had this sentence.
>
> I hope that you will take time to respond to this letter, because I am really not pleased with what you are doing.

(Composite Exhibit B, p.3) (emphasis supplied). Appellate counsel, however, persisted in submitting to this Court the very same work-product which had already been rejected by the trial court. Appellate counsel thus ignored his clear legal duty to research, prepare and assert persuasive positions pursuant to his appointment by the trial court.

Appellate counsel's absolute failure to conduct virtually any independent work resulted in actual prejudice, as well as in a constructive denial of counsel. The actual prejudice resulted from appellate counsel's failure to brief this Court on dispositive points, such as the prosecutorial misconduct, thereby undermining the appeal's outcome. The presumptive prejudice arose because appellate counsel's total lack of preparation during the briefing stage precluded him from acting knowledgeably, competently and persuasively in order to ensure the proceeding's requisite adversarialness. Appellate counsel's disgraceful oral argument before this Court, as documented later in this petition, confirmed his gross negligence in the preparation and briefing of that appeal. Clearly, petitioner's appellate counsel was never competent to be entrusted by the courts of this state with a capital appeal.

C. Issues Deficiently Omitted by Appellate Counsel from Initial Brief.

Because this Court has recognized that, "Death penalty cases are different and consequently, the performance of counsel must be judged in the light of these circumstances," Knight v. State, 394 So.2d at 1001, counsel in capital cases must perform their duties with a conscious regard for the grave, final consequences of inadequate representation. Likewise, this Court must evaluate the effectiveness of counsel's performance with the highest standards and expectations called for in capital cases. This is particularly true when counsel's ineffectiveness centered on his deficient failures to raise and preserve issues. Such failures undermine both the immediate proceeding as well as all subsequent proceedings because issues omitted and thereby not preserved are subsequently barred from future judicial consideration due to the initial, unjustifiable omissions. All future proceedings, therefore, cannot, by definition, be fair and complete.

Absent a future legal finding of fundamental error, petitioner will now be barred in subsequent post-conviction proceedings from raising issues omitted by his appellate counsel during the direct appeal before this Court. J.L. Smith v. State, 453 So.2d 388, 389 (Fla. 1984); McCrae v. State, 437 So.2d 1388 (Fla. 1983). Furthermore, appellate counsel's omissions may also be construed as a waiver of such issues in a subsequent federal habeas corpus proceeding under 28 U.S.C. § 2254(d). See, e.g., Campbell v. Wainwright, 738 F.2d 1573, reh'g denied, 746 F.2d 815 (11 Cir. 1984); Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). In effect, petitioner may now never receive the benefit of any judicial review of the trial court's errors due to appellate counsel's unjustifiable omissions during the direct appeal before this Court. Petitioner thus has suffered actual dual prejudice as a consequence of the omissions discussed in this section because he was thereby denied both his day in this Court with respect to each such issue, as well as his days in all other courts with respect to each consequently barred issue.

1. Trial Court's Improper and Express Reliance on "Presumption" in Favor of Capital Punishment to Override Jury and Impose Death Penalty.

Appellate counsel failed to brief, argue, and preserve for future judicial review the trial court's erroneous imposition of the death penalty due to the trial judge's misconceptions regarding the applicable guidelines as expressed in the instant judgment and sentence. [R.-175-77]. The trial court, as noted earlier, elected to override the jury's recommendation of life imprisonment. [R.-475]. That recommendation was based upon the jury's finding that, under the facts proven at trial beyond a reasonable doubt, a sentence of life imprisonment was appropriate and lawfully should have carried great weight.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), the seminal pronouncement on judicial overrides of jury life recom-

mendations, this Court upheld the jury's traditional role in American jurisprudence. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910 (emphasis supplied). Paragraph six of the trial judge's judgment and sentence, however, states:

> The crime of which the Defendant stands convicted is an aggravated capital felony for which the law of Florida presumes death to be the appropriate penalty, unless the aggravating circumstances are outweighed by mitigating circumstances.

[R.-176] (emphasis supplied). The trial judge's written conclusions, also asserting that Florida law presumptively requires a sentence of death for an aggravated capital felony, [R.-185], reiterated that misconceived view of current capital case law as developed by this Court and the United States Supreme Court since the enactment of Florida's post-Furman statute. Of course, no such presumption in fact exists.

The notion of a "presumption" favoring the death penalty in aggravated capital felonies of course stems from the early case of State v. Dixon, 83 So.2d 1, 9 (Fla. 1973), this Court's initial review of Florida's post-Furman death penalty statute. The instant court's express application of such a "presumption" in petitioner's case, almost a full decade of after Dixon, was erroneous in light of Tedder v. State, 332 So.2d at 908, and numerous other rulings which have firmly established the current -- and correct -- constitutional guidelines governing the imposition of the death penalty in Florida. Such a "presumption", indeed, would do violence to every jury recommendation of life, effectively usurping the jury's role altogether.

Although one aggravating circumstances may in some situations suffice to justify the death penalty, this Court has, since Dixon, conclusively established that Florida's capital sentencing procedure is not a mere counting process between aggravating and mitigating circumstances, "but rather a reasoned judgment as to what factual situations require [not presume] the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." Randolph v. State, 463 So.2d 186, 193 (Fla. 1984) (emphasis supplied).

Appellate counsel, however, failed to present for this Court's consideration the trial judge's express application of an out-dated, non-existent and erroneous, "presumption" in favor of the death penalty to justify his jury override despite this Court's clear declaration that jury recommendations must prevail unless "virtually no reasonable person could differ" with the propriety of imposing the death sentence. In view of that clear error as established by the record on appeal, appellate counsel's omission was extremely prejudicial. It may cost petitioner his life.

Furthermore, the trial court's application of that "presumption" to override the jury's recommendation of life imprisonment was contrary to the due process requirements of the United States Constitution as set forth by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Proffitt, the Supreme Court noted that, "[T]he sentencing judge must focus on the individual circumstances of each homicide and each defendant." 428 U.S. at 252 (emphasis supplied). The trial court's stated "presumption" is contrary to Proffitt because it shifted the analytical focus away from the alleged crime and its alleged perpetrator, thereby relieving the trial court of its ultimate duty to weigh the unique, particular circumstances of each case and, in effect, reverting to the "mere counting process" expressly prohibited by

this Court since Dixon and, especially, in Randolph, 463 So.2d at 193.

2. Trial Court's Improper and Express Reliance on Victim's Virtues and Lifestyle to Override Jury and Impose Death Penalty.

Although appellate counsel cosmetically briefed and attempted to orally argue the trial court's findings regarding aggravating circumstances, he never raised, and thereby failed to preserve, the trial judge's improper and express considerations regarding the victim's perceived virtuosity. [R.-180-86]. In his written Findings of Fact the trial judge erroneously and improperly relied on his personal, moralistic views of the victim's "good" traits and lifestyle to support his personal finding of two aggravating circumstances. The trial judge, for instance, made repeated and specific references to the alleged victim as "a widower who lived at home alone and devoted his retirement years to community volunteer service", [R.-181], in support of his findings with respect to the first aggravating circumstance.

In that first circumstance, the trial court considered whether petitioner had committed a burglary or kidnapping in conjunction with the homicide. A victim's relative virtuosity is not an element of either offense. The victim's virtues or lifestyle therefore had no material bearing as to this first aggravating circumstance. The trial court's emotive dwelling on its subjective moral beliefs thereon was consequently erroneous and impermissible with respect to the first aggravating circumstance.

More significantly, the trial judge interjected similar immaterial, personal beliefs almost exclusively to justify his finding that petitioner's alleged conduct was especially heinous, atrocious or cruel. The finding, verbatim, reads as follows:

> WHETHER this capital felony was especially heinous, atrocious and cruel.

> FACTS: The victim was retired, a widower, who devoted his retirement years to community service. He lived at home alone. Upon returning home one Sunday evening, after working at the hospital followed by dinner with friends, he was assaulted with a firearm in the sanctity of his home in his own bedroom, bound hand and foot, and gagged. Money was taken from his wallet from his person and ceramic banks were broken on the floor. He was physically carried out of his own house, thrown into the trunk of his own car, and driven out of town down back roads in the middle of the night. He most surely knew that he was going to die. He tried to escape by disconnecting the back lights to the car. He was taken to an isolated area, removed from the trunk and shot three times.
>
> CONCLUSION: This capital felony was especially heinous, atrocious, and cruel, an aggravating circumstance under Section 921.141(5)(h). Florida Statutes 1979, which justifies imposition of the death sentence.

[R.-183]. Those extensive references were clearly improper because the Florida capital sentencing statute does not recognize a victim's "goodness" or lifestyle as a basis for deciding an appropriate penalty for a capital felony. See § 921.141, Fla. Stat. (1985).

Moreover, as previously noted, the United States Supreme Court has also established that the sentencing judge must focus on each defendant and his crime, not the victim of that crime. Proffitt, 428 U.S. at 252. Of course, the avoidance of such irrevelant, and positively subjective, considerations is the very reason for the constitutionally-mandated focus on the accused and the offense. Otherwise, identical criminal acts could be disproportionately punished depending only on the sentencer's subjective view of the victim's relative "goodness" or social worthiness, thus inviting the freakish, discriminatory and inconsistent punishments outlawed by and since Furman.

Appellate counsel, presumably aware of controlling law and of the trial court's skewed considerations, was ineffective in failing to present that issue to this Court for consideration on appeal. He also thereby failed to preserve it for subsequent

post-conviction proceedings. Alternatively, if appellate counsel was not aware of the law controlling the facts reflected in the trial record, either before or after his appointment, his failure to be so aware constituted a dereliction of his duties as enunciated by this Court in Wilson. Appellate counsel's omission of that issue was prejudicial in any event because it denied petitioner this Court's consideration of the trial court's clear error, thereby undermining the appeal's outcome.

3. Trial Court's Improper Allowance of Unsupervised Entry by Non-Juror to Jury Room For Substantial Portion of Jury Deliberations.

Appellate counsel also failed to address and preserve the propriety of allowing the court reporter into the jury room for a substantial portion of jury deliberations without any judicial safeguards. The record shows that, after the jury had been out for only five minutes, they returned to the courtroom with certain specific requests. [R.-1174-76]. First, the foreman of the jury informed the trial court that the jurors had not been able to hear the testimony of the prosecution's "star" witness, Colleen O'Brien. [R.-1177]. They therefore requested a transcript of O'Brien's testimony, a transcript of the testimony of another witness, and a tape recorder with which to listen to the tape of petitioner's out-of-court statement. [R.-1177].

The trial court denied the jury's request for the transcripts, but supplied the jury with the court reporter's tape recorder and allowed the court reporter entry into the jury room to operate the machine. [R.-1179]. The court reporter entered the jury chambers and remained there for 20 minutes, [R.-1179], even though petitioner's tape-recorded statement was only twelve minutes long, ostensibly only to operate a machine with which the reporter must have been quite familiar due to past experience. [S.R.-13-20]. The entire length of jury deliberations was seventy-five minutes, 20 minutes of which a

non-juror was present in the jury room without any supervision or any documentation of what transpired during that time. [R.-1174-80].

Although the integrity of the jury decision-making process is a cornerstone of due process, appellate counsel failed to alert this Court to the record fact that a non-juror had been in attendance during almost one-third of the total jury deliberations for this capital charge. Petitioner was thereby right to have this Court consider on its merits that particular, and potentially highly dangerous, irregularity. Furthermore, appellate counsel omitted to request leave to interview or poll the jurors. In light of the trial judge's override based on his misconceived presumption in favor of death sentencing, his improper consideration of the victim's perceived goodness, and the unusual allowance of an unsupervised foreign presence in the jury room during almost one-third of the total jury deliberations, appellate counsel's failure to seek an interview or polling of the jury is prima facie evidence of his altogether ineffective legal assistance.

4. Additional Issues Prejudicially Omitted by Appellate Counsel Although Previously Identified By Trial Counsel.

A self-evident starting point for every appellate counsels' analysis of appropriate issues to be developed in a complex capital appeal is the trial counsel's statement of judicial acts to be reviewed. That starting point was even more critical in the instant case due to the trial court's appointment of unqualified counsel to represent petitioner on direct appeal. Petitioner's appellate counsel, however, failed to brief and argue -- or even mention -- various meritorious issues already conveniently identified for him by trial defense counsel in the instant Statement of Judicial Acts to be Reviewed. [R.-187-91].

Appellate counsel's deficient failure to adequately research and brief the already-identified issues, as outlined below, prejudiced petitioner. Petitioner was denied access to this Court with respect to the merits of each such issue as a result of appellate counsel's blanket omission of the already-identified issues. Petitioner may also now be barred from raising those issues in subsequent judicial proceedings. In effect, appellate counsel's omissions have denied petitioner the opportunity to ever have the merits of all such issues judicially reviewed. Appellate counsel's omissions are inexcusable, moreover, because each such issue had already been neatly pin-pointed for him. Thus, appellate counsel only needed to research the law, apply it to the facts of his client's case and raise the relevant, meritorious points for this Court's consideration.

a. Trial Judge's Failure to Receive and Consider all Material Evidence Prior to Ruling in Favor of Admitting Petitioner's Out-of-Court Statement into Evidence.

Although addressing defendant's objections to the admissibility of his out-of-court statement at trial, appellate counsel failed to raise the issue presented by trial counsel in paragraph twelve of the Statement of Judicial Acts. In that paragraph, trial counsel identified the impropriety of the trial judge's conclusive acceptance of evidence presented at a prior session of petitioner's suppression hearing held before a different judge to determine the admissibility of petitioner's out-of-court statement. [R.-18]. That deficient omission was critical because petitioner's out-of-court statement, ultimately, was the only real evidence prompting his conviction due to the jury's inability to hear the testimony of the state's "star" witness and the only third-party witness to the events in question.

The facts of that bizarre procedural twist are as follows. On February 1, 1980, defense trial counsel filed a motion to suppress petitioner's "confession". [R.-14]. On April 15 and 16, 1980, a hearing on the defense motion to suppress was held with Judge William T. Swigert presiding. [R.-199-277]. After hearing the testimony of two officers from the Marion County Sheriff's Office who were present during petitioner's interrogation, as well as the testimony of the petitioner, Judge Swigert denied the motion to suppress. [R.-272-73]. None of the Michigan police officers that had, in fact, arrested petitioner testified at this initial suppression hearing although the confession's admissibility was challenged on Miranda grounds, voluntariness grounds and legality-of-the-arrest grounds. Nor, indeed, were the several Michigan officers admittedly present during petitioner's tape-recorded statement called to testify at that time.

Because the admissibility of petitioner's out-of-court statement hinged on both the legality of the arrest effected by Michigan police and the "totality of circumstances" surrounding petitioner's interrogation with both Florida and Michigan police present, the testimony from Michigan police was singularly important. In fact, the testimony from the Michigan officers who actually effected petitioner's arrest was indispensible to an affirmative judicial finding that their questionable procedural conduct was in fact lawful. Accordingly, the first session of the suppression hearing concluded, but with incomplete evidence on the record.

Later, during the trial with Judge Angel presiding, the suppression hearing was reopened so that the Michigan officers' missing testimony could be proffered. [R.-989-1031]. When the presentation of evidence concluded Judge Angel denied the motion to suppress, stating:

> Taking into consideration and taking judicial notice of all prior proceedings before Judge

> Swigert in which--after a thorough hearing and evidentiary hearing and law presented to Judge Swigert he ruled that the confession or statement would be admissible, that being the law in the case, at this point and now having heard additional evidence that was not presented to Judge Swigert, I find that the additional evidence that has been presented here does not establish that the statements were not freely and voluntarily given and do not established any ground which would exclude these statements or admissions by the Defendant. Therefore, I find, again, that any statements made by the Defendant were freely and voluntarily made after a knowing intelligent waiver of his Constitutional Rights and, further, that they were not made or induced by any threats or promises.

[R.-1031] (emphasis supplied).

Of course, on a motion to suppress, the presiding judge acts as the fact-finder and must weigh all available material evidence before positively certifying the out-of-court statement's voluntariness. Weighing all the reasonably available material evidence is essential because legal voluntariness is determined by the "totality of circumstances" surrounding the subject statement. See, e.g., Fikes v. Alabama, 352 U.S. 191 88 S.Ct. 281, 1 L.Ed.2d 561 (1957). The instant trial judge's unquestioning, sweeping acceptance of another judge's incomplete fact-finding conclusions as the "law in the case" was therefore both technically incorrect and highly suspect.

It was technically incorrect because Judge Swigert's factual, incomplete conclusions were not "law". It was highly suspect because Judge Angel, the ultimate decision-maker, never received, much less considered, all of the relevant, available

evidence, thus prematurely concluding that the prosecution had met its burden of proof. This was especially true in view of the "totality of circumstances" evidentiary standard governing the legal voluntariness of petitioner's out-of-court statement. It was, after all, literally impossible for the trial judge to consider evidence presented at a hearing during which he was not present.

In light of the above peculiar circumstances, the trial judge needed to conduct a de novo evidentiary hearing before definitively ruling on petitioner's motion to suppress, especially because all of the witnesses who testified at the initial hearing were conveniently available to the trial judge. Surely, with an unusual procedural sequence of events centering on matters with constitutional dimensions during a capital proceeding, the trial judge should have arranged for a satisfactory consideration of all relevant testimony from all important witnesses before positively certifying the statement's legal voluntariness. As it was, however, neither Judge Swigert nor Judge Angel ever received and considered the necessary evidence to ascertain the statement's voluntariness. Thus, petitioner was denied his due process right to a fair judicial determination of his statement's admissibility by an appropriately informed judge and in accordance with the "totality of circumstances" evidentiary standard which governed that issue. Nonetheless, appellate counsel ignored that previously-identified issue altogether.

b. Trial Judge's Express and Improper Shifting of Evidentiary Burden From State and Onto Petitioner to Prove Involuntariness of The Out-of-Court Statement.

In addition to being without an adequate testimonial foundation, the trial judge's final ruling was erroneous because it effectively shifted the burden of proof from the prosecution to the accused based on Judge Swigert's prior ruling. It must

be remembered, of course, that the "reopened" suppression hearing was not an appellate procedure where a presumption of correctness in favor of prior findings could be said to apply. Rather, the trial court's bifurcated continuation of the same proceeding in the same court required that the prosecution's evidentiary burden to establish admissibility by a preponderance of the evidence remain constant. See, e.g., Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). Yet, the trial judge's unequivocal ruling that the "additional evidence" he considered "[did] not establish that [petitioner's] statements were not freely and voluntarily given" had expressly and improperly shifted the prosecution's evidentiary burden to petitioner. That shifting of evidentiary burdens was thus erroneous. Appellate counsel, however, inexcusably failed to brief or argue that issue also.

c. Jury's Rendition of Guilty Verdict Despite Admitted Failure to Perceive or Understand Indispensible Testimony of Only Eye-Witness.

Appellate counsel also failed to assert or brief the failure of the trial judge to, sua sponte, declare a mistrial when advised by the jury that they had not heard, inter alia, the testimony of Colleen O'Brien, the prosecutions's chief witness. O'Brien was the only eye witness, besides petitioner, to the subject events. The jury's total failure to perceive O'Brien's indispensible testimony had already been identified for appellate counsel by trial counsel in paragraph twenty-six of the Statement of Judicial Acts. [R.-189].

As previously discussed, the jury had returned to the courtroom within a few minutes of having recessed and announced that they had not been able to hear certain key testimony. [R.-1174-78]. Nevertheless, appellate counsel failed to raise or argue the propriety of a conviction based on evidence or testimony which the jury had admittedly not understood or heard. Without having perceived such indispensible evidence,

the jury's verdict became unsupportable because it was based on evidence they actually could not have considered during their deliberations.

Without such evidence, moreover, it was -- and still is -- difficult to imagine how that jury could have overcome all reasonable doubts against the constitutional presumption of innocence, as the law required them to do. Clearly, the jury's verdict was not supported by the evidence they actually heard and considered in rendering their judgment, making petitioner's conviction based an insufficient evidence violative of petitioner's due process rights and, consequently, unconstitutional.

d. Trial Court's Unjustified and Prolonged Delay of One-Hundred and Twenty-nine (129) Days Between Conviction and Sentencing.

Finally, appellate counsel failed to brief and argue the issue presented in paragraph thirty-seven of the Statement of Judicial Acts. [R.-170]. In that paragraph, defense trial counsel pointed out that a delay of 129 days had elapsed from the time of the jury's recommendation of life imprisonment to the trial judge's override of that recommendation. The trial court's excessive delay prejudiced petitioner because it unnecessarily placed him in the position of languishing in a jail cell for 129 days agonized by the trial judge's prolonged procrastination, knowing the possibility of a death sentence was ever-present and wondering what the judge had decided to do with his fate. This capricious and unjustifiable period of suspended animation violated petitioner's constitutional right to a reasonably timely imposition of sentence. Juarez-Cesares v. United States, 496 F.2d 190, 192 (5th Cir. 1974). The proper remedy for such a violation, moreover, is vacation of the sentence and release of the prisoner. Id. at 193. Appellate counsel, however, omitted any discussion of that substantive constitutional issue from his briefs and oral argument, thereby prejudicially denying petitioner

the opportunity to have this ultimate of penalties vacated and to obtain his freedom.

Appellate counsel's failures to brief and argue the above enumerated issues specifically set out for his consideration by trial counsel, together and separately, amount to an inexcusably substandard performance, for it would be ludicrous to presume a strategic choice on his part to omit each and every such issue altogether. Appellate counsel's omissions, moreover, have also likely barred each of the above issues from consideration throughout subsequent proceedings, thereby further prejudicing petitioner. In the alternative, if appellate counsel is deemed to have made conscious, strategic choices to omit each and every of the above issues, such choices would have constituted a sorely "ill chosen" and prejudicial strategy: "Certain defense strategies may be 'so ill chosen' as to render counsel's overall representation constitutionally defective." Balkcom, 688 F.2d at 738, quoting Washington v. Watkins, 655 F.2d at 1346.

Taken together, the numerous specific omissions outlined above allowed the prosecution's case regarding the omitted issues to stand unchallenged without "meaningful adversarial testing" contrary to Cronic and progeny. The above-documented omissions thus establish presumptive prejudice and compel the relief herein requested. This is particularly true in view of the fact that appellate counsel had absolutely no excuse for ignoring the already-identified meritorious issues briefly discussed herein. This Court must therefore issue the requested writ, according petitioner the opportunity to raise, argue and preserve the above issues during a new -- and fair -- appeal before this Court.

D. Issues Ineffectively Briefed in Reply to Answer Brief: The Voluntariness Objection, The Pregnancy Cramps and The Burglary Statute.

Appellate counsel's brief in reply to the state's arguments was as deficient as his Initial Brief. Although,

as developed below, the state's Answer Brief had introduced new legal points into petitioner's appeal, appellate counsel failed to provide effective replies to the state's various arguments. Specifically, appellate counsel was deficient in his reply to the state's argument regarding the alleged waiver of petitioner's objection to the admissability of his out-of-court statement. Additionally, appellate counsel deficiently replied to the state's argument concerning O'Brien's pregnancy cramps. Finally, appellate counsel was deficient in his reply to the state's burglary statute argument.

1. Appellate Counsel's Deficient Reply to State Argument Regarding Petitioner's Alleged Waiver of the Voluntariness Objection.

In its Answer Brief, the state commenced its voluntariness argument by noting that, "The law is settled that the failure to renew a specific objection at trial contemporaneously with admission of the contested evidence constitutes a waiver" thereof. (Answer Brief, p.8). The state then asserted that defense trial counsel objected to the introduction of petitioner's out-of-court statement only on the basis that a proper predicate had not been established. (Answer Brief, p.8). In reply, appellate counsel appropriately provided this Court with the precise phrasing of the critical objection, quoting it from the record. (Reply Brief, p.5). Appellate counsel's deficient omission, however, was his failure to provide any analysis to accompany that bare quotation.

As was his custom, appellate counsel merely asserted in summary fashion that, "The foregoing statement of defendant's trial counsel read in the context of the sequence of events at trial reflects that the issues concerning admissibility of the confession had been preserved as more fully set forth in Defendant's initial brief." (Reply Brief, p.5). Appellate counsel's duty, however, was to apprise this Court of "the context of the sequence of events at trial" to which he referred. Moreover,

his reliance on the Initial Brief was totally misplaced because the Initial Brief likewise omitted to address "the sequence of events at trial" which assertedly negated a waiver of the voluntariness objection.

As appellate counsel mentioned, the precise objection at trial must be fairly viewed within the context of that proceeding. During both the pre-trial and trial stages of this case petitioner had resolutely asserted and maintained the involuntariness of his out-of-court statement. He does so still to this day. Petitioner had, specifically, vigorously contended since the date of his arrest that his statement was part and parcel of an agreement with Florida police during their one-day visit to Michigan on December 5, 1979.

Petitioner had emphatically asserted the involuntariness of the statement by virtue of the pre-trial motion to suppress. The hearing of that motion, as noted previously in this petition, was hampered by its procedural bifurcation. At the conclusion of the hearing's second and final session during the trial proper, Judge Angel definitively denied petitioner's motion to suppress.

When later during the trial the prosecution attempted to introduce the tape of the statement, defense counsel renewed petitioner's long-standing opposition to its admissibility, stating:

> I object, other than the Court's prior ruling which I'm aware of, object on the ground that there has not been a proper predicate to its publication to the Jury.

[R.-1041]. The sequence of events preceding the objection, outlined above for this Court's consideration, established that this phraseology cannot reasonably be construed as "the intentional relinquishment of a known right." Masser v. London Operating Co., 106 Fla. 474, 145 So. 79 (Fla. 1932). Moreover, the above objection, read in the context of petitioner's consistent and

adamant opposition to the statement's voluntariness, did not warrant an inference that petitioner intended to waive or relinquish his long-standing opposition to the statement's voluntariness at the critical juncture of actual admission into evidence.

Even if taken out of context, the plain and reasonable import of trial counsel's precise wording did not warrant a finding of waiver. Defense trial counsel's precise phrasing was: "I object, other than the Court's prior ruling which I am aware of..." A fair reading of defense trial counsel's objection compelled the conclusion that petitioner's opposition on the voluntariness issue remained constant and, in addition thereto, petitioner was interposing an independent objection to its admissibility on the distinct basis of an improper predicate. The objection, in its totality, must therefore fairly be read as: "I object, in addition to the Court's prior ruling which I am aware of...", and not as: "I object, but not including the Court's prior ruling which I am aware of..." Appellate counsel's failure to analytically elaborate on the summary assertion contained in his Reply Brief was prejudicially deficient because it denied this Court an accurate view of the subject, and pivotal, events.

Appellate counsel's omissions regarding petitioner's out-of-court statement are dramatically underscored by the jury's conceded inability to perceive O'Brien's testimony. Absent petitioner's out-of-court statement, of course, her testimony would have been the only evidence to support petitioner's conviction. This was true because, as previously noted, she was the only witness, besides petitioner himself, competent to testify regarding the events in question. Thus it was incumbent on appellate counsel to ensure success on that crucial issue.

2. Appellate Counsel's Deficient Reply to State Argument Regarding O'Brien's Pregnancy Cramps.

With respect to O'Brien's pregnancy cramps, the state conjured some interesting -- and absolutely baseless -- arguments. The pregnancy cramps were central to the trial continuance and speedy trial extension which were subsequently the basis for denial of petitioner's motion for discharge. The trial court's error and abuse of discretion with regard to the pregnancy cramps therefore rendered both the granted trial continuance and speedy trial extension, as well as the denied motion for discharge, erroneous. As such, petitioner was denied his constitutional and statutory rights to a speedy trial.

Specifically, the assistant attorney general representing the state on appeal argued, for the first time, that the assistant state attorney representing the state at trial had not relied on O'Brien's pregnancy, but on the nature of her pregnancy, for the requested trial date continuance and speedy trial extension:

> What he [appellate counsel] fails to either note or comprehend is that the basis of the State's motion for a continuance was not the pregnancy of Colleen O'Brien; the State sought to postpone trial because of the particular nature of Colleen's pregnancy, as evidenced by a statement from her doctor, which prevented her from traveling from Flint, Michigan to Florida or at during scheduled trial time. The statement of the doctor (R. 45) reveals that he did not feel the patient should travel due to the fact that she was experiencing extreme cramping at a time approximately two months prior to expected delivery date.

(Answer Brief, p.14). The state's argument on appeal was both factually inaccurate and logically specious.

From a factual viewpoint, the record on appeal established that the trial-level prosecutorial authorities never attempted during the subject motion to differentiate the pregnancy from the cramping. Of course, any such attempt would have been a blatant sophistry, for the latter is but a foreseeable

physiological manifestation of the former. Consequently, the state's appellate argument amounted to nothing more than a belated fiction which had no actual bearing on the trial court's ruling during the time of the proceedings in question.

In like vein, the state's appellate advocate trivialized petitioner's constitutional right asserting that, "Appellant only quarrels that delivery was a foreseeable consequence of pregnancy and thus not an exceptional circumstance. He has failed to realize that condition of the pregnancy and not delivery was the basis for the motion and thus, he is unable to show an abuse of that discretion." (Answer Brief, p.16) (emphasis supplied). Again, the state was belatedly attempting on appeal to draw a false distinction between "condition of the pregnancy" and "delivery." The medical advice and legal argument upon which the prosecution exclusively relied for its motion specifically recited that it was the "stage of pregnancy," -- so near to the expected due date of May 28th -- that made travel undesirable and dangerous for O'Brien.

In other words, it was the proximity to the date of delivery which was the precise medical reason for O'Brien's inability to travel, not some other "condition" of her pregnancy. That proximity obviously made her condition delicate. Indeed, the medical advice upon which the prosecution expressly and exclusively relied in support for its motion never even alluded to any peculiar "condition" of O'Brien's pregnancy. Neither did the prosecution in its legal arguments to the trial Court. Consequently, the state's belated appellate position was both at variance with its trial level position and totally without substantive merit. As such, it called for a careful factual and analytical reply to unmask its intrinsic fallacy.

The record on appeal, moreover, would have provided appellate counsel with all the necessary facts for such a reply. For instance, in its written motion, the prosecution had positively recited O'Brien's pregnancy as the grounds for its requested continuance and extension: "The continuance is necessary

since ... Colleen O'Brien is pregnant and the expected delivery date is late May, 1980, which pregnancy has incapacitated the said Colleen O'Brien in that she is unable to travel or endure the excitement or pressure of a trial without exposing the unborn child and herself to unnecessary risks." [R.-46] (emphasis supplied). Plainly the prosecution relied on the pregnancy itself, not on the cramping sophism, at the time in question.

To substantiate those grounds, the prosecution attached a (hearsay) note, presumably from O'Brien's doctor, which, in its entirety, stated that, "The patient is pregnant and expected date of delivery is May 29. I do not feel this patient should travel due to fact she had extreme cramping now." [R.-45]. Thus, the doctor had made absolutely no distinction between the pregnancy and the pregnancy cramps; furthermore, the doctor had attempted no assessment of the pregnancy's "condition," other than to say that the cramps apparently associated with her imminent due date were extreme and advised against travel. Whether those cramps were unusual, unexpected, unforeseeable or otherwise exceptional was simply not addressed.

During the hearing of the motion, the prosecution again exclusively relied on the same medical advice. Specifically, the prosecution stated to the trial court that during a telephone conversation the same doctor had confirmed that, "The assigned due date is May 28 and that it would highly undesireable and dangerous for child and mother to travel in this stage of pregnancy." [R.-279] (emphasis supplied). Clearly, the focus of the medical advice and the prosecution's argument remained fixed at all times (prior to the appellate argument) on the imminent due date; the problem, to quote the prosecution, was O'Brien's advanced "stage of pregnancy." The trial court, having been proffered only those grounds in support of the motion, then granted the prosecution's request for a continuance and extended the speedy trial time period for petitioner's case.

The record on appeal thus disclosed that the prosecution never proffered any evidence whatsoever to affirmatively

prove that O'Brien's cramps were unusual, unexpected, unforeseeable or otherwise exceptional as was required under Florida Rule of Criminal Procedure 3.191(f). The only evidence proffered to the court was that O'Brien was in an advanced state of pregnancy and was experiencing pregnancy cramps. Travel, consequently, was improvident. Accordingly, any unilateral finding, implicit or otherwise, by the trial court that O'Brien's pregnancy cramps were somehow unforeseeable or unexpected pursuant to Rule 3.191(f) would have been without any evidentiary foundation at all, thus constituting an abuse of discretion.

Of course, the law required the prosecution to affirmatively prove (1) the existence of the statutorily specified exceptional circumstances and (2) that such circumstances were not attributable to the prosecution. See Fla. R. Crim. Pro. 3.191 et seq.; See also, Stuart v. State, 360 So. 2d 406 (Fla. 1978); K.M. v. Baker, 366 So.2d 133 (4th DCA 1979); Flournoy v. State, 322 So.2d 652 (2nd DCA 1975); Hogan v. State, 305 So.2d 835 (1st DCA 1974). Florida Rule of Criminal Procedure 3.191 moreover obliged the trial court to have petitioner "forever discharged" unless the prosecution satisfied the Rule's strict requirements. The instant trial court, nonetheless, allowed the prosecution an extension of time in excess of the speedy trial period without any medical advice or other competent evidence to satisfy the prosecution's burden of proof. Accordingly, the trial court abused its discretion and erroneously denied petitioner his constitutional and statutorily rights, under both Florida and Federal law, to a speedy trial. § 918.05, Fla. Stat. (1985).

The trial court's error was made particularly egregious by the documented fact that the prosecution had unilaterally and without explanation delayed bringing petitioner to trial in accordance with the three prior court orders to that effect. Petitioner, of course, had been incarcerated, always available and not once requesting a continuance, awaiting timely trial while the prosecution unduly delayed until a point in time that precisely coincided with O'Brien's expected due date. The

prosecution's preceding delays were thus the real cause of any need to extend the speedy trial time; the supposedly "exceptional" circumstances would never have occurred had the prosecution simply tried petitioner in accordance with the prior court orders. Consequently, the prosecution's unjustified failure to comply with the prior court orders via its discretionary manipulation of the trial docket negated any subsequent finding that the need for a speedy trial extension had not been caused by the state. To this day, the prosecution's unilateral delays remain unexplained and unjustified.

Moreover, it was undisputed on the record that all parties had been actually aware of O'Brien's pregnancy since the date of petitioner's arrest. [R.-224,253]. Because most human pregnancies at or about nine months, the above "coincidence" cannot be brushed aside as mere inadvertence. Additionally, because many human pregnancies entail various delicacies and complications as the gestation period advances, O'Brien's cramps during her penultimate month of pregnancy could not reasonably be deemed as presumptively unforeseeable, unexpected or unusual in any respect. In any event, Rule 3.191 forbids any presumption of unforseeability; furthermore, the Rule expressly forbids the shifting of consequences for a state delay onto the accused. Yet, as illustrated above, the trial court did just that in this case.

With all of the foregoing facts established by the record on appeal, appellate counsel should have alerted this Court to the precise factual circumstances and procedural background surrounding O'Brien's pregnancy cramps. Moreover, the outcome of that issue, had it been effectively argued, could have secured his client's release. Nonetheless, appellate counsel did absolutely nothing in reply to the state's deceptive appellate argument. Instead, he merely replied that, "The Defendant relies on the argument presented in his initial brief on this point." (Reply Brief, p.7).

Appellate counsel's unconscionable, prejudicial omission to provide any reply whatsoever to an argument as factually incorrect and logically hollow as that asserted by the state's appellate advocate must, if nothing else, shock the good conscience of this Court. Indeed, appellate counsel's outrageous failure with respect to this matter must be deemed by this Court to constitute a constructive denial of counsel giving rise to the presumption of prejudice mandated by Cronic and progeny. Consequently, that specific omission gives rise to both actual and presumptive prejudice.

3. Appellate Counsel's Deficient Reply to State Argument Regarding The Florida Burglary Statute.

In its Answer Brief, the state also asserted that petitioner had committed burglary under Section 810.02(1), Fla. Stat. (1985), because he had remained in the subject structure and "obviously... formed the intent to commit an offense." (Answer Brief, p.18). The statutory language referred to by the state in support of its argument did indeed provide that a burglary was deemed to occur when a person remained in a structure with an unlawful intent. The statute, however, also contained an exclusionary proviso: "...unless... the defendant is licensed or invited to enter or remain. " § 810.02(1), Fla. Stat. (1985). If that proviso applied, burglary could not be shown.

Of course, a competent counsel would have recognized the need to reply substantively to the state's argument. To reply competently, the instant appellate counsel was minimally required to review the statute, research the case law and determine whether the law, as applied to the facts established by the trial record, supported a finding of statutory burglary. Had the instant appellate counsel competently proceeded to do the above, he would have realized, and replied, that the record on appeal indicated petitioner's case was governed by the burglary

statute's exclusionary proviso. At the very least, appellate counsel would have been in the position to make a credible argument by showing that the state had failed to carry its burden of proof with respect to the essential elements of burglary.

Had appellate counsel carefully reviewed the record, he would have realized that petitioner was invited to enter, and thereafter remained in, the premises with his girlfriend, the homeowner's guest. She was also the only other person in the structure at the time in question -- a lawful invitee who had the apparent authority to receive visitors. [R.-891]. When the victim suddenly arrived at the dwelling, an altercation immediately erupted, but no demand was made for petitioner to leave. [R.-892].

Although the record does not specifically establish an express invitation to remain after the victims's arrival, it is beyond question that the prosecution bears the burden of proof to establish all the criminal elements of an alleged offense beyond a reasonable doubt. E.g., Purifoy v. State, 359 So.2d 446, 449 (Fla. 1978); Rivers v. State, 140 Fla. 487, 192 So. 190 (Fla. 1939); Campbell v. State, 92 Fla. 775, 109 So. 809 (Fla. 1926) None of the elements, including intent, may be presumed or inferred, as the state implicitly urged in its Answer Brief: "It is clear that, although Appellant initially started to leave the house, he obviously remained therein and equally obviously at that moment in time formed the intent to commit an offense." (Answer Brief, p.18). Neither, of course, may any element of that alleged crime be treated as "obvious" on the record under well-established law. E.g., Purifoy v. State, 359 So.2d at 449; See also, Rivers v. State, 140 Fla. 487, 192 So. 190 (Fla. 1939); Campbell v. State, 92 Fla. 775, 109 So. 809 (Fla. 1926). Rather, the prosecution must proffer competent evidence on the record that positively overcomes all reasonable doubts with respect to each element of the alleged crime, includ-

ing the requisite unlawful intent. E.g., Rozier v. State, 436 So.2d 73 (Fla. 1983).

Furthermore, as conceded by the state, petitioner had attempted to leave the subject premises once the victim arrived. Petitioner's undisputed attempt to leave diametrically contradicted a finding, implicit or otherwise, that he attempted to stay. It thus precluded a finding that he formed an intent to commit an offense while attempting to stay in the premises because he concededly had not attempted to stay. Indeed, the only reasonable conclusion compelled by the facts established on the record is that petitioner was lawfully in the structure and attempted to leave but was somehow unable to do so. This conclusion is further compelled by the constitutional presumption of innocence absent competent evidence proving all the elements of burglary beyond, and to the exclusion of every reasonable doubt.

The prosecution thus sorely failed to carry its "beyond a reasonable doubt" burden of proof with respect to the essential elements of burglary. Moreover, the state foreclosed such a conclusion by its express admission that petitioner had attempted to flee. The trial court's finding was consequently without a constitutionally adequate evidentiary basis. It was, therefore, incumbent upon appellate counsel to carefully review the facts, research the law and devise a persuasive analysis in reply to the state's Answer Brief.

Appellate counsel should have, at the very least, emphasized the state's critical admission regarding petitioner's attempted departure and the logical analysis which flowed therefrom. Perhaps, however, he never carefully considered the state's Answer Brief. In any event, appellate counsel's specific omission to brief this Court with respect to that specific issue in reply to the state's argument prejudiced petitioner because, as seen from the transcript of the oral argument excerpted below, that omission caused this Court to accept the state's flawed argument for lack of an alternative.

In sum, appellate counsel's briefing was shoddy from beginning to end. His specific deficiencies, as seen above, had caused petitioner both actual and presumptive prejudice during the appeal's briefing stage. Additionally, this Court should expect more -- and must demand better -- from appointed counsel in order to both ensure the integrity of the proceedings before it and to safeguard the essential constitutional rights of this state's citizens. Unfortunately, however, the instant appellate counsel's shoddiness, with identical consequences, carried over to his oral argument as well.

E. The Oral Argument: Failure to Prepare, Persuasively Present and Factually or Legally Substantiate Meritorious Issues.

On June 8, 1982, this Court heard oral arguments in Routly v. State of Florida, 440 So.2d 1257 (Fla. 1983). Throughout this section, petitioner designates by asterisk approximately three dozen specific acts or omissions during appellate counsel's oral argument which constituted ineffective representation. Again, petitioner will focus only on appellate counsel's substantial, discrete deficiencies while simultaneously directing this Court's attention to the air of uncertainty and awkwardness which permeated appellate counsel's personal appearance before this Court as a result his gross unpreparedness.

As the certified transcript illustrates, petitioner's appellate counsel was totally unprepared to argue this appeal "in such a manner designed to persuade [this Court] of the gravity of the alleged deviations from due process". Wilson, 474 So.2d at 1165. Appellate counsel's oral argument was rendered ineffective because it was substantially devoid of any legal authority, any persuasive oral advocacy or any plausible theme or theory of the case. More importantly, appellate counsel's oral argument, as well as his responses to the questions of this Court at that time, revealed his analytical improvisa-

tion due to his factual unfamiliarity with petitioner's case and the law applicable thereto.

Petitioner, once again, does not intend to fault appellate counsel for mere uncertainty; he faults appellate counsel's chronic inability to sustain credible, persuasive positions on numerous important issues flowing from appellate counsel's (1) failure to conduct legal research, (2) failure to learn the facts of the case and (3) failure to develop analytically plausible theories and arguments for purposes of the direct appeal. This lack of preparation, coupled with his lack of expertise in capital cases, prompted appellate counsel to utter the inaccurate statements and detrimental concessions which littered his entire oral presentation before this Court. Moreover, the oral argument lacked any semblance of organization or logical coherence, making appellate counsel flounder and lose control of his presentation, as well as his time. Ultimately, this foreseeable and unnecessary compounding of deficient errors doomed appellate counsel's client, as discussed in more detail below.

1. Oral Argument on Issues Related to Petitioner's Apprehension and Trial.

Appellate counsel addressed the issues relating to petitioner's apprehension and trial during the first half of his oral argument. As seen below, however, appellate counsel quickly lost control of his presentation as a consequence of his inability to answer this Court's opening query. Appellate counsel's "argument" was thus quickly unraveled. He then compounded his opening deficiency again and again. Appellate counsel's oral argument was, in short, a downhill affair all the way.

a. Appellate Counsel's Factually Erroneous Response to this Court's First Query Regarding O'Brien's Non-Existent Statement to Michigan Police Due to His Un-Familiarity With Record on Appeal.

Appellate counsel commenced his argument by stating to this Court that the first issue for discussion would be "the admission of the defendant's tape recorded confession." [T.-4]. Following counsel's lead, this Court inquired, "At that time had the defendant's girlfriend told the police in Michigan that he had killed somebody?" [T.-5]. Appellate counsel responded, "I believe she had, your Honor." [T.-5]. Appellate counsel's first response to this Court's initial inquiry was incorrect.* At that time, petitioner's girlfriend, Colleen O'Brien, had not provided any statement to the Michigan police regarding any incident in Florida. (Hanna Deposition, p.6).

At that critical opening threshold, appellate counsel apparently had not prepared himself to respond in an informed and intelligent manner "designed to persuade the court", thereby resulting in the following colloquy -- all of which, of course, was premised on appellate counsel's factually incorrect response to the first query:

COURT: At that time had the defendant's girlfriend told the police in Michigan that he had killed somebody?

A: I believe she had, your Honor. Ah...ah...the ah...

COURT: Would not that event have given the Michigan police probable cause to arrest him without a warrant?

A: It would depend on the circumstances of the communication from the...the Florida officers, who were Officers Alioto and Gerald, to the...ah...

COURT: I am not talking about information from Florida. I am talking about firsthand information that the Michigan police had from ...ah... the woman in Michigan. If someone comes to a policeman and says, "My friend committed murder and I was there and I saw him did it -- do it" -- excuse me, would not that be sufficient to establish probable cause for an officer to make an arrest?

A: I am not sure it would, your Honor. I...I think it would depend on, first of all, the reliability of the... of the witness. I...I think simply the bare allegation that Person B has committed a homicide without more -- I... I'm not sure that that would establish sufficient probable cause . I think--of course corpus delicti is a trial...ah...ah...doctrine, but I think that there would -- it would require something more than that. Aa...And I think that...uh... what Miss O'Brien said was that she had been a witness to a killing in Florida. I...I'm not sure that it was established at that point that it -- in fact was a, a murder and I would direct the Court's attention to the record which shows that initially this defendant was charged with second

degree murder. Umm...It's my understanding that, that Miss O'Brien's colloquy was with officers Gerald and Alioto, who were Florida officers, and apparently they communicated to Flint, Michigan, officers that they did wish to speak to Mr. Routly, but I...uh... it doesn't appear in the record, at least to my recollection, that there was an actual ...umm...

COURT: I thought she talked with the Michigan officers first; they then contacted Florida and Florida officers went to Michigan.

A: That...that is my understanding.

[T.-5-6]. Although that may have been appellate counsel's "understanding," it was factually wrong. The Michigan police had merely held O'Brien until the arrival of Florida police without asking her any questions or taking any statement regarding any Florida incident.

As the above illustrates, appellate counsel at the outset advised this Court that O'Brien, petitioner's girlfriend, had spoken with Michigan police directly. In response to the Court's follow-up questioning, however, appellate counsel provided an answer predicated on a communication from Florida officers, not the girlfriend. Either appellate counsel was simply not thinking during his oral argument before this Court or he was inexcusably unfamiliar with the basic facts of the case and, therefore, uncertain how to respond. Naturally, the Court immediately corrected him. As illustrated above, appellate counsel's thoughtlessness or lack of preparation, or both, thus forced his quick scamper into an unpersuasive and

ineffective attempt to explain his shocking unfamiliarity with the record on appeal.

Appellate counsel sought refuge in hedging phrases such as "I'm not sure", or "I think", or "it is my understanding", or "at least to my recollection" more than a half-dozen times in response to this Court's second question, [T.-5-6], thereby baring his fatal ignorance to this Court at the argument's very commencement. The Court even attempted a graceful deferral to appellate counsel's factual expertise, stating: "I thought she talked with the Michigan officers first; they then contacted Florida and Florida officers went to Michigan." [T.-6]. Appellate counsel, simply could not prevent himself from manifesting his ignorance of the record facts important to that issue by his speechless inability to instruct this Court as to what actually occurred. That specific failure resulted in this Court's misapprehension of that, the first of several important points.

Fleeing the moment's embarrassment, appellate counsel hurriedly concluded that discussion as follows:

> In any event, the uh...the defend... defendant's first argument concerning the admissibility of the confession, uh... as you have aptly pointed out, concerns the legality of the arrest, and I would ask the Court to compare the...uh...the arrest in this case to...uh...the arrest in the case of Brown v. Illinois, which is cited in the brief and also...uh...the Florida case of State v. Chorpening, which is a Second District Court of Appeals case.

[T.-7]. Appellate counsel completely failed at that juncture to analyze and apply the law regarding the inadmissibility of a statement obtained as a direct result of an allegedly illegal arrest.* Appellate counsel, in fact, did not even attempt to

analogize the Brown and Chorpening cases. Obviously, appellate counsel's gross unfamiliarity with the relevant facts would have made any analysis of the law difficult at best.

The devastating prejudicial effects of appellate counsel's opening gambit are confirmed in this Court's opinion affirming petitioner's conviction and death sentence. This Court, conspicuously noting appellate counsel's obliviousness to legal authority, as well as his lack of clarity, surmised in its written opinion that:

> Although the defendant cites no authority for his position, he seems to assert that the state is bound by the legal conclusion as articulated by the Michigan officer on cross-examination, and that we should infer from this testimony that the defendant was arrested on information that fell below the standard of probable cause.

Routly, 440 So.2d at 1260. Appellate counsel's argument, a scandalous performance before this state's highest court, indeed lacked clarity and consistency. Difficult as it may be to fault this Court's misunderstanding of petitioner's true position, one fact remains crystal clear: this Court ultimately rejected petitioner's appeal on that issue due to appellate counsel's specific omission to lay out the facts leading up to, and surrounding, petitioner's arrest.

Thus, in its written opinion, this Court expressly relied on its belief that "[t]he [Michigan] officers had previously taken a statement from defendant's girlfriend, an eyewitness to the murder, who implicated the defendant as the perpetrator" of the alleged crime to support a finding of probable cause on those erroneous facts. Routly, 440 So.2d at 1261. Continuing, this Court concluded that, "The mere fact that Officer Black (the arresting officer) was not privy to the statement would not render the arrest unlawful. Nor would the legal conclusion of the officer prevent the State from arguing and presenting evidence that probable cause did in fact exist." Id.

In sum, then, within the first few minutes of his oral argument, appellate counsel's unfamiliarity with the record on appeal led him into self-contradiction, not a very persuasive technique for an adversarial proceeding. He also was unable to resolve the issues raised by inquiries from the bench, thereby losing much, if not all, credibility with this Court. His belated and inadequate analyses in response to the Court's questioning was also ineffective, for he failed altogether to apply relevant and controlling legal authority or provide any other persuasive or logical support for his oral argument. Ultimately, the misconceptions with which he left this Court condemned his client, as seen above from this Court's written opinion.

b. Appellate Counsel's Failure to Effectively Argue the Facts and Law of Petitioner's Arrest, Out-of-Court Statement and "Waiver" of Extradition.

Appellate counsel then shifted back to his original line of argument, introducing "the second (pause) reason that the confession should have been suppressed...inadequate or no Miranda warnings." [T.-7]. Appellate counsel, however, merely referred this Court to a "swearing match" between petitioner and Florida police, asserting in cursory fashion that, "It would be our position that a break in... ah... in interrogation would require a re-advisement of Miranda rights" and breezily informing this Court that he was "of course, ...relying on Miranda v. Arizona and its progeny on that point." [T.-8]. Competent advocacy requires more than passing references to cases which appellate counsel summarily asserts as applicable.

Appellate counsel's incompetent "analysis" of the Miranda warnings issue would seem incredulous to any attorney, much less one representing a client on death row. Appellate counsel: 1) completely failed to cite any specific case law on such a fundamental issue as questionable Miranda warnings for this Court's consideration;* 2) completely failed to provide any

in-depth legal analysis with respect to such issues in factually difficult cases;* 3) completely failed to provide any analogy to the facts or circumstances of comparable cases;* and, 4) relied exclusively on a single citation to a seminal case of legendary but only general significance to the instant case. This sort of cosmetic representation is unprofessional, unconscionable, slipshod, sloppy and just plain wrong. Nonetheless, petitioner's appellate counsel did just that, and nothing more.

Appellate counsel then turned to the involuntariness of the confession; voluntariness, of course, remains the ultimate standard of a confession's admissibility. See, e.g., Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1970). Although appellate counsel did make a passing reference to "the law pertinent to... ah... the admissibility of... of confessions," [T.-8], he again failed to provide any such law for this Court's consideration.* That specific failure may well have been the result of his complete unfamiliarity with the case law cited in his Initial Brief which, as discussed earlier, he had plagiarized from Richard's work notes and trial counsel's suppression memorandum. Because appellate counsel lacked competence at the time of his appointment to this case, his plagiarism of others' work-product obviated any need to actually research and learn the law applicable to his client's capital appeal. Inevitably, then, he was therefore unable to discuss the law which he never learned because of his election to blindly appropriate his predecessors' work-product.

When this Court next questioned appellate counsel, suggesting an analogy between the facts of the instant case and a typical plea bargain, appellate counsel meekly fell back on a grab-bag "totality of circumstances" argument without bothering to describe or even mention any such circumstances to this Court:*

The third reason that we think the confession should have been suppressed was... was that it was not a voluntary confession (pause) not voluntary in the way that that phrase has come to be known in the law pertinent to... ah... the admissibility of... of confessions. And specifically, the Defendant has testified that the reason that he gave the confession was that he was informed by Officers Gerald and Alioto that, number one, his girlfriend, Colleen, who he knew to be in custody and who he knew to be pregnant, would be released if he gave the confession. Secondly, he... he was informed, according to his testimony, that the so-called pending Michigan charges would be dismissed if in fact he agreed to confess to this and accompany the police officers back to the State of Florida. And third... umm ...

COURT: It's the same thing, if they have a plea bargain where some person agrees to plea to one charge on the grounds that the other charges be dismissed, the fact that the other charges are dismissed would not detract from the voluntariness of the original plea, would it?

A: Well, your Honor, what I am suggesting though is that... th... that it wasn't just that circumstance, that... that the totality of the circumstances... uh...show that in fact the defendant

was offered a... a promise of benefit by giving this confession and that for that reason it was not a voluntary confession. The other (pause)... the other reason that the... that the defendant alleges that he was motivated to confess was he was informed -- and this is supported by the record -- that he was a suspect in a second degree murder case; that by confessing, the maximum charges that he would face would be the charge of second degree murder and that he would expect... uh... could expect a penalty of no more than 10 to 15 years.

[T.-8-10]. Managing to avoid answering this Court's friendly question, appellate counsel specifically omitted to draw the key distinction between a plea bargain and the instant case which would have resolved this Court's concerns on this point.* Even more prejudicial, appellate counsel failed to mention a controlling statute -- the Uniform Criminal Extradition Act -- which was in effect both in Michigan and Florida, as discussed in full detail below.

A plea bargain, of course, is based on an express agreement between the prosecution and the accused supported by inherent benefits to both. Ultimately, the bargain must be judically approved. In contrast, a confession is typically extracted, without any judicial safeguards, during the frightening initial hours after arrest, during which time the accused's singular disadvantage has been utilized by the police to induce unconstitutional self-incrimination. Thus, "confessions, unlike pleas, cannot be bargained away." M.B.D. v. State, 311 So.2d 399 (Fla. 4th DCA 1975) (emphasis supplied).

Because of the readily apparent potential for police abuse, confessions have long been held involuntary and therefore inadmissible if induced "by any direct or implied promises, however slight." Bram v. U.S., 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). Thus, appellate counsel's duty as petitioner's appointed advocate was, first, to cite the uniform statute. Additionally, it was his duty to reject this Court's flawed analogy -- or adopt its friendly suggestion -- and persuasively explain the proper analysis. Appellate counsel was ineffective by being totally unprepared to cite the uniform statute and by failing to draw and defend the elementary, almost self-evident, distinction between a plea bargain and the instant case.

The "voluntariness" of petitioner's out-of-court statement, moreover depended on the circumstances surrounding the Michigan interrogation. E.g., Harris, 401 U.S 222. Because the legal voluntariness of an out-of-court statement is determined under the "totality of circumstances," see, e.g., Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 561 (1957), appellate counsel's duty under Wilson required him to present for this Court's consideration all important or questionable "circumstances" surrounding the out-of-court statement made by petitioner to police immediately following his arrest. Appellate counsel, however, specifically omitted to alert this Court to particularly questionable factual circumstances surrounding that interrogation established by the record on appeal.*

For example, during his interrogation, petitioner was alone in the interrogation room with no less than five police officers. [R.-208-09]. Furthermore, petitioner was interrogated in that type of unnecessarily intimidating atmosphere during the early morning pre-dawn hours immediately following a life-threatening arrest involving many policemen. [R.-982-84]. That type of indirect, excessive intimidation to induce self-incriminting statements from suspects based on the disparity of power and knowledge immediately after arrest has long been

judicially prohibited. See, e.g., Stein v. New York, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953) reh'g denied, 346 U.S. 842. 74 S.Ct.13, 98 L.Ed. 362; Malinski v. New York, 324 U.S. 402, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Ziang Son Wan v. United States, 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131 (1924). Had appellate counsel dutifully made this Court aware of the above circumstances during petitioner's direct appeal, its outcome would no doubt have been different based on the weight and volume of controlling law.

The sheer volume of case law on this specific point, moreover, would certainly have convinced appellate counsel of its importance had he done his homework by, at least, actually reading the cases cited in the plagiarized portion of his Initial Brief. Appellate counsel's duty to do this minimal homework and prepare himself to be an effective oral advocate was made more significant by his lack of familiarity and experience with capital case law at the time of his appointment, as shown in the succeeding section hereof. His failure to do his homework and learn the necessary law ultimately denied petitioner this Court's consideration of important and favorable elements of his case in deciding the merits of his appeal on this issue based on the totality of all material circumstances.

Furthermore, appellate counsel's failure to factually and concretely substantiate his involuntariness argument again left this Court with no choice but to guess as to the viability or propriety of petitioner's position. Consequently, this Court's decision-making process took place without a complete understanding of both factual and legal points critical to petitioner's position on this issue. Appellate counsel's specific omission thereby undermined the appellate procedure.

When this Court proceeded to question appellate counsel on the appropriate legal standard for judicial review of the trial-level facts, his inexperience, or lack of preparation, or both, rendered appellate counsel unable, again, to respond

substantively.* Instead, appellate counsel resorted to labored, prolonged and virtually incoherent evasion:

COURT: Now are you giving us the facts in the light most favorable to the State or are you giving us the defendant's version of the facts?

A: A little of each, your Honor, uh... the a...

COURT: How do we receive those facts? Should we look at them... ah...in the light most favorable to the State?

A: Well, your Honor, I think that even in the light most favorable to the State that the record supports... ah... the defendant's testimony to this extent: The extradition proceedings, which the defendant waived... ah... from Michigan to Florida, was on the charge of second degree murder. Now at the time of that extradition all of the information that was later used to take--

COURT: What did the officers say about what promises they made or representations they made to the defendant?

A: The officers testified that they made no such promise.

COURT: Did the trial court then resolve the conflict of testimony?

A: A... a... apparently it did, your Honor. There were two--there was a --

COURT: In whose favor? In whose favor?

A: Against the defendant.

COURT: Should we upset that [trial court resolution] simply because the defendant says one thing and the officer says something else?

A: Well, your Honor, I... I believe--now this is difficult to determine from the record, but it's my understanding that at the time of the suppression hearing the... the transcript from the extradition proceedings from Michigan was not in the record at that point; that the Court, the trial court did not have the benefit of the documentation of the fact that the defendant was in fact extradited on the charge of second degree murder, that... that he waived extradition on the charge of second degree murder.

COURT: Assuming that to be true, does that impeach the officers' testimony and make it false?

A: Well... uh... I think it does, your Honor. I think that it... it call... certainly calls into question the officers' testimony given that the actual charge which the defendant waived extradition on was second degree murder, and this was, despite the fact that all the information that was subsequently taken to the Grand Jury, was in the possession of the police officers.

COURT: Well, but apart from... uh... the statement, what's the effect of that? Let's assume that he was extradited on a third degree felony.

A: Well, I think the effect of it is is it [sic] lee... it le... lends credence to the defendant's testimony that in fact he was misled about his position,...ah... in this prosecution.

COURT: You don't take the position that it made the indictment imperfect or anything of that sort?

A: No, sir, I don't. I think it's... it's analogous to an improper arrest. I think the remedy for an improper arrest is not a... a... a... suppression, you know, you can't suppress -- well, I guess you could, but we do not typically suppress the arrest. The... ah...the remedy would be a civil action or something of that nature. What... what I think it goes to is the voluntariness of the confession. An improper arrest can render the fruits of that arrest inadmissible and I think, too, that an improper arrest procedure, which in this case is an extradition on an uh...

COURT: Had he not already made the statement before he waived extradition?

A: That is correct, your Honor. (Pause)

[T.-10-13]. Appellate counsel thus managed, not only to leave this Court's questions substantively unanswered, but also to set his client up for this Court's foreseeable, indeed, inevitable, disregard of that position. The rejection was inevitable be-

cause appellate counsel's presentation amounted to nothing more than reargumentation, without any new analyses, of a "swearing match" regarding the statement's voluntariness. The swearing match had necessarily been resolved, whether correctly or not, by the trial court.* Of course, as developed below, it was not, in fact, a "swearing match" at all and appellate counsel should have therefore presented the proper evidentiary points contained in the record on appeal in support of his argument.

The actual prejudice caused by this specific act is evidenced by this Court's published opinion, in which it summarily -- and predictably -- declined to review the "swearing match" between petitioner and Florida police on that point, stating:

> The defendant next asserts that the confession was not voluntarily given, having been induced by various promises made by the officers. Defendant relies on a factual dispute between the testimony of the officers and himself. These issues have been resolved by the fact-finder in favor of the state, and we find nothing in the record that supports a reversal on this issue.

Routly, 440 So.2d at 1261. Thus, appellate counsel prejudiced petitioner by asserting a position which basic legal principles had predestined for outright rejection absent a careful analysis on his part. Simultaneously he inexplicably ignored promising, salient evidentiary matters raised by the record on appeal.

Specifically appellate counsel also failed to investigate and ascertain whether the transcript or tape of the extradition proceedings had been available during the trial level proceedings* although he squarely relied on that point, or tried to, in support of his oral argument before this Court. Thus, as he sought to dodge each new question raised by this Court, he inexorably drove himself -- and his client -- into the proverbial corner. This Court's own familiarity with the record thus made appellate counsel's argument not only ineffective, but devastatingly so, because he had failed to establish an accurate chronology of events critical to his position. He was therefore

forced to re-argue a bare swearing match which he, like this Court, must have known was hopeless all the time.

At that point, moreover, appellate counsel's partisan duty was to instruct this Court on the false importance it was attaching to the chronology of events regarding petitioner's arrest, statement and waiver of extradition. As illustrated above, appellate counsel was left dumbfounded when this Court observed that petitioner "confessed" prior to waiving extradition. While in this speechless state, appellate counsel acquiesced to this Court's implicit deduction that, because the statement preceeded the waiver of extradition, the two could not possibly be linked together as corresponding parts of an inducement to petitioner by Florida police.

Of course, that mere sequence of events could not foreclose a relationship between the two. Furthermore, the objective documentary record before this Court, and available to appellate counsel at that time, demonstrated the trial court's error in resolving the subject "swearing match" against petitioner, as shown below. Unfortunately, appellate counsel never recovered from this Court's observation regarding that matter due to his state of total unpreparedness.

The key to the inter-relationship between petitioner's confession and waiver of extradition for second degree murder charges found right in the record on appeal. [R.-98-101]. The record on appeal included the official transcript of the hearing conducted by the Sixty-Eighth District Court for the City of Flint, Michigan, the Honorable Basil F. Baker presiding, at approximately 2:17 p.m. on December 5, 1979. That proceeding lasted a mere minute, but was freighted with crucial implications:

> Flint, Michigan
> Wednesday, December 5, 1979 - at
> about 2:17 p.m. (Court and all
> other parties present)

COURT: Okay, you're Dan Routly?

ROUTLY: Yes sir.

COURT: You want to step up in front of the lectern there. You, ah, you're evidently charged with an offense in the State of Florida. Is that right - Second Degree Murder?

ROUTLY: Yeah.

COURT: And you are desiring to waiver your right to have extradition on this. Is that - is that your --

ROUTLY: Yes your Honor.

COURT: But you're - you understand you have a right to have a hearing on this and have a right to have counsel. You understand all that do you?

ROUTLY: Yeah.

COURT: And you're -- you're willing to give up all those rights, are you, to - and to go back voluntarily to Florida to - to stand trial for this offense. Is that right?

ROUTLY: Yes.

COURT: Okay. Now he has got to sign this here, now.
Has he read this do you know?

OFFICER HARRIS: No he hasn't your Honor.

COURT: All right. Have him read it - yeah. (At about 2:18 p.m. Defendant Routly reads waiver and signs it).

[R.-99-100] (emphasis supplied). The above record clearly showed somebody had advised the Michigan Court that petitioner had been

charged with "an offense in the State of Florida... second degree murder." Petitioner, of course, was already incarcerated; the only possible source of that information was Florida police.

Naturally, whoever informed the Michigan Court about the second degree charges must have been a person(s) with the apparent authority to speak on behalf of the State of Florida. Otherwise, the Michigan Court would not have so casually assumed the information's veracity. The record before this Court further established that the only representatives of the State of Florida present during petitioner's apprehension in and removal from Michigan were Marion County Officers Jerald and Alioto. Logically, one, or both, of those officers advised the Michigan Court that petitioner was facing only a charge of murder in the second degree, precisely as petitioner had always maintained.

It thus becomes clear that petitioner, whose position has remained unflinching from inception, was telling the truth all along and Florida police were acting in bad faith for just as long. Petitioner had maintained since the day of his arrest that his post-arrest statement was induced by: (1) the promise that O'Brien would be freed in order that petitioner's baby (with whom she was presently pregnant) would not be born and raised in a jailhouse; (2) a "deal" comprising a confession and waiver of extradition on his part in exchange for a charge of no more than murder in the second degree with a ten-to-fifteen year sentence on the state's part. Whether Jerald and/or Alioto carried with them the actual authority to deliver on the state's part of such a "deal" is irrelevant because the only question was whether foreign enticements had compromised the statement's voluntariness; however, the Florida policemen's likely lack of authority to extend their improvident promises to petitioner rendered them unable to honor their agreement upon their return to Florida and forced them to subsequently obfuscate and, perhaps, lie. Thus, Florida police, in effect, misled the Michigan Court and tricked petitioner in order to extract an incriminatory statement and waiver of extradition, thereby

making petitioner's out-of-court statement involuntary and inadmissible as a matter of law.

Moreover, a review of the objective occurrences subsequent to petitioner's satisfaction of his part of this "deal" as documented in the record before this Court would have further vindicated petitioner on direct appeal. First, the record established that petitioner's girlfriend was indeed pregnant with petitioner's baby at the time in question. Second, that O'Brien was promptly freed by the authorities upon petitioner's "confession" and waiver of extradition. Third, it was abundantly clear that petitioner had indeed "confessed" and waived extradition. Fourth, the record established that petitioner was, in fact, initially charged only with second degree murder prior to the state's reconvening of the Grand Jury to indict petitioner for first degree murder. Clearly, the above circumstances cannot be dismissed as mere "coincidence."

The Michigan Court's reference to the second degree charge, as quoted from the record on appeal, without any prior reference by petitioner, coupled with the above "coincidences," effectively established that second degree charges were in fact contemplated by all persons involved at that time. This was true because, by simple process of elimination, the only party thereafter disagreeing to this fact was the state, even though the state, (or its representatives) had been the only possible source of information for the Michigan Court's initial reference to that particular charge as established by the record on appeal.

The suspicious nature of the above facts, as documented in the record on appeal, also raised the ugly specter that the tape and/or transcript of the extradition proceedings may have been "unavailable" at the suppression hearing due to the calculated design of those most interested in, or benefited by, its unavailability. If so, the prosecution would have violated petitioner's rights pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and progeny. Of course, it takes very little deduction to realize that Jerald and Alioto

would have been exposed to some sort of bureaucratic detriment if their overzealous rashness or deliberate trickery in Michigan resulted in the release of their surprise "catch" based on such a "technicality." Appellate counsel left that possibility unexplored too.

Moreover, the State of Florida, pursuant to the Uniform Criminal Extradition Act, had no right to extradite petitioner at that time. Both Michigan and Florida had adopted the Uniform Criminal Extradition Act at the time in question. M.C.L.A. §§ 780.01 et seq.; §§ 941.01 et seq., Fla. Stat. (1985). The uniform statute specifically delineated the positive requirements for petitioner's extradition, none of which Florida police in Michigan had satisfied. Specifically, Section 941.031, Fla. Stat. (1986), as well as Michigan's corresponding statute, required that a demand for extradition be made in writing "accompanied by an authenticated copy of an indictment or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of a warrant supported by an affidavit made before a committing magistrate of a demanding state." See also Clarke v. Blackburn, 151 So.2d 325 (2d DCA 1963).

In this case, there was no charge whatsoever pending against petitioner at the time he was removed by Florida police from Michigan and transported, handcuffed, to this state. The record on appeal established that both the indictment and information obtained and filed by the prosecution against petitioner in this case occurred after his forcible removal from Michigan. Of course, the actual pendency of criminal charges as evidenced either by an authenticated indictment, information, warrant or other appropriate document is one of the specifically enumerated prerequisites established by the uniform statute for extradition. The lack of any indictment, information or warrant--much less the lack of an authenticated document of that type--thus would have rendered any extradition from Michigan at that time fundamentally defective. See, e.g., Hattaway v. Culbreath, 57 So.2d 661 (Fla. 1952).

Although petitioner supposedly waived his rights to extradition under the statute, the transcript of those proceedings, also contained in the record on appeal, conclusively established that the Michigan Court's advice of rights to petitioner failed to comply with the statutory requirements. Of course, it has also been long well-settled that a waiver, to be legally valid, must constitute a voluntary relinquishment of a known right. E.g., Masser v. London Operating Co., 106 Fla. 474, 145 So. 79 (Fla. 1932). Consequently, the waiver of unknown rights is a nullity as a matter of law.

The record on appeal specifically demonstrated that the Michigan Court advised petitioner of only two "rights": first, "a right to have a hearing on this" and second, "a right to have counsel." [R.-99]. The uniform statute, however, expressly mandated that: "It shall be the duty of [the presiding] judge to inform [the extradited] of his right to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in Section 941.10." § 941.26 Fla. Stat. (1986). The "advice of rights" quoted above verbatim from the hearing transcript contained in the record on appeal showed that petitioner was never advised by the Michigan Court, as required the statute, "of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus." Neither of the two specifically enumerated rights were given prior to obtaining petitioner's waiver of those rights, making any purported waiver thereof null under both Masser and the uniform statute adopted by both of the subject jurisdictions.

Although, to be sure, the Michigan Court had vaguely advised petitioner of "a right to have a hearing on this" the statute specifically imposed a positive "duty" on the court to affirmatively apprise petitioner of his right "to the issuance and service of a warrant of extradition." In this case, the advice of that right was critical, for petitioner would then have been able to realize that the entire extradition procedure, at the very least, was premature. As such, the trial court's

failure to advise petitioner of the first specific right enumerated within the statute was extremely prejudicial, for it left petitioner ignorant of his true legal position at that time.

Additionally, the transcript demonstrated that the Michigan Court never advised petitioner -- indeed, never even mentioned -- petitioner's right to obtain a writ of habeas corpus. Knowledge of that second enumerated right was important because it would have enlightened petitioner to his available legal alternatives -- to the fact that he could invoke the rule of law to promptly determine the legality of his detainer. In any event, the uniform statute specifically required it.

The transcript, in sum, demonstrated that extradition was but an empty veiled threat utilized by the prosecution to induce petitioner's "waiver." The waiver thereby obtained was, as a matter of law, violative of the specifically enumerated statutory requirements, as well as the common law requirements for a legally valid waiver. Consequently, petitioner's handcuffed, forcible return to Florida pursuant to the Michigan proceeding and the defective waiver thereby obtained was unlawful. Nonetheless, as with all the other meritorious issues present in this case, appellate counsel callously turned his back on that specific issue also.

For the record, this Court must note that the unavailability of this pivotal evidence during the critical suppression hearing remains to this very day, unexplained and unresolved. All we know is that the tape itself was, and is, "missing" and that the transcript, while initially "unavailable", is now stamped with the clerk's seal as having been filed with the trial court on July 11, 1980. Clearly, this Court's dispassionate review of the suspicious circumstances present herein, especially in light of the Michigan Court's belief that petitioner was facing only second degree charges, must open its mind to the position which petitioner has earnestly maintained since December 5, 1979.

No doubt, had appellate counsel consulted the record on appeal more carefully than he conducted his legal "research",

he would have been able to apprise this Court of the foregoing matters and would thereby have secured a different appellate outcome. The above circumstances were so suspicious, the Michigan Court's initial reference to second degree charge was so glaring and petitioner's position had been so vigorous and constant that appellate counsel should have recognized the need to trace and resolve the material factual questions as documented in the appellate record regarding that fundamental and intrinsic issue.

Appellate counsel's refusal to act with regard to this issue was based on two reasons. First, was the unspoken but perennial problems posed by the state statutory scheme which limited appellate counsel's compensation to an absurdly low amount. In view of that limitation, appellate counsel simply was not inclined to undertake the substantial time and effort required to become sufficiently familiar with the record on appeal. That type of inhibition, of course, was precisely the sort of state interference which rendered the Florida statutory scheme in this case a "systemic defect" violative of petitioner's Sixth Amendment and Fourteenth Amendment rights, as discussed in full detail below.

The second motive for appellate counsel's neglect of the foregoing matters was the contrived response he actually gave his client to keep him quiet. His response was that, "It is simply too late to search for new evidence." (See Composite Exhibit B, p.5). Of course, the transcript of the extradition proceeding in Michigan was not "new" evidence. It was a public, judicial document contained in the record on appeal which had inexplicably become "unavailable" during the critical suppression hearing and which thus had prevented petitioner from conclusively substantiating at that critical time the position he has now steadfastly maintained during the past six years. Appellate counsel's flatly incorrect response to petitioner's plaintive urgings, and his prejudicial failure to act zealously thereon, is thus revealed to be nothing more than a profession-

al's lazy excuse for inaction to his layman client. Appellate counsel's acts and omissions with respect to this particular point were made exceptionally reprehensible by the fact that his client's life depended squarely on him.

That inaction, in and of itself, constituted a deficient omission: "An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Balkcom, 688 F.2d at 739, quoting Davis v. Alabama, 596 F.2d at 1217. The instant appellate counsel, therefore, undermined the appeal's outcome and prejudiced petitioner by failing to "investigate sources of evidence" (in this case, obviously, the record on appeal) which were dispositive of petitioner's appeal in its entirety. That issue would have compelled a favorable appellate result because the jury's admitted inability to perceive O'Brien's testimony left petitioner's statement as the only evidence capable of sustaining a conviction. Appellate counsel's blithe indifference to that "prominent and meritorious" issue which indisputably was a "fundamental and intrinsic part" of petitioner's case on appeal, S.E. Smith, 488 So.2d 31, thus rendered his representation, as a matter of law, "a mere sham, amounting to no representation at all," Blake, 758 F.2d at 534, because it allowed the prosecution's self-serving and false version of events to go unchallenged.

Furthermore, because the arrest occurred outside of this jurisdiction, thereby signalling many potential constitutional issues, a competent counsel would have very carefully reviewed the record and, when necessary, even explored further the critical facts surrounding his client's arrest, confession and waiver of extradition. Because appellate counsel failed to do so*, he failed his client. As seen above, that specific omission, coupled with his prior inexperience, precluded him from being able to confidently and accurately respond to this Court's concerns regarding his client's arrest, waiver of extra-

dition and trial. Consequently he was unable to fulfill his duties as defined by this Court in Wilson.

To summarize, appellate counsel's wholesale failure to make himself competent to handle petitioner's appeal by consulting the record on appeal sufficiently, together with his incompetence at the time of his appointment, rendered him fundamentally ineffective. Unable to marshall the record on appeal, his representation amounted to a constructive denial of counsel because he was thus precluded from requiring the state's case to survive the crucible of meaningful adversarial testing, much less than carrying his burden of proof. The specific voluntariness omission thus gives rise to a presumption of prejudice, as a matter of law, under S.E. Smith, Cronic and progeny.

c. Appellate Counsel's Factually Erroneous Response to this Court's Follow-Up Query Regarding O'Brien's Arrest Due to His Unfamiliarity With Record on Appeal.

This Court then proceeded to another factual inquiry which appellate counsel was, again, unprepared to answer:*

COURT: What motivated the lady to start telling people that this man was a killer?

A: It's not clear from the record, your Honor.
Uh...It's my understanding that...that Colleen O'Brien was arrested for a...a separate offense, a...a theft offense that had occurred in Michigan and that somehow in the process of her interrogation or something it came to light that she had...ah...been a witness or, quite frankly, I think had been involved in...ah...this Florida homicide.

It...it... to my recollection it's not clear in the record.

[T.-13-14]. Appellate counsel evidently also had failed to make himself familiar with the facts surrounding the circumstances of his client's girlfriend's arrest.*

Those facts, of course, were crucial because that arrest occasioned the statement to the Florida police in Michigan leading ultimately to his client's own arrest. Not only were the facts crucial, but they also were readily available to appellate counsel had he properly prepared his case, as shown below. That omission, therefore, was yet another occasion during the oral argument where appellate counsel's deficient lack of factual and legal preparation rendered him unable to offer this Court any persuasive, or even plausible, theory of the case despite the readily availability factual support.

Officer Hanna's deposition testimony, for instance, established that as soon as Michigan police apprehended O'Brien they notified Florida police, who flew to Michigan the following day and interviewed her. (Hanna Deposition, p.4). Officer Hanna's deposition testimony further established that Flint police did not personally interrogate O'Brien regarding the Florida murder: "We didn't discuss -- we didn't have knowledge of the facts of the case. Not enough to intelligently discuss, so we waited for the people from Florida, so it would have been the day following her arrest that she gave the statement." (Hanna Deposition, p.6) (emphasis supplied). When Officer Hanna was specifically asked if O'Brien had given Michigan police any statement regarding the Florida case he responded: "No, I hadn't asked her any questions at all." (Hanna Deposition, p.6) (emphasis supplied). Had appellate counsel taken the first, small step of reading the deposition testimony of this key witness, he would have been prepared to answer this Court's queries.

Appellate counsel's specific failure to take even that first, small step for this death row client made it impos-

sible for him to resolve this Court's query on that point. Appellate counsel, as seen previously, had similarly failed to prepare himself to discuss the circumstances surrounding the statement O'Brien made to Florida police in Michigan resulting from her apprehension by Flint police. At this later stage in the argument, he compounded that lack of preparation regarding O'Brien's statement with his unfamiliarity regarding the circumstances surrounding the apprehension which occasioned it.

Indeed, appellate counsel was so unnerved by his inexcusable lack of preparation and this Court's obviously superior knowledge of the case that he was unable to recognize friendly questions from the bench:

> COURT: Was she trying to make it [her implication of petitioner] diminish her own culpability?
>
> A: I... I believe she was throughout the... ah... throughout the proceedings, your Honor. I think she was initially. Eh... There were two stories apparently. She gave two different stories... ah... during this period that... ah... she was apprehended in Flint, Michigan, and I think throughout the proceedings she attempted to diminish her own...ah... culpability in this. (Pause)

[T-14]. Floundering about for something decent to say, appellate counsel could only manage a circular reiteration of the Court's friendly suggestion. Appellate counsel's inability to grasp this Court's assistance, when offered, revealed his absolute neglect of this case. Surely, if appellate counsel had substantially prepared for his oral argument before this Court, he

would have been able to seize opportunities which, as the transcript demonstrates, were presented to him, but to no avail.

Appellate counsel thus hurriedly concluded the first half of his argument by lamely stating that, "In any event, the... ah... the case law that we would be relying on is stated in the brief on Point 1." [T.-14]. In fact, that plagiarized portion of appellate counsel's Initial Brief was no more adequate than his inept attempt at oral argument on the same issues. Like the oral argument, it omitted any significant factual discussion or legal analysis of the important and, for petitioner, life-or-death issues of this case. (See Initial Brief, pp.8-15).

2. Oral Argument on Issues Related to Petitioner's Sentencing.

Petitioner's appellate counsel next proceeded to argue issues relating to the penalty phase of his client's death sentencing. At the outset, he advised this Court that his presentation would show "that, at most, there were two valid aggravating circumstances and as a corollary to that I believe there were at least two valid mitigating circumstances." [T.-15]. Unfortunately, as shown below, he never kept that promise, either to this Court or to his client. Rather, appellate counsel actually conceded his client's case in response to this Court's questioning on each and every point during the second part of his oral argument. That running betrayal was both presumptively and actually prejudicial, for it left petitioner in an adversarial proceeding without any advocate at all, much less an effective one.

a. Appellate Counsel's Failure to Effectively Argue the First Aggravating Circumstance: Unfamiliarity With Record on Appeal, Failure to Substantiate Argument and Uttering Concession of Guilt.

Appellate counsel initially argued the non-existence of burglary and kidnapping with respect to the first aggravating

circumstance, based on the trial court's finding that petitioner had committed the capital felony together with other statutorily enumerated felonies, reiterating the well-worn, simplistic refrain from his Initial Brief:

> Well, as stated in the brief, I... I believe there is simply no evidence of burglary whatsoever. The... the record does not reflect that the defendant committed a burglary. At the time that he entered the victim's house, he was invited to enter by Colleen O'Brien, who is [sic] apparently a licensee of those premises. She had been staying with the victim... Uh... The defendant shows up, Colleen invites him into the house, and while there the victim returns. Uh... The record seems to reflect that... that the defendant attempted to exit the house when the victim came to the house. Apparently there was no back door to the house. When the victim came in...uh... the defendant then pointed a gun at the victim, tied the victim up, and took him out to the car and eventually shot him.

[T.-16]. Appellate counsel, however, had still failed to research Florida's burglary statute, which plainly provided that "burglary" occurs when a person remains in a structure with an unlawful intent, §810.02(1), Fla. Stat. (1985), even though that very point was stressed in the state's Answer Brief.

Had appellate counsel developed that point in his Reply Brief, or at least acquainted himself with the burglary statute prior to oral arguments, he would have recognized the

need to either distinguish his client's conduct based on the facts of the case or the statute's legislative history. Alternatively, he would have been in a position to argue its unconstitutionality based on grounds of vagueness or overbreadth. Instead, appellate counsel prejudiced his client with his first concession,* (in which he incorrectly, and presumably inadvertently, referred to robbery, not burglary): "I am not arguing that the...that the capital felony was not committed in the course of a robbery. I think it clearly was a robbery." [T.-17] (emphasis supplied). In rapid-fire style, appellate counsel continued conceding his client's interests: "I think that arguably it was also a kidnapping..." [T.-17] (emphasis supplied). In "arguing" against the first aggravating circumstance, appellate counsel finally conceded his client's entire case with respect to that particular issue:

> [U]h... but in any event, it... it would be my argument that it was -- although it was technically both a robbery and a kidnapping, that it was part of the same felonious transaction.

[T.-17] (emphasis supplied). Appellate counsel's novel "felonious transaction" theory, typically, was also not accompanied by any analysis or case references* to persuade this Court of its applicability.

Of course, this Court immediately observed the obvious: that the trial court had in fact combined burglary and kidnapping in support of a single aggravating circumstance, [R.-182], making either kidnapping or burglary, alone, sufficient to uphold the trial Court's first aggravating circumstance. Appellate counsel's specific failure to familiarize himself with the record on appeal regarding that fairly elementary point and his lack of preparation on that issue, coupled with his lack of expertise at the time of his appointment,

thereby again forced him to ignominiously retract his ill-prepared, or unprepared, "argument":*

A: There simply is no support in the record that it was burglary.

COURT: Well, [the finding of burglary and kidnapping] added up to one aggravating circumstance, though.

A: I begyer...

COURT: The [trial] Court, as I read the sentencing order, considers that as one aggravating circumstance.

A: That's correct, your Honor.

COURT: So certainly it would support kidnapping, would it not?

A: I believe it would your Honor. I... I'm just pointing out --- that the...

COURT: So the burglary, at best, is surplusage.

A: Yes, sir.

COURT: He didn't... he didn't say one aggravating circumstance because it occurred during the course of a burglary, another aggravating circumstance because it occurred during the course of kidnapping.

A: No, sir, he did not.

[T.-17-18]. Once again, appellate counsel was left speechless; he apparently had not bothered to analyze the position he ultimately took on petitioner's behalf, much as he had failed to acquaint himself with the burglary statute, for otherwise he would have arrived at the same inescapable conclusion as this Court.

Had appellate counsel been competently prepared, he would at that juncture have interposed the argument previously outlined herein based on Presnell v. Georgia, 439 U.S. 14, 99

S.Ct. 235, 58 L.Ed.2d 207 (1978). The Presnell argument, whether or not ultimately embraced by this Court, would have at least satisfied appellate counsel's duties under Wilson to "discover and highlight possible error... in such manner designed to persuade the court." Wilson, 474 So.2d at 1165. It was also his duty to research, prepare and assert this argument under Federal law. E.g., Cronic, 466 U.S. 648.

Instead, appellate counsel casually conceded his client's guilt on robbery (a crime not in question) and kidnapping -- hardly zealous acts of advocacy -- and thereby foreclosed any hope of success for his client with respect to the trial judge's findings regarding the first aggravating circumstance. The above-quoted exchange again disclosed appellate counsel's inexcusable lack of preparation, inevitably producing an ineffective oral argument before this Court. Appellate counsel's specific omissions with regard to this point thereby prejudicially deprived petitioner of the right to have his day before this Court with an effective advocate zealously representing his best interests on this issue.

b. Appellate Counsel's Failure to Effectively Argue the Third Aggravating Circumstance: Improper Assertion of "Personal" Feelings Without Any Legal Analysis or Authority.

Immediately after conceding the question of burglary as surplusage, appellate counsel quickly jumped to the third aggravating circumstance based on pecuniary gain and, unfortunately for petitioner, commenced his argument by once again conceding his client's basic position:*

> I suppose, arguably, that you could... you could add that... ah...since there were two separate felonies, i.e., a burglary -- I mean a robbery and a kidnapping in the first aggravating circumstance. Then I suppose

that you could argue that it was also committed for the...for a pecuniary gain.

[T.-18]. Immediately apparent, of course, is appellate counsel's reiterated, prejudicial concession regarding petitioner's allegedly commission of robbery. Appellate counsel then embarked on a line of argumentation focusing on his own wholly immaterial "personal feeling" rather than arguing applicable substantive law, as was his partisan duty:*

> My personal feeling is that is not what that aggravating circumstance refers to. Eh... In my view ...ah... that particular aggravating, statutory aggravating circumstance, is intended to apply to murders for hire and things of that nature. I... I realize that this Court though has found in cases of, for example, robbery that... ah... if there was a separate -- another separate felony then this aggravating circumstance could also be found to apply.

[T.-18-19] (emphasis supplied). Apparently, appellate counsel had prepared nothing substantively better to argue on his client's behalf, resorting instead to his "personal feeling" when there was substantial case law he could have marshalled. See, e.g., Michael v. State, 437 So.2d 138 (Fla. 1983); Artone v. State, 382 So.2d 1205 (Fla. 1980).

Appellate counsel assuredly knew that such "feelings" have no bearing in a court of law; his blatantly prejudicial failure to do more than recite "personal feeling" in support of his oral argument in a capital appeal cannot be overlooked by this Court. Appellate counsel, furthermore, was under a duty to "not assert his personal opinion" regarding the subject matter he was arguing before this Court. CPR, Disciplinary Rule 7-106 (c)(4) (1986). Appellate counsel's failure to recite more than

his "personal feeling" for this Court's consideration in violation of his professional duties was prejudicial to petitioner because it deprived him of this Court's consideration of his position on the legal merits thereof.

Moreover, while referring to the "intended" application of this statutory circumstance, appellate counsel again failed to provide the Court with even a glimmer of the statute's legislative history to support his argument.* He likewise failed to cite any authority on the law governing the general application of the statutory aggravating circumstances.* Indeed, appellate counsel concluded his superficial one-paragraph argument by stating generally that this Court had already ruled otherwise, while making no attempt whatsoever to distinguish his client's case* from those unnamed, unidentified cases he had just conceded to have been already adversely decided. Appellate counsel's incredible failure to "argue" more than his "personal feeling," in the final analysis, also laid the predicate for a finding of presumptive prejudice; clearly, a lawyer's bare recital of feelings cannot be deemed "meaningful adversarial testing." Cronic, 466 U.S. at 659.

c. Appellate Counsel's Failure to Effectively Argue the Second Aggravating Circumstance: Failure to Devise Theory or Theme of Case, to Make Distinction Between Murder and Kidnapping to Avoid Detection and Uttering Concession of Guilt.

Appellate counsel then shifted back to the second aggravating circumstance, murder for avoidance of arrest or detection. That third circumstance, of course, pivoted on petitioner's purpose in forcing the victim into the vehicle's trunk. Analytically, findings of purpose or intent are necessarily based on external conduct which was logically consistent with a particular purpose to the exclusion of others. It was therefore foreseeably, and absolutely, essential for petitioner's success in that portion of the oral argument that appel-

late counsel bring with him, and persuasively offer this Court, a plausible theory or explanation for the conduct in question.

This Court therefore immediately asked appellate counsel to explain his theory of the case. Again, unfortunately for petitioner, his counsel was unprepared. Appellate Counsel was simply unable to offer any reasonable, plausible theory or explanation for his client's course of conduct during the deeds construed as kidnapping:*

COURT: Why did he kill the (inaudible)?

A: According to the defendant's testimony, he killed the man becau... he lost his temper. Ah... He had put the man in the trunk ...ah...they were driving, he and Colleen were now driving off into the night away from the victim's house, someone in a panic, "What do we do next," at which point the victim, I think in anger, begins to disconnect the...ah... the wires to the taillights in the back of the car. At that point the defendant, in his statement, says that he lost his temper, went out, opened the trunk, pulled the man out of the trunk and shot him. The only evidence of intent --

COURT: Why did he take him from his home if... ah... he'd accomplished his purpose, whatever his purpose was? Why didn't he simply leave the defendant tied up in his home?

A: It... It's not clear from the record, your Honor. It... It just simply is not clear. It...eh... I believe in another part ...ah ...the Defendant

states that he... ah... was looking for a place to let the victim out of the car.

COURT: Well, but why would he have done that except to avoid detection (pause) detection of the events that occurred in the victim's home?

A: (Pause) Your Honor, it's... it's just not clear to me. I... I don't know why. I think that every homicide--

COURT: Is it not a reasonable inference that he put him in the trunk to carry him away from his home to an isolated area to avoid detection?

[T.-19-21] (emphasis supplied). Having come before this Court for oral arguments without a theme or theory of his client's case, petitioner was reduced to asserting the unlikely scenario of "anger" as the motive for the victim's tampering with the vehicle's tail lights. Appellate counsel's assertion "was utterly devoid of common sense" and, as such, undermined the merits of petitioner's defense. Balkcom, 688 F.2d at 744.

The prejudice resulting from appellate counsel's incredible explanation of the case is again manifested by this Court's outright rejection of it in its written opinion: "In a desperate effort to gain freedom, the victim apparently disconnected the vehicle tail lights." Routly, 440 So.2d at 1265. This Court's description of the victim's desperation as the probable motive for the disconnection of the tail lights is infinitely more plausible. Moreover, it takes no genius to divine it. In fact, desperation is conspicuously the most, if not the only, plausible description of the victim's probable state of mind. Appellate counsel's total inability to proffer such a common-sensical theory of the case for this Court's consideration illustrated the extreme absence of forethought

which he devoted to the preparation of petitioner's direct appeal. This Court simply cannot turn its back to this appalling lack of responsible advocacy and allow petitioner a fate resulting therefrom which he does not in fact deserve.

With the above quoted exchange, moreover, this Court had provided appellate counsel a key hint at a crucial analytical distinction: kidnapping of the victim to avoid detection as opposed to murder of the victim to avoid detection. Had appellate counsel devoted sufficient time to analyze that issue prior to his appearance before this Court, he would have realized the distinction, raised it and argued it vigorously. At the very least, he would have recognized it upon this Court's friendly suggestion. It was a critical distinction, moreover, because petitioner's course of conduct as reflected in the record on appeal indicated that his intent at that time was simply to restrain the victim's freedom of movement temporarily in order to make a quick get-away before the victim had an opportunity to contact police, as amplified below. Yet, appellate counsel's deplorable lack of expertise, forethought, preparation and zealousness with regard to that specific matter was again brought into sharp focus by his failure to make the pivotal distinction, even at that late stage*.

Before concluding with that point, appellate counsel went so far as to, in essence, concede his client's overall guilt*: "I think that the defendant... uh... simply flipped out... uh... and began to commit these felonies." [T.-22]. In like vein, appellate counsel assured this Court that, "Your Honor, I am not... eh... eh... saying that he's innocent." [T.-22]. Concessions of guilt in open court, it should be needless to say, fly in the face of Wilson, as well as all principles of effective partisan advocacy. The instant appellate counsel thus betrayed his professional duties, as well as his death row client.

Moreover, appellate counsel's concession of guilt in open court contravened his professional duties as mandated by

this Court: A lawyer "shall not assert his personal opinion as to the guilt or innocence of an accused." CPR, Disciplinary Rule, 7-106(c)(4) (1986) (emphasis supplied). Appellate counsel's assertion before this tribunal of his client's guilt therefore constituted unprofessional, unacceptable behavior. E.g., The Florida Bar v. Brennan, 377 So.2d 1181 (Fla. 1979). At the very least, a concession of such magnitude rendered appellate counsel's "assistance" to petitioner before this Court fundamentally ineffective.

d. Appellate Counsel's Failure to Effectively Argue the Fourth Aggravating Circumstance: Compounding of Earlier Failures to Devise Theory or Theme of Case and to Make Distinction Between Murder and Kidnapping to Avoid Detection; Additional Failure to Establish Proper Evidentiary Standards and Uttering Concessions of Guilt.

Appellate counsel then addressed the fourth aggravating circumstance -- that the murder was especially heinous, atrocious or cruel. Appellate counsel commenced his presentation with an intemperate equivocation which was not in his client's best interests and constituted grossly ineffective advocacy* with respect to that specific issue:

> Umm... You know it's very difficult to stand before this Court or any other court... ah... and (pause) and say that any homicide is not especially heinous, atrocious and cruel, and I... heh... certainly can sympathize with any circuit judge who... who would have to make that statement in a courtroom in which the family of a victim might be present.

[T.-22-23]. His partisan duty, of course, was to argue his client's case in a manner designed to persuade this Court, not

to equivocate or purport sympathy for the trial court's perhaps unpleasant but certainly lawful duties. Additionally, if it was in fact "difficult" for appellate counsel to stand before this Court and zealously advocate any important point on behalf of his client, he, first, should never have volunteered to accept that responsibility and, second, should have sought leave to withdraw promptly. Appellate counsel, however, did neither.

The prejudice brought about by appellate counsel's previous failure to establish for this Court the critical distinction regarding kidnapping-versus-murder to avoid detection is highlighted by this Court's next question: "Let me ask you: Putting a... a victim in a trunk of an automobile, tied up ... ah... and taking him out obviously for the purpose of murder, would normally be a rather atrocious thing, wouldn't it?" [T.-23] (emphasis supplied). Had appellate counsel devised an overall theory or theme for his case -- had he prepared himself to make the above logical distinction for this Court -- the last-quoted inquiry would have been rendered moot, much less conceded by appellate counsel. Furthermore, the above inference was not established beyond a reasonable doubt by the record, and emanated from this Court's own express hypothesizing to explain petitioner's course of conduct: "The reasonable hypothesis is that (pause) he had him out there for what other reason?" [T.-21] (emphasis supplied).

Rather than remind this Court of the need for proof beyond a reasonable doubt, or point out the flaws in the Court's understanding of the facts, or make the critical distinction between murder and kidnapping to avoid detection even at that belated juncture, or, at least, remaining silent, appellate counsel actually, specifically and affirmatively conceded the atrocity of his client's crime.* [T.-23]. This Court cannot brook such a shocking lack of responsible advocacy in a capital appellate proceeding. See, e.g., Wilson, 474 So.2d 1162.

As if to distance himself from his pariah client in the eyes of this Court, appellate counsel then reiterated his damning opening equivocation:*

> Umm... (pause) As I said it's difficult to stand before this Court and say that this homicide or any other homicide... is... is not especially heinous, atrocious and cruel, but I think that if -- when you compare it to the facts of various other cases that I've read, that have been decided by this Court, and particularly those cases ... umm... (pause) in which the... the heinous, atrocious, cruel standard has been... uh... has been... uh... sustained, I... I just don't think that it rises to that occasion.

[T.-24-25]. Appellate counsel was so busy qualifying his argument on the final aggravating circumstance that he never even attempted to define the "heinous, atrocious and cruel" legal standard to which he was referring,* much less did he engage in any analysis* or provide any legal authority* on the appropriate standard for this Court's consideration. Likewise, he didn't bother to name the cases he had "read", if any. Appellate counsel merely uttered circular, almost unintelligible, remarks which contained no substance whatsoever. Obviously, appellate counsel had remained as incompetent to represent petitioner before this Court as on the day he was appointed to do so by the instant trial court.

The prejudice suffered by petitioner due to appellate counsel's specific failure to devise a coherent theme or theory of the case left this Court to render its judgment on the basis of its fundamentally flawed understanding regarding petitioner's purpose in putting the victim in the vehicle's trunk compartment. That failed understanding was again reflected in

this Court's published opinion. While discussing cases where "the victims were subjected to agony over the prospect that death was soon to occur," this Court, in its written opinion, inferred that, "Mr. Bockini must have known that the defendant had only one reason for binding, gagging and kidnapping him." Routly, 440 So.2d at 1265 (emphasis supplied). Of course, the Court's implicit conclusion was that the "only" reason for petitioner's alleged kidnapping of the victim was to murder him. Appellate counsel's deficiencies during that portion of his oral argument thus caused this Court's rejection of his appeal on that particular issue and, moreover, on the basis of an impermissible "hypothesis" not established on the record beyond a reasonable doubt as required by law.

In fact, petitioner's limited purpose at that time was to avoid arrest by finding an isolated spot and depositing the victim to prevent him from summoning the police immediately. Petitioner thus hoped to gain sufficient lead time to escape beyond the state borders. Petitioner's immediate flight from Florida, as documented in the appellate record, demonstrated that his only concern during the events in question was to make his get-away and thus fully corroborated that explanation of his conduct.

That simple explanation would have cast a different -- and decidedly favorable -- light on the issue. It was also the most plausible explanation supported by the record on appeal because the record contained no indication of premeditated design or murderous malice. Rather, the record established that petitioner and his girlfriend drove around the area in question in a state of panic for approximately one hour after the altercation in the dwelling wondering and discussing "what to do next." [R.-948-50]. The shooting incident ultimately occurred only in a spontaneous and stressful burst of uncontrolled, angry panic after petitioner and his girlfriend were forced to pull over because of a problem with the vehicle's tail lights. [R.-894-95]. Yet, appellate counsel failed to think this spe-

cific matter through to its logical conclusion, as was his partisan duty. Moreover, he failed to present the foregoing alternative, eminently plausible, factual scenario for judicial review. In the final analysis, appellate counsel left this Court with a prejudicially incomplete and erroneous view of petitoner's case as demonstrated by the portion of this Court's opinion quoted above.

e. Appellate Counsel's Failure to Address the Fifth Aggravating Circumstance and to Reserve Rebuttal Time.

Finally, appellate counsel was stopped by this Court in mid-sentence because his time had expired. Appellate counsel was thus unable to address the fifth and final aggravating circumstance.* Moreover, appellate counsel had failed to reserve any time for rebuttal which, in this case, was symptomatic of his inexperience and substandard performance.*

That specific omission clearly did not result from appellate counsel's conscious choice, but rather because his lack of experience and preparation, or both, caused him to lose control of his "argument" and his time. If, on the other hand, appellate counsel's specific omission to reserve rebuttal time is viewed as a conscious and strategic choice, it was so "utterly devoid of common sense," Balkcom, 688 F.2d at 744, and "so ill chosen" as to render counsel's representation constitutionally defective. Id. at 738, quoting Washington v. Atkins, 655 F.2d at 1346.

Appellate counsel's failure to provide for any rebuttal time thus left the state's argument standing in its entirety without any "meaningful adversarial testing." Cronic, 466 U.S. at 659. Moreover, that omission became critical because the state's argument was forceful, organized and cogent, complete with a theory of the case, citation to legal authority and discussion of legal analyses. This Court thus interrupted the state's presentation only once, at the beginning. [T.-27]. The

state's resolute and persuasive response, unlike petitioner's appointed appellate counsel's, demonstrated competency and credibility. [T.-27-8]. The contrast simply could not have been greater, nor the damage to petitioner, due specifically to a lack of rebuttal.

In sum, during the entire oral argument appellate counsel fumbled about, improvising his legal analyses on the spot as the Court was making its various inquiries. Such improvisation resulted from the sheer lack of preparation which compounded his lack of competence at the time of appointment. It made his presentation disjointed, lacking any theory of the case, as well as making him lose track of his time and argument. Similarly, appellate counsel's argument had no persuasive or consistent theme, leaving this Court to draw its own unfavorable conclusions for lack of facts or explanations favorable to petitioner. Indeed, as illustrated above, appellate counsel was forced to retract his statements or contradict himself outright in open court on numerous occasions. Even worse, he actually conceded his client's case, including his client's guilt, during several key junctures of his oral argument. Appellate counsel's specific failure to properly manage his time and reserve an opportunity for rebuttal finally prevented him from salvaging that devastating performance. The above, in tandem, fundamentally bankrupted the oral argument phase of petitioner's direct appeal.

F. The Motion for Rehearing: Appellate Counsel's Failure to Correct Prior Deficiencies and Assert Meritorious Issues.

Despite appellate counsel's legally and factually inadequate briefs and his disastrous oral argument, he still had one final opportunity to correct the many factual errors, logical inconsistencies and other prejudicial deficiencies which had no doubt confused this Court and led to its failure to apprehend, or to fully and correctly apprehend, key points of

petitioner's case. That final opportunity, of course, was the motion for rehearing through which appellate counsel could set the record straight and attempt to mitigate the damage caused by his prior failures to research, prepare and argue his client's case. Any zealous advocate would have seen to it that the final opportunity not be lost. Moreover, it was appellate counsel's positive professional duty to "act with dispatch to rectify his errors with the least inconvenience or harm to his client." The Florida Bar v. Ossinsky, 255 So.2d 526, 527 (Fla. 1971). Instant appellate counsel, however, failed to seize that final opportunity, as he had with all the others.

Appellate counsel instead prepared a superficial, three page motion for rehearing raising only two points. The first point, incredibly, was a bare reassertion of the "swearing match" regarding the conflict in testimony between the Florida police and petitioner pertaining to the out-of-court statement's voluntariness. As noted above, this Court had already reminded appellate counsel during oral arguments of the elementary point that an appellate court will simply not disturb trial court resolutions of conflicting testimony. This Court furthermore explicitly declined to do as much in its written opinion. Yet, appellate counsel, presumably anxious to preserve the trappings of appellate legal assistance, again stuck that non-issue in his motion while still ignoring the additional evidentiary matters contained in the record on appeal to break the supposed "swearing match" as well as the many unresolved, substantial issues raised by this case. He furthermore failed to attempt any resolution of the various concerns which he had so painfully dodged throughout this Court's questioning during his oral argument.

For instance, appellate counsel failed, in his motion for rehearing, to advise this Court that the testimony of petitioner's arresting Michigan officer was not at all a "legal conclusion" as described by this Court in its written opinion but, rather, a factual description of the details which subjectively had prompted him to arrest petitioner on December 5,

1979. Those factual details, as earlier noted, were that Michigan police had been advised by Florida police that petitioner was wanted for questioning regarding an alleged incident in Florida. When objectively considered, that factual testimony regarding the actual, subjective arrest motive of the individual officer in question cannot several years later be transformed into a "legal conclusion" by way of litigation. Yet, as with all the other issues now raised in this petition for the first time, appellate counsel specifically failed in his motion for rehearing to alert this Court about its misunderstanding of that specific point.

Appellate counsel additionally failed to alert this Court of its misconceptions regarding O'Brien's pregnancy cramps. As previously discussed, those cramps were the justification for the formal continuance and extension of speedy trial obtained by the state subsequent to the three de facto "continuances" which the state had previously granted itself by failing to call petitioner's case for trial in accordance with the preceding court orders to that effect. [R.-279-82]. That formal continuance and extension, in turn, formed the basis for denial of petitioner's subsequent motion for discharge. As also previously discussed, the issues raised by those cramps were numerous and unconscionably ignored by appellate counsel during the briefing and oral argumentation stages of petitioner's direct appeal. The consequences of those omissions were vividly illustrated in this Court's written opinion and should have been addressed in the motion for rehearing, if not before.

This Court's apparent failure to comprehend the previously-detailed facts surrounding O'Brien's cramps were evident in its summary dismissal of petitioner's appeal with respect to that issue. Specifically, this Court opined:

> The only question in dispute was the foreseeability of the witness' unavailability for trial. The court found that the unavailability was unforeseeable; we believe that the record supports this finding. The witness was in her penultimate month of

> pregnancy and evidently experiencing unusual cramps which cautioned against her travel.

Routly, 440 So.2d at 1261 (emphasis supplied). Thus, the unfounded notion of unusualness was the precise and express basis for this Court's denial of petitioner's appeal with respect to this specific issue. Moreover, this Court mistakenly believed the trial court had affirmatively determined the unforeseeability issue; however, as previously documented herein, neither the doctor, the prosecution nor the trial court had ever determined O'Brien's condition to be exceptional, unusual, unforeseeable or unexpected prior to the trial court's ruling.

To be sure, the trial court's written order, prepared by the prosecution on an ex parte basis and executed by the trial court some three weeks after its actual ruling, asserted a finding of unforseeability. This Court, as quoted above, even made a pointed reference to that belated assertion in its written opinion. Routly, 440 So.2d at 1261. Nonetheless, the trial court's purported "finding" of unforseeability lacked absolutely any evidentiary foundation.

Moreover, because neither the medical advice nor the legal argument proffered to the trial court prior to its actual ruling contained any reference to the allegedly exceptional or unforeseeable nature of O'Brien's pregnancy cramps, the subsequent assertion unilaterally sneaked into the written order by the prosecution was but a self-serving, tardy and unfounded attempt to superficially satisfy the statutory requirements in disregard of what actually transpired. That particular sequence of events additionally demonstrated the questionable tactics employed by state agents throughout this case in contravention of petitioner's constitutional rights. Appellate counsel, however, again failed to rectify his prior deficiencies; rather, he compounded them with his continuing disregard of his Wilson role.

With respect to the burglary statute, appellate counsel failed in his motion for rehearing to emphasize to this Court that, although the statute was satisfied when a person

remains in a structure with the intent to commit an offense therein, the statute also mandated the previously-discussed exclusion. See § 810.02(1) Fla. Stat. (1985). Having already been alerted to the statute's provision both by the state in its Answer Brief and by this Court during oral arguments, any competent counsel would have taken the time to review and carefully analyze it. Such review and analysis would have been fruitful because, as noted earlier herein, the trial record indicated that petitioner's case was governed by the burglary statute's exclusionary proviso. The prosecution, moreover, had failed to prove the essential elements of burglary. Appellate counsel's specific omission to alert this Court of its misapprehensions regarding that particular issue in the motion for rehearing prejudiced petitioner because it caused this Court to finally reject petitioner's appeal on that issue based on such misapprehensions. Routly, 440 So.2d at 1262.

Appellate counsel similarly failed to raise this Court's erroneous conclusion in its written opinion that petitioner had failed to object to the admission of the out-of-court statement at trial and had therefore waived the right to assert same on direct appeal. Routly, supra at 1260. As noted previously, it was absolutely essential for appellate counsel to lay out for this Court the precise phrasing of the objection and the preceding sequence of events which occurred both during pre-trial and trial stages of this case so that this Court could positively appreciate petitioner's intent to not waive that issue. Furthermore, it was absolutely essential for appellate counsel to elaborate on the same factual specifics to demonstrate that the facts of the case could not support an inferred or implied waiver of that issue.

Of course, appellate counsel should also have raised all of the various other points or issues raised now for the first time in this petition, especially the prosecutorial misconduct. In short, there existed numerous, "prominent and meritorious" issues which formed a "fundamental and intrinsic"

part of this case. S.E. Smith, 484 So.2d 31. Appellate counsel should, and could, have raised all such issues in his motion for rehearing, if not before. His inexplicable indifference to all such issues prejudiced petitioner as a matter of law under S.E. Smith because it denied him a meaningful appeal on the merits with respect to each such specific issue.

The magnitude of appellate counsel's (1) lack of appreciation for the stakes involved in this case, (2) ongoing failure to familiarize himself with the record of the case and (3) failure to establish in his mind a chronology of key events even at that late stage, was exposed by yet another easily-determined factual misstatement contained in his motion for rehearing: apparently, appellate counsel's familiarity with facts essential to his client's case only dimmed with the passage of time. Thus, not only did appellate counsel waste his client's last opportunity for effective advocacy on a non-issue, but he again affirmatively misstated the facts of the case to this Court.

The motion for rehearing advised this Court that, "The record reflects at the time [petitioner] gave his tape-recorded confession there was an information on file in Florida charging the [petitioner] with second degree murder." (Motion for Rehearing, p.2). A review of the record immediately reveals that the "tape-recorded confession" was obtained at 2:08 a.m. on December 5, 1979, [S.R.-13-21], whereas the "information on file" was not "on file" until 4:12 p.m., over fourteen hours later that day. [R.-2]. Appellate counsel's disdain for the factual details of this case -- and to his professional partisan obligations in a capital proceeding as explained by this Court in Wilson -- caused him to specifically ignore that sequence of events. As previously discussed, the above factual sequence as established by the record on appeal was absolutely essential to a proper extradition under the Uniform Criminal Extradition Act which both Florida and Michigan had adopted at

the time in question. Yet, appellate counsel remained oblivious to it throughout the entire appellate process.

Appellate counsel's gross factual ignorance was further aggravated in the motion for rehearing by his failure to provide substantive law for this Court's consideration. Appellate counsel cited only one case within that portion of his motion, quoted verbatim a brief excerpt from the opinion and asserted that, "The principles discussed ... are directly applicable to the facts of the instant case." (Motion for Rehearing, p.2). Thus, appellate counsel altogether failed to mention a controlling statute even while purportedly analyzing the law. That bald assertion was moreover thrust upon this Court without any analysis or rationale explaining the asserted applicability. Even first-semester law students know they must provide sound analysis in order to be effective advocates.

The second and final point of appellate counsel's motion for rehearing was a three-paragraph attempt to assert an analogy between Washington v. State, 432 So.2d 44 (Fla. 1983), and petitioner's case. That clumsy, half-hearted attempt was brief enough to be reproduced herein verbatim:

> The Court affirmed the death sentence imposed by the trial court under the authority of Griffin v. State, 414 So.2d 1025 (Fla. 1983) and Coombs v. State, 403 So.2d 418 (Fla. 1981), inter alia. In affirming the death sentence, the Appellant suggests that this Court has overlooked its recent decision in Washington v. State, 432 So.2d 44 (Fla. 1983). Griffin is distinguished from the instant case in that the Griffin case involved two homicide victims. Coombs is distinguishable in that the jury recommended the death penalty which was imposed by the Court.
>
> Appellant maintains that the instant case is more similar to Washington v. State than either of the above cited cases. Specifically, in both cases there was no additional evidence presented by the State in support of the aggravating circumstances aruged [sic] in support of the death penalty, and in both cases the court imposed the death penalty over the jury recommendation of life imprisonment.
>
> In this case the jury recommendation of life imprisonment deserved greater weight than it was given by the trial court.

> Accordingly, the death sentence should have been vacated and set aside by this Court, and Appellant respectfully requests rehearing on that issue.

(Motion for Rehearing, p.3). Appellate counsel's attempted analogy on that point shows that he again failed to develop any coherent argument "designed to persuade" this Court, merely resorting to stringing together a series of blanket conclusory assertions.

Appellate counsel's formal conclusion in his motion that, "In this case the jury recommendation of life imprisonment deserved greater weight than it was given by the trial court", was also devoid of legal analysis or logical explanation. Clearly, appellate counsel's failures in the motion for rehearing to develop logical transitions, analytical points or policy explanations which are required of first semester law students in research and writing projects was inexcusable and prejudicially deficient. They deprived petitioner of his right to a zealous and effective advocate as required by Wilson.

Appellate counsel, in sum, squandered his client's last opportunity to correct his own previous fatal errors and to compensate for his ongoing failure to zealously advance his client's interests. That failure was in disregard of his Wilson role and in breach of his professional duties to his client. The Florida Bar v. Ossinsky, 255 So.2d at 527. The motion for rehearing also lacked legal research, analysis, forethought, preparation and advocacy. Thus, appellate counsel's final act before this Court on his client's behalf was a travesty equally violative of petitioner's Sixth Amendment rights as all that had preceded it.

VII.

JUDICIAL APPOINTMENT OF APPELLATE COUNSEL.

Both Federal and Florida law impose specific duties on the trial court and the contemplated appointee during the process of appointing an advocate for an indigent. Those duties parallel each other and are designed to ensure the effectiveness of counsel and, thereby the adversarial efficacy of the proceeding in question. The breach of those duties therefore cannot be tolerated. As seen below, however, both the instant trial court and the instant appellate counsel altogether disregarded, to petitioner's detriment, their respective legal duties during the instant appointment process

A. The Legal Duties of Courts and Counsel in the Judicial Appointment Process.

Because the responsibility for appointment of appellate counsel for indigent defendants resides with trial courts, this Court recently admonished the trial courts of Florida to not "appoint appellate counsel without due recognition of the skills and attitudes necessary for effective appellate representation." Wilson v. Wainwright, 474 So.2d at 1164-65. This Court in Wilson specifically established that: "A perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly, zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated." Id. (emphasis supplied). The Wilson Court further declared that, "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 [trial] court's mind when an appointment is made." Id. (emphasis supplied).

The United States Supreme Court has similarly established that, "The guarantee of counsel 'cannot be satisfied by mere formal appointment'." Evitts v. Lucey, 105 S.Ct. at 835, quoting Avery v. State of Alabama, 308 U.S. 444, 446, 60 S.Ct.

321, 322, 84 L.Ed. 377 (1940). The strict constitutional prohibition against merely formal appointments is based on the recognition that effective legal assistance is the predicate for the protection of all other constitutional rights: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have." Cronic, 466 U.S. at 654, and authorities cited therein. The Cronic Court, like the Wilson Court, also recognized that the "character of a particular lawyer's experience may shed light in an evaluation of his actual performance." Id. at 655.

During the convoluted sequence of events outlined below and ultimately resulting in the appointment of the instant appellate counsel, the trial court breached its duty to reasonably assess "counsel's ability to fully, fairly and zealously advocate [petitioner's] cause" during petitioner's direct appeal before this Court. As shown below, the trial court never inquired into the instant appellate counsel's skill, experience and positive appreciation of his role in relation to the gravity of the charge involved in the instant case. (See Exhibit E). The trial court's failure to undertake any such inquiry, coupled with appellate counsel's actual incompetence at the time, thus rendered the instant appointment "perfunctory" and "merely formal." As this Court squarely declared in Wilson, that specific failure constituted "a denial of meaningful representation which will not be tolerated". Wilson, 474 So.2d at 1164-65. Consequently, this Court must now, at the very least, afford petitioner his right to an adequate appeal with a competent advocate at his side.

Furthermore, under the Code of Professional Responsibility (hereinafter "CPR"), a member of the Florida Bar should not accept a client whose legal problem is beyond the scope of the attorney's expertise, unless, of course, the attorney has the disposition, time and resources required to overcome his/her lack of qualifications. Specifically, the CPR mandates that, "A

lawyer should represent a client competently." CPR, Canon 6 (1986). That Canon signifies that an attorney "should accept employment only in matters which he is or intends to become competent to handle" (emphasis supplied) and that, "A lawyer generally should not accept employment in any area of the law in which he is not qualified." CPR, Ethical Considerations 6-1, 6-3 (1986). Consequently, "a lawyer offered employment in a matter in which he is not and does not expect to be so qualified should either decline the employment" or make the appropriate arrangements to otherwise ensure competent representation. CPR, Ethical Consideration 6-3 (1986). Under the CPR, a Florida attorney appointed to represent an indigent is thus under a duty to ensure competence which roughly corresponds to the trial court's duty under Wilson and Evitts to avoid perfunctoriness.

To enforce the duty imposed by Canon 6 and the Ethical Considerations thereto, this Court adopted mandatory Disciplinary Rules which provide that a lawyer "shall not handle a legal matter which he knows or should know that he is not competent to handle." CPR, Disciplinary Rule 6-101(1) (1986) (emphasis supplied). Furthermore, this Court has mandated that a lawyer, even if competent, "shall not handle a legal matter without preparation adequate in the circumstances." CPR, Disciplinary Rule 6-101(2) (1986) (emphasis supplied). Of course, in the context of a capital appeal, "the circumstances" are unique and, as recognized by this and other courts, require the highest standard of care, preparation, and diligence.

This Court has consequently held that the acceptance of a legal matter which an attorney knows or should know he is not competent to handle constitutes unacceptable, substandard conduct. The Florida Bar v. Glick, 397 So.2d 1140 (Fla. 1981). The courts of this state have similarly recognized the legal duty of counsel to advise a client of any lack of competency, especially in criminal matters. E.g., Easley v. State, 334 So.2d 630 (Fla. 2d DCA 1976). See also, The Florida Bar v. Ossinsky, 255 So.2d 526 (Fla. 1971); The Florida Bar v. Dingle,

220 So.2d 9 (Fla. 1969). The scrupulous observance of this duty is necessary to the integrity of our judicial system because, otherwise, the typical, relatively unsophisticated client would have no ready means to learn of any such incompetence and would be harmed thereby.

Moreover, because an attorney is an officer of the court, his duty to ensure his own competence and to provide effective representation derives from two distinct sources. The first source, as discussed above, is the Code of Professional Responsibility as adopted and enforced by this Court. The second source is counsel's status as an officer of the court. As an officer of the court, he must assist the trial court in fulfilling the constitutional duty imposed by Wilson and Evitts upon all trial courts to avoid perfunctory or merely formal appointments. In view of the foregoing, appellate counsel in the instant case violated his duty by failing to either decline the appointment or exert the necessary effort to ensure his post-appointment competence. Furthermore, appellate counsel violated his duty to advise his client of his lack of competence in a timely and meaningful fashion, thereby leaving him in ignorance while on death row.

In sum, both the instant trial court and the instant appellate counsel were under concomitant duties to affirmatively and positively evaluate the contemplated appointee's competence prior to actual appointment in order to determine whether he was qualified to receive and accept appointment in this capital case. Furthermore, the instant appellate counsel was under a duty to timely advise the courts and his client of any lack of competence. Finally, instant appellate counsel was under a duty to decline, if appropriate and by proper means, the instant appointment due to any such lack of competence, as Richard had previously done.

B. The Actual Process of Appointment in the Instant Case.

Initially petitioner was represented, by designation, by the Public Defender of the Seventh Judicial Circuit. This Court, however, ordered that office to withdraw as appellate counsel for petitioner due to the backlog of capital appeals in that office at that time. In re: Directive to the Public Defender of the Seventh Judicial Circuit of Florida, Case No. 60,514 (April 28, 1981). Pursuant to this Court's directive, the Public Defender of the Seventh Judicial Circuit filed a motion to withdraw on May 13, 1981. (See Composite Exhibit C and attachments thereto). The motion was granted and petitioner's second appellate counsel, James L. Richard of Ocala, was appointed by Circuit Court Judge William T. Swigert on June 1, 1981. (Composite Exhibit C, p.1). Judge Swigert was not the trial judge. Although he had presided over petitioner's pre-trial suppression hearing, Judge Siwgert did not attend any portion of the trial and was therefore not familiar with the development or details of this capital case. Judge Swigert, furthermore, never undertook any inquiry into Richard's skill, experience and attitude relative to the gravity of the instant charge. In fact, Judge Swigert apparently took Richard's name from a list of local attorneys generally willing to accept appointments and "appointed" him on the spot and without Richard's presence or prior knowledge. That practice, in light of Wilson, must be deemed per se deficient.

Recognizing the magnitude of his task, however, attorney Richard, on July 10, 1981, filed a motion for an extension of time to file his initial brief. In order to ensure competent representation for petitioner, Richard requested in that motion, only as an alternative, permission to withdraw in favor of more experienced counsel. (See Composite Exhibit D). Richard's motion for extension of time was based on his professional recognition of the amount of preparation required in this case for an effective appeal, as well as his recognition of the grave stakes involved. (Composite Exhibit D, pp.4-6). Richard's

motion, moreover, exemplified compliance with the professional duty of an attorney appointed to represent an indigent but who is unqualified to do so for whatever reason. Thus, Richard recognized -- and promptly notified this Court of -- the need for either additional time or more experienced counsel.

In his motion, Richard specifically pointed out his lack of experience in criminal appeals and his relatively recent admission to the Bar as an attorney. (Composite Exhibit D, p.5). He acknowledged that he had never participated in any manner in the defense or prosecution of a capital felony and was therefore unfamiliar with the case law applicable to capital cases. (Composite Exhibit D, p.5). He also alerted this Court to the fact that several major issues needed to be presented on appeal and, more importantly, that each such issue required substantial amount of research and preparation in areas where Richard recognized he lacked incompetence. (Composite Exhibit D, p.5). Richard's request for an extension of time was thus expressly based on his ethical duties to this Court and his client to research and prepare each point on appeal in a thorough and proper manner. (Composite Exhibit D, p.5). This Court, without hearing or opinion, elected to grant Richard's alternative request for permission to withdraw on July 31, 1981, rather than allowing him the requested sufficient time to adequately research and prepare petitioner's case on direct appeal. (See Composite Exhibit C, p.13).

Presumably, the basis for this Court's granting of the alternative request to withdraw was Richard's inexperience in this area of practice as documented in his motion. In comparison, the ultimate appellate counsel in this case was equally or similarly inexperienced, unqualified and unprepared to handle petitioner's appeal. (Exhibit E, p.1). Appellate counsel, for instance, had been an attorney for a similar period of time, about four years, and had professional experience similar to Richard's. (Exhibit E, p.1). Like Richard, appellate counsel had never participated in any manner in the defense or prosecution of a capital

felony (Exhibit E, p.1). Similarly, like Richard, appellate counsel had participated in only two appeals. (Exhibit E, p.1). Furthermore, the instant appellate counsel, a sole practitioner, was under the same pressures as Richard with regard to time and money. (Exhibit E, p.2).

On October 23, 1981, the instant appellate counsel was nonetheless appointed to represent petitioner before this Court. He was appointed by Chief Judge Aulls at the courthouse in Tavares. Unlike Judge Swigert and Judge Angel, Chief Judge Aulls had no experience with petitioner's case other than his involvement with the trial court's stated inability to locate competent counsel for petitioner's direct appeal.

Thus, petitioner's adversarial position had significantly deteriorated even before the commencement of his appeal proper as a result of this substitution in his appointed appellate counsel. Moreover, that prejudicial substitution was accomplished without any inquiry into the new appointee's skill, experience, ability or attitude in relation to the gravity of the instant charge, (Exhibit E, p.2), and was therefore in violation of both Florida and Federal law. Petitioner had thus, unknowingly, suffered a serious decline in the caliber and enthusiasm of his appointed advocate from the experienced, competent but overworked Public Defender to attorney Richard, an inexperienced but committed private practitioner who appreciated the scope and gravity of the case and his responsibilities therein, and finally to the new appointee, an inexperienced and incompetent private attorney who lacked the time, resources, experience, zealousness and devotion required to effectively represent petitioner before this Court.

Appellate counsel's incompetence at the time of appoint ment (as well as thereafter) was vividly illustrated by his unexplained, contradictory substantive legal advice to petitioner during the direct appeal. Appellate counsel, for instance, advised petitioner on December 11, 1981, immediately prior to filing the Initial Brief that, "Although we have a valid speedy

trial argument, the case law is clear that very few felony cases are reversed for a speedy trial violation." (Composite Exhibit B, p.1)(emphasis supplied). Yet, by January 13, 1982,--barely a month later-- appellate counsel was advising petitioner that, "[B]ased on the facts in [sic] the law only the suppression issue and speedy trial would be likely to result in reversal of your conviction." (Composite Exhibit B, p.4) (emphasis supplied).

Appellate counsel maneuvered that diametric turnabout without any substantive explanation to his client, asserting only that, with respect to the omitted issues, "my research reflected no viable argument, and it seemed frivolous to waste the court's time with material not likely to result in reversal." (Composite Exhibit B, p.4)(emphasis supplied). By June 4, 1982, moreover, appellate counsel's research and memory apparently had produced yet new -- and inconsistent -- results: "As I believe I told you previously, the speedy trial decisions in recent months have been going the other way," appellate counsel advised petitioner immediately before oral arguments. (Composite Exhibit B, p.8).

In view of the foregoing discussions presented in this petition regarding the per se reversible error standard applicable to prosecutorial misconduct at that time and the pregnancy cramps used to justify the speedy trial extension, the above statements were simply incredible. That absolutely erroneous legal advice conclusively demonstrated appellate counsel's utter lack of research, preparation and diligence throughout the direct appeal. That sort of fundamentally erroneous legal advice, moreover, independently constituted ineffective legal assistance. See, e.g., Herring, 422 U.S. 853. In view of the wanton plagiarism documented herein, the above-quoted statements were also less than an honest description of appellate counsel's "research." They were, perhaps, even fraudulent misrepresentations.

Even if one supposes the latter advice to be substantially correct appellate counsel should then have vigorously argued the speedy trial issue during oral argument, as well as emphasizing the issue both in the Reply Brief and the motion for

rehearing. Appellate counsel, however, omitted to even mention this issue in the Reply Brief, the oral argument, or the motion for rehearing, despite his unequivocable assurance to petitioner that the issue was one of only two "likely to result in reversal." Appellate counsel's abominable advice and conduct, in short, was incompetent under any set of circumstances.

During the instant appointment process, moreover, the trial court specifically recognized, and plainly attested to, the serious appointment problems posed by this and similar cases. In a letter dated August 18, 1981, Marion County Circuit Judge William T. Swigert informed Chief Judge Aulls of the extreme difficulty in obtaining competent appellate counsel to represent petitioner on appeal. (Composite Exhibit A, p.2). In a letter dated September 1, 1981, Chief Judge Aulls reiterated this problem to then Chief Justice Sundberg of this Court. (Composite Exhibit A, p.1). Chief Judge Aulls' letter explicitly stated: "I have discussed this matter with several of what I would consider the more competent criminal counsel in Ocala and they have set forth the problems you all recognize, being of course the inadequate compensation for the time and especially the responsibility involved." (Composite Exhibit A, p.1) (emphasis supplied). That acknowledged statutory interference based on the "inadequate compensation" mandated by state law is substantively analyzed in full detail in the succeeding section of this petition.

For this section of the petition, the importance of that interference is that it prompted the trial court to solicit unknown attorneys from distant communities to represent petitioner. As such, the statute's influence helped to corrupt the appointment process itself. Coupled with the trial court's complete failure to inquire into the skill and experience of the instant appellate counsel, Section 925.036 helped trigger the fatal downward spiral in the caliber of petitioner's appellate representation; it thereby abridged at the outset petitioner's right to the effective assistance of the advocate appointed by

this state to protect his interests during adversarial proceedings before this Court.

Petitioner, moreover, was never made aware either by the trial court or his appointed appellate counsel of the problematic appointment process and its potentially fatal impact on his appeal before this Court. It was not until the very last moment that petitioner was made privy to the instant appointee's lack of competence. Finally, on December 26, 1983, appellate counsel wrote petitioner, advising him that this Court had denied the motion for rehearing. It was only at that point, when the appellate procedure had been terminated, that appellate counsel first revealed to his client that petitioner's case had been his "first capital felony appeal." (Composite Exhibit B, p.10). It was also at that late juncture that appellate counsel first advised his client that "more experienced representation might have served you better." (Composite Exhibit B, p.10). The soundness of appellate counsel's belated admission is not open to question. His duty, however, was to notify petitioner of his incompetence in a timely manner, for otherwise the notification would be meaningless as a practical matter. Appellate counsel honored that duty only in the breach.

Appellate counsel's breach of his duty to timely advise petitioner of his incompetence was extremely prejudicial because it allowed petitioner to repose on appellate counsel's non-existent qualifications. Thus, petitioner was allowed to proceed throughout the entire adversarial appellate process believing that competent and diligent representation had been appointed on his behalf. In fact, appellate counsel's acts and omissions, combined with the trial court's disregard of its duties during the appointment process and the state interference created by Section 925.036, demonstrate that petitioner never had any real prospects of success during the direct appeal before this Court.

In conclusion, the process employed by the trial court and appellate counsel to provide representation in the instant

case was constitutionally deficient: it denied petitioner his fundamental constitutional right to effective legal assistance throughout all proceedings before this Court because it placed him in an adversarial proceeding represented by an incompetent and unqualified advocate. That deficiency was underscored by the actual judicial knowledge regarding the serious representation problems posed by the compensation statute as established by the above-quoted correspondence from the trial court to this Court. That process violated the United States Supreme Court's decision in Evitts as well as this Court's mandate in Wilson: "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." Wilson, 474 So.2d at 1165 (emphasis supplied). This Court must now animate its Wilson declaration and accord petitioner the relief to which he is entitled.

VIII.

STATE INTERFERENCE WITH PETITIONER'S RIGHT TO EFFECTIVE LEGAL ASSISTANCE, EQUAL PROTECTION OF THE LAW AND DUE PROCESS.

In this section petitioner sets forth the violation of his right to effective legal assistance and his right to due process of law as a consequence of Section 925.036(2)(e) Fla. Stat. (1985).[3/] In essence, petitioner demonstrates how the statutory limitation on compensation for appointed appellate counsel operated as a "systemic defect" to the detriment of his constitutional rights. Petitioner specifically demonstrates how the statutory compensation limit hampered his appointed appellate counsel's ability to mount an effective appeal before this Court, how it injected alien considerations into the instant attorney/client relationship, thus engendering conflicts between himself and appointed appellate counsel, and how he was thereby denied the right to effective legal assistance as secured by the Sixth Amendment to the United States Constitution. Petitioner further demonstrates how the statute denied him the right to due process and equal protection under the law as secured by the Fourteenth Amendment to the United States Constitution.

Petitioner, at the outset, recognizes that the statute in question has been previously held to be constitutional. Mackenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1973). Petitioner submits, however, that Mackenzie's conclusion fails to comport with the due process and equal protection safeguards which are fundamental in capital proceedings. Moreover, Mackenzie and its progeny are either factually or legally inapplicable to the instant case, as explained below.

Petitioner does not challenge the state's right to establish a compensation ceiling, however. Petitioner only objects to the statute's patently inadequate amount, which

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3/ Discussion of this Court's recent ruling in Makemson v. Martin County, 11 F.L.W. 337 (Fla. 1986), is contained in the following section. Petitioner apologizes for any redundancy or inconvenience thereby caused.

underscores its arbitrariness, especially in the context of capital appeals where the stakes are highest and the burden of proof is placed on the indigent defendant(s)/appellant(s). Finally, inasmuch as the Chief Judge of the instant trial court had expressly acknowledged the actual problems directly caused by the challenged statute in the instant case, Section 925.036 must be deemed unconstitutional under this particular set of circumstances.

In Mackenzie, this Court rejected a constitutional challenge brought by an attorney who had been appointed to represent an indigent. This Court, in a single-paragraph ruling, held:

> [W]hile appellant argues that Section 925.035 fails to comport with the Due Process and Equal Protection Clauses of the Constitution of the United States and the State of Florida, as applied to the provision of defense counsel of extraordinary services, we are of the opinion that: 1) Section 925.035 does, both on its face and as applied, comport with the foregoing constitutional provisions; and, 2) if a change in the foregoing statutorily-provided compensation be called for, it is within the province of the Legislature, not the Court's to make such change.

Mackenzie, 288 So.2d at 201. It should be noted that Section 925.035, upheld in Mackenzie, is the predecessor to the current statute.

The Mackenzie dissent, however, cogently detailed the problems inherent in the statute as well as the Mackenzie opinion itself. Noting the "voluminous amount of work" involved in that case and the uncontradicted evidence that the compensation ceiling was unrealistic and unreasonable, the dissent urged that, "The statute must be read to apply only when reasonable in light of the special circumstances of the particular case and applicable provisions of the Constitution." Mackenzie, 288 So.2d at 202, (Ervin, J., dissenting). Justice Ervin persuasively observed that, otherwise:

> [The statute] is out of harmony with the rationale of Gideon v. Wainwright (citation

> omitted) that a reasonable measure of equal legal representation will be afforded indigents similar to that which wealthy clients are able to afford. If it were the rule in Florida that good counsel would be paid commensurate with the value of their services rendered indigent defendants, the spirit of the Gideon case and not just the letter would be more honestly and quantitatively served.

Mackenzie, 288 So.2d at 202, (Ervin, J. dissenting). Justice Ervin then reviewed case law from various jurisdictions and concluded that the Florida statutory scheme was defective.

In Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978), this Court revisited the question of statutory limitations on fees and costs. In Rose, the trial court appealed the appellate court's quashing of its order allowing witness fees higher than those statutorily authorized. This Court upheld the trial court, explaining that, "Where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements." Rose, 361 So.2d at 137 (emphasis supplied).

In Rose, this Court implicitly recognized Mackenzie's harshness and correctly declined to "abdicate its responsibility and defer to legislative..... arrangements." Of course, Rose's conclusion is compelled by the constitutional duty of the judiciary to interpose itself in the defense of civil and constitutional rights against improper encroachments by political majorities. Rose thus makes Mackenzie inapplicable when important rights are jeopardized or the judicial process is itself compromised.

The effect of Rose, then, was to undercut Mackenzie's rationale that only the Legislature may change the statutory ceiling on compensation. Rose's contradictory effect on Mackenzie was pointedly noted by Chief Justice England in his Rose dissent: "The Court's decision today is wholly inconsistent with Mackenzie v. Hillsborough County" (citation omitted). Rose, 361 So.2d 135, 139 (England, C.J., dissenting). Although Chief Justice England's observation was analytically

accurate, Rose nonetheless remains the more sound decision because it implicitly recognized the unreasonableness and arbitrariness of the absolute statutory scheme.

In Rose's wake, the courts of this state experienced great uncertainty and confusion regarding the applicability of the statutory ceilings. For instance, in Pinellas County v. Maas, 400 So.2d 1028 (Fla. 2nd DCA 1981), the appellate court considered a county's challenge to the trial court's finding that the statutory scheme was unconstitutional. The Maas Court quashed the trial court's ruling on Mackenzie's authority. Maas, 400 So. 2d at 1029.

Interestingly, however, the Maas Court distinguished Maas from Rose on the basis that, in Rose, this Court had ascertained "that the expenditure of public funds was required to protect the rights of the [Rose] defendant and that the action taken was necessary to enable the court to perform one of its essential judicial functions." Id. at 1030. The Maas Court, in distinguishing Rose, noted that in Maas "[t]here was nothing in the record to show that the statutory maximums, albeit unrealistic by today's standards, were precluding indigent defendants from obtaining the benefit of competent counsel." Id. at 1030. Thus, the Maas Court established a fundamental distinction: Rose applies where "the expenditure of public funds was required to protect the rights of the defendant" and Mackenzie applies where the statutory limitation does not impose a substantial hardship on the protection of those rights.

The Maas Court also relied on County of Seminole v. Waddell, 382 So.2d 357 (Fla. 5th DCA 1980). In Waddell, the appellate court considered yet another trial court's attempt to provide reasonable fees to appointed counsel in excess of those statutorily allowed. The Waddell Court likewise upheld the statutory scheme on the express authority of Mackenzie. The Waddell Court, however, felt itself compelled to pointedly note that the respondent, a trial judge, had argued, "not without considerable persuasiveness, that the Rose case cannot be recon-

ciled harmoniously with Mackenzie." Waddell, 382 So.2d at 358. The Waddell Court nonetheless deferred to this Court's Mackenzie ruling, explaining that, "It is the province of [the Florida Supreme Court], not ours, to recede from [the] 1973 opinion." Id.

Concluding, the Waddell Court held that, "Whatever its faults, the statute is clear and unequivocal. It is a mandatory limitation of $2,500 for [trial] representation per capital case per defendant, and it provides no exceptions for 'extraordinary' cases or multiple representation." Id. at 359. Thus, the Waddell Court, contrary to the Maas Court and this Court in Rose, concluded that the statute provided absolutely no room for judicial discretion. The confusion surrounding the statute's application thus continued to abound.

In Dade County v. Goldstein, 384 So.2d 183 (Fla. 3rd DCA 1980), a county again appealed a trial court order awarding fees in excess of the statutory limitation. At the outset, the Goldstein Court noted the confusion which reigned, and continues to reign: "In all fairness to the trial court, it should be noted that the above statutory requirements have not heretofore been definitely interpreted by a Florida appellate court. Moreover, these requirements have given rise to many divergent interpretations by the bench and bar at the trial level." Goldstein, 384 So.2d at 184, n.1. Turning to the "plain terms" of the statute, the Golstein Court concluded that it disallowed "taking into consideration the nature of the services rendered, the responsibility incurred, discovery required, the circumstances under which it was rendered, the value of the services to the client, and the beneficial results, if any, of the services." Id. at 188. The Goldstein Court, like the Waddell Court but unlike the Maas court and this Court in Rose, therefore concluded that the absolute statutory maximum must be applied without exception.

To ameliorate the obvious harshness of this result, however, the Goldstein Court defined the term "case" as used in the statute to mean a "count" of an indictment or information.

Id. The Goldstein Court justified its definition by explaining that the amount of work and responsibility involved in the defense of a single count is much less than that involved in multi-count situations. A multi-count case, the court explained, "necessarily exposes the defendant to a much greater criminal liability." Id. at 189. Thus, the Goldstein Court, while noting the absolute nature of the statute, nonetheless concluded that exposure to criminal liability is a factor which should be judicially considered when applying the statute.

Responding to the continuing confusion over Mackenzie, this Court reconsidered the subject statutory scheme in the case of Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981). In Bridges, this Court again qualified the effect of the increasingly untenable Mackenzie holding. First, the Bridges Court held, on the authority of Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981), that the "stacking" of fees was permissible. Bridges, 402 So.2d at 412. In so ruling, however, this Court failed to account for the unqualified statutory provision that, "This section does not allow stacking of the fee limit established in this section." § 925.036(1), Fla. Stat. (1985).

More significantly, this Court announced in Bridges that:

> Unless it is demonstrated that the maximum amounts designated for representation in criminal cases by section 925.036 are so unreasonably insufficient as to make it impossible for the courts to appoint competent counsel to represent indigent defendants, we cannot say that section 925.036 violates the sixth amendment right to counsel.

Bridges, 402 So.2d at 414-15. Thus, this Court in Bridges again attempted to temper Mackenzie's bright-line harshness by, first, allowing for stacking despite the statutory prohibition thereof and by, second, expressly acknowledging, for the first time, that the statute must be held unconstitutional when it is shown that its limits make it impossible to appoint competent counsel to represent an indigent.

The Bridges concurrence by Chief Justice Sunberg, relying on Gideon v. Wainwright, emphasized that, "[I]t would be the duty of the Courts to strike down [the statutory] limitations in favor of reasonable compensation" upon a showing that the statute made it impossible to secure competent representation. Bridges, 402 So.2d at 415 (Sunberg, C.J., concurring specially) (emphasis supplied). The Chief Justice succinctly noted that, "Ineffective counsel is no counsel at all." Id.

Justice Boyd, concurring in part and dissenting part, took a different approach, explaining that a court must be deemed to have inherent authority to provide compensation in excess of the prescribed amounts when the gravity or complexity of the case warrants it. Justice Overton, dissenting, likewise explained that, in difficult cases, the Sixth Amendment right to effective legal assistance would require compensation greater than that allowed by the statutory scheme. Relying on various rationales, this Court in Bridges affirmatively, and correctly, established that Mackenzie's ruling must yield where a showing is made that the statutory limitation actually interfered with the Sixth Amendment right to effective legal assistance.

Subsequent to Bridges, the courts of this state have continued to grapple with the uncertainty long-embedded in this area of the law. For instance, in Marion County v. DeBoisblanc, 410 So.2d 951 (Fla. 5th DCA 1982), the appellate court was faced with yet another trial court attempt to circumvent the statute's harshness. The DeBoisblanc Court struck the trial court order as being in direct conflict with this Court's prior rulings. The concurrence by Judge Sharp, however, explicitly recognized and embraced the exceptions to Mackenzie established by this Court in Rose and Bridges.

Judge Sharp concurred with the majority, but only because "there was no showing made in this case that the defendant's right to counsel was abridged in any way by the statute limiting compensation to his attorneys." DeBoisblanc, 410 So.2d at 953, (Sharp, J., concurring specially)(emphasis supplied).

Referring to the Bridges Court, the DeBoisblanc concurrence noted that, "They recognized the statute would be subject to attack on constitutional grounds if a showing were made that it was 'impossible' to secure effective counsel for an indigent defendant because of the fee limit." Id. at 953-54 (emphasis supplied). Judge Sharp's concurrence exemplified the growing judicial recognition that the statute must yield to the Constitution, at least in some cases.

In Martin County v. Makemson, 464 So.2d 1281 (Fla. 4th DCA 1985), the appellate court was again forced to overturn a trial court attempt to award fees commensurate with the gravity and complexity of the case at hand. After an extensive review of Florida jurisprudence on this issue, the Makemson Court certified four questions to this Court, noting that "an absolute fee cap works inequity in some cases." Makemson, 464 So.2d at 1283. The certified questions have not yet been answered.[4/] Chief Judge Anstead, however, dissented, emphasizing that, "This is a case in which the defendant's life was not only at risk, but in which the death penalty was actually imposed." Makemson, 464 So.2d at 1286 (Anstead, C.J., dissenting).

Noting the gravity and complexity of that death penalty case, Chief Judge Anstead explained that the record demonstrated that, "[T]he maximum amounts designated by statute for representation in this case for trial and appellate counsel are so unreasonably insufficient as to make it impossible for the trial court to appoint competent counsel for the indigent involved." Id. at 1287. The Chief Judge thus found "presumptive impossibility" based on the record on appeal. The Chief Judge considered the trial court's rationale for its ruling, quoting persuasively therefrom:

4/ As previously noted, this Court's answer to the certified questions came down on July 18, 1986, only days prior to the filing of this petition. Petitioner has therefore attached a supplement to this petition which addresses this Court's recant Makemson ruling.

> [T]his Court is confronted with conflicting laws, one of which requires competent counsel for a defendant who has been sentenced to death and the other stating that defense counsel can be paid only $2,000 for his services. The lowest bid for these services was $4,500 which is more than twice what the Legislature has allowed. One of these laws must yield to the other. There is no doubt in the court's mind that the Legislature, if confronted with the problem, would admit that the law requiring competent counsel was paramount and superior to the law allowing a mere $2,000 fee for the dreadful responsibility involved in trying to save a man from electrocution. Therefore this court finds that F.S. 925.036 in setting rigid maximum fees without regard to the circumstances in each case is arbitrary and capricious and violates the due process clause of the United States and Florida Constitutions. (citation omitted). In simpler language, the Statute is impractical and won't work.

Makemson, 464 So.2d at 1287 (Anstead, C.J., dissenting, quoting trial court ruling). The Chief Judge concluded with the indisputable observation that, "Surely something is wrong with a system that prevents a reasonable fee from being assessed in a capital case but authorizes the State to provide counsel for private landowners in eminent domain proceedings where the fees have been as high as $800,000." (citation omitted). Id.

The foregoing review of the case law on this issue reveals a conspicuous gap: no indigent has ever asserted the statute's absolute fee cap as an abridgement of, or interference with, his right to effective legal assistance, due process or equal protection. The cases which have come before this Court and other Florida courts have focused solely on the rights of trial courts to inherently or otherwise award higher fees, the rights of appointed counsel to be justly compensated for the reasonable value of their efforts and the right of counties which must pay the fees of appointed counsel to limit their expenses to the statutory maximum. Thus, neither this Court nor any other Florida court has squarely confronted and resolved the clash between the statutory scheme in question and the constitutional rights of indigents. This conspicuous gap, as well as

the anarchy which has long reigned in this area of the law, makes it urgent that this Court resolve this issue now.

A. State Inference With Petitioner's Right To Effective Legal Assistance: Unreasonable Economic Constraints and Conflicts of Interest.

In the instant case, the statute deprived petitioner of his right to competent appellate counsel. That denial occurred as a consequence of the statute's unreasonably low financial limitations. Those limitations foreseeably set the stage for appointment of incompetent appellate counsel by making the appointment itself financially onerous, thereby discouraging competent counsel from participating in the appointment process. Compounding its mischief, the statute's unreasonable limitations then foreseeably induced the instant appointed counsel to unduly limit his professional efforts to that which roughly corresponded to the amount of the statutory limit. The statute thus undermined petitioner's appellate case from its very inception.

As succinctly noted by Justice Ervin in his Mackenzie dissent, "The adage that 'you get what you pay for' applies not infrequently. In our pecuniary culture the calibre of personal services rendered usually has a corresponding relationship to the compensation provided." Mackenzie, 288 So.2d at 202. (Ervin, J., dissenting). Appointed appellate counsel are therefore forced by the statute, despite their clients' best interests and constitutional rights, to either discount potentially meritorious issues because of economic unfeasibility or to personally finance the development of those issues. Accordingly, indigent defendants tend to receive "short shrift" at the hands of appointed counsel because they are denied a just compensation for the tremendous efforts required to prepare and argue an effective capital defense. Id.

In this case, moreover, the Rose and Bridges exceptions apply. In Rose and Bridges, as noted above, this Court

recognized the statute's unconstitutionality when it makes it "impossible" to obtain competent counsel for an indigent. The series of correpondence previously discussed in this petition from Judge Swigert to Chief Judge Aulls of the trial court and, ultimately, to the Chief Justice of this Court, established the inability of the instant trial court to secure competent counsel to represent petitioner during his direct appeal due specifically to the subject statute.

The initial letter in that correspondence series was from Judge Swigert of the instant trial court to Chief Judge Aulls, also of the instant trial court. Judge Swigert's letter specifically identified petitioner's case and stated that, "[W]e have been unable to obtain private counsel" to represent petitioner on direct appeal to this Court. (Composite Exhibit A, p.2) (emphasis supplied). Judge Swigert attributed that inability to two reasons. First, was "the statutory limitations of Section 925.036." Second, was the inexperience of the local Marion County Bar in criminal, much less capital, appeals. Judge Swigert concluded his correspondence by summarizing, "In short we cannot obtain private counsel to handle" petitioner's direct appeal. (Composite Exhibit A, p.2). (emphasis supplied).

Chief Judge Aulls then forwarded a copy of Judge Swigert's letter, together with his own cover letter, to the Chief Justice of this Court. In his own cover letter, Chief Judge Aulls also identified the statutory fee cap as the culprit for the acknowledged inability of the trial court to secure competent appellate counsel for petitioner. (Composite Exhibit A, p.1). This Court, through its Chief Justice, responded to Chief Judge Aulls by advising the trial court to appoint the Public Defender of the Fifth Judicial Circuit to represent petitioner on direct appeal (Composite Exhibit A, p.3).

The trial court, for whatever reason, proceeded to elicit volunteers from other communities. In so doing, it furthermore omitted to apprise itself of the credentials, competency, attitudes and skills of those foreign attorneys, as

previously discussed. In this case, the operation of the statute, combined with the trial court's total omission to assess the competence of contemplated appointees from other geographic areas, resulted in the appointment of an inexperienced and incompetent appellate counsel. The results of his incompetence are documented throughout this petition, as well as the prejudice to petitioner as a consequence thereof.

The state statutory scheme also interfered with petitioner's Sixth Amendment right to effective legal assistance by creating unnecessary conflicts and tension between appointed counsel and his client, thus interferring with the attorney/client relationship itself. The unreasonably low compensation ceiling obviously induced appellate counsel to tailor his efforts to the low statutory limitation, as previously shown, whereas petitioner expected, and, ultimately, demanded full-scale, effective representation. The conflict thereby engendered was based on appointed counsel's need for economic self-preservation and the duties, efforts and expenses triggered by the instant appointment in order to effectively defend his client's interest before this Court.

Although appointed counsel must be held to their lawful professional duties in any event, the economic considerations "in our pecuniary culture" cannot be ignored. Mackenzie, 288 So.2d at 202, (Ervin, J., dissenting). Appointed appellate counsel are thus induced and, in practice, propelled, by the statute's harsh economic limitations to detrimentally trim their efforts on behalf of indigents based on unilateral financial considerations. The conflict is greatest in a capital appellate proceeding because the duty to the client is highest, the consequences of deficient acts and omissions are worst, and the efforts and expenses greatest, especially because the defendant/appellant is held to carry the burden of proof and facts are viewed most favorably to the state.

Faced with that sort of conflict, the duty of appointed counsel, as did Richard herein, would of course be to move for leave to withdraw. However, if every appointed counsel

caught in the statute's vise moved for leave to withdraw, either the system would become paralyzed or indigent defendants would be routinely deprived of their Sixth Amendment right to effective legal assistance. Undeniably, however, the problems spawned by the statute are endemic in this state, as expressly acknowledged by the trial judge and the Chief Judge of the instant trial court in the previously discussed correspondence to this Court. Thus, petitioner's constitutional right to effective legal representation was abridged by the foreseeable, if not inevitable, conflicts engendered by the state statutory scheme.

That clash of interests between the appointed attorney and his client inexorably poisoned the instant attorney/client relationship. Eventually, it led to a total breakdown of trust and communication between petitioner and his appointed appellate counsel. Ultimately, petitioner was forced to file his pro se motion to remove the instant appellate counsel from his case, which this Court summarily denied without hearing or opinion.

Appellate counsel's own contemporaneous recognition of that lurking "conflict of interest" (as he phrased it) was borne out by his correspondence to petitioner: "Your unhappiness with the brief may lead to a conflict of interest between the two of us, and in that event I thought that it was necessary, in order to protect your rights, that the Supreme Court be aware of the fact that you are not happy with the brief that has been filed." (Composite Exhibit B, p.7). Appellate counsel's duty, as the professional with expert knowledge, education and experience in the field of law, however, was to take the necessary steps to prevent his deficient performance from compromising "the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result". Wilson, 474 So.2d at 1163, citing Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). This was true even though he was subject to the admittedly unreasonable pressures created by the statute. Appellate counsel, however, failed again to act in accordance with his professional status and duties, thereby reinforcing the

statute's negative force. Appellate counsel's omissions with regard to that specific matter thus bared petitioner to the vagaries of the appellate process without a devoted and trusted advocate representing his best interests.

Clearly, the state interference with the Sixth Amendment right to effective legal assistance attributable to Section 925.036 during petitioner's direct appeal was repugnant to law and justice. As aptly noted by both the trial court and Chief Judge Anstead in Makemson: "The law requiring competent counsel was paramount and superior to the law allowing a mere $2,000 fee for the dreadful responsibility of trying to save a man from electrocution." Makemson, 464 So.2d at 1287 (Anstead, C.J., dissenting, quoting trial court ruling). The problems inherent in the statute and in this Court's Mackenzie ruling have now, unfortunately for this state's jurisprudence, become entrenched in the case law. Those problems will continue to plague the courts of this state until this Court resolutely and definitively aligns itself with the fundamental constitutional rights endangered by this unreasonable, arbitrary statutory scheme.

B. State Interference with Petitioners' Right To Equal Protection Of The Law: Denial of Access to Courts Due to Arbitrary and Unreasonable Limitation on Necessary Resources.

Fairness in the criminal justice system is inherently a fundamental due process right of each individual. When the state enacts a law that impinges on the due process rights of a discrete classification of persons within the criminal justice system, those enactments must therefore survive judicial strict scrutiny under an equal protection analysis. E.g., Massachusetts Board of Retirement v. Margia, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 529 (1976); Jackson v. Marine Exploration Co., Inc., 583 F.2d 1336, 1346 (5th Cir. 1978). Furthermore, "financial status is not a rational basis for the state to deny or burden access to adjudicatory processes." Chrysler Corp. v. Texas

Motor Vehicle Comm'n, 755 F.2d 1192, 1202 (5th Cir. 1985), reh'g denied, 761 F.2d 695. The state must therefore grant equal access to its judicial system, any inequality being subject to the strict scrutiny of the courts.

The equal protection guarantee as applied to the criminal justice system, moreover, "does not represent a balance between the need of the accused and the interest of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." Mayer v. Chicago, 404 U.S. 189, 196-197, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (emphasis supplied). See also, Griffin v. Illinois, 351 U.S. 12 76 S.Ct. 585, 100 L.Ed. 891 (1956). Thus, the state may not enact economic obstacles to an indigent's right to equal access to its courts unless it can demonstrate some truly compelling interest to justify the burden(s), "for there can be no equal justice where the kind of an appeal a man enjoys 'depends on the money he has'". Douglas v. California, 372 U.S. 353, 355, 83 S.Ct. 814, 816, 9 L.Ed.2d 811 (1963) (emphasis supplied). If the state somehow obstructs equal justice, it therefore violates the "duty of the government to equalize access to the courts by assisting the poor." Id. at 1203.

In the instant context, the statutory compensation scheme established by Section 925.036, Fla. Stat. (1985), creates a discrete classification based exclusively on indigency. Petitioner belongs to that discrete class of indigent capital defendants presently incarcerated by the State of Florida. As applied to petitioner's class of indigent capital defendants, the statutory scheme operates to unreasonably and affirmatively discourage willing and competent representation by making it virtually impossible, economically, for most attorneys to mount an effective capital appeal. This result is indisputably verified by the previously-discussed judicial correspondence.

The precise statutory figure, moreover, is wholly arbitrary, there being absolutely no rational relationship

between the flat $2,000 statutory cap and any given case, much less petitioner's capital appeal. A fortiori, the statute cannot survive strict judicial scrutiny because the state could achieve its ostensible cost-containment objectives by less invidious means than a blind, absolute economic limit for indigents' representation. Furthermore, the statute's arbitrariness is brought into sharp relief by its textual disallowance of any discretion to judicially adjust its limitations based on exceptional circumstances; indeed, the statute does not even recognize the fundamental difference between a capital appeal and other appellate proceedings.

The statute's interference is of course more acutely felt in the appellate process, where appointed appellate counsel are required to carry the burden of proof on behalf of their clients under a legal standard that further requires factual evaluations most favorable to the state. The statute's interference is even greater in rural or remote areas, as opposed to heavily populated metropolitan areas, where, presumably, the market of competent and willing attorneys would be greater. Finally, the consequences of the statute's interference is greatest in a capital proceeding of whatever sort because of the complex and voluminous case law as well as, of course, because human life is at stake.

In petitioner's case, emanating from a rural area, the statute's inhibiting effects converged to create the most damage possible: a capital appellate proceeding from a remote rural area where the Chief Judge of the Circuit Court had expressly recognized the total unavailability of competent counsel to represent him and where petitioner was held carry the burden of proof. The actual consequences of the statutory scheme in petitioner's case are evidenced by the documented fact that appellate counsel, in essence, did little or nothing by way of independent work-product. Essentially, as seen above, appellate counsel performed roughly $2,000 worth of cosmetic representation during petitioner's direct appeal. Petitioner was thus

unconstitutionally denied equal access and equal justice with respect to each issue which the instant appellate counsel compromised or discounted on account of the statute's unreasonable economic constraints.

C. State Interference with Petitioner's Right To Due Process: Denial of a Fair Appeal on the Merits Due to Arbitrary and Unreasonable Limitation on Necessary Resources.

The statutory scheme as applied discriminates on the sole basis of indigency and denies Florida indigents effective legal assistance and equal access to the courts of this state with respect to each issue which appointed appellate counsel are forced to neglect on the statute's account. This neglect of meritorious issues, moreover, undermines the fairness of the appellate process as a whole because it forces the courts of this state to render judgments based on defective and incomplete information. The statute is therefore violative of the due process requirements guaranteed by the Fourteenth Amendment. See, Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209, (1959). The instant appellate counsel's neglect of issues based on the statute's constraints effectively denied petitioner his right to an appeal with respect to each neglected issue, thereby violating petitioner's due process rights as well.

D. State Interference: Cronic and Progeny's Presumption of Prejudice.

Cronic and progeny, as discussed previously, require a presumption of prejudice when a "systemic defect" is shown to have interfered with a criminal defendant's constitutional rights. The statutory scheme erected by Section 925.036 constituted just such a systemic defect throughout petitioner's direct appeal because, as demonstrated above, it significantly interfered with petitioner's constitutional rights. The statute's effects penetrated the appointment process, the appeal proper and the

attorney/client relationship. The statute's corrosive influence on every aspect of the proceedings before this Court was so pervasive in quantity and so fundamental in quality that the cost of litigating its effect in this particular case is wholly unjustified. Cronic, 466 U.S. at 658. Accordingly, in addition to the actual prejudice shown above, this Court must presume prejudice and issue its writ of habeas corpus to restore petitioner's constitutional rights in all respects.

IX.

CONCLUSION

The foregoing petition documents the instant appellate counsel's numerous, specific and unjustifiable deficiencies throughout all phases of the direct appeal which prejudically denied petitioner effective legal representation before this Court. The above-documented acts and omissions resulted in more than a substantial likelihood that, absent appellate counsel's deficiencies, the result of petitioner's appeal would have been different. Appellate counsel, as shown above, neglected or ignored even dispositive issues as exemplified by his neglect of the prosecutorial misconduct issue throughout all phases of the direct appeal.

Appellate counsel's obvious lack of factual and legal research, forethought and preparation made him reluctant to assert with conviction even the most minute of matters, whether factual or legal; his specific failure to develop and assert the pivotal issue of prosecutorial misconduct was particularly prejudicial. Coupled with his lack of expertise at the time of his appointment, appellate counsel was consequently unable, time after time, to present his client's case to this Court in a forceful, accurate and convincing manner, as would a competent and effective advocate. Appellate counsel's deficiencies, moreover, were so continuous and egregious that they constituted a mere sham, amounting to no representation at all, and resulted in a constructive denial of counsel giving rise to a presumption of prejudice.

Appellate counsel was also rendered ineffective by virtue of his prior inexperience, the state statutory interference with his ability to prepare and, ultimately, by his careless disregard for the duties and responsibilities imposed by law on appointed appellate counsel in a capital proceeding. Appellate counsel's failure to consult with the record resulted in his failure to know critical facts of his client's case and

prevented him from marshalling those facts in support of his legal arguments. Furthermore, his prior inexperience, coupled with his plagiarism of his predecessors' work-product, relieved him of the practical necessity to research the law applicable to those unlearned facts. In addition to appellate counsel's unilateral irresponsibility, the state statutory scheme hampered his ability to devote time and resources to the preparation of petitioner's appeal. Indeed, the state interference induced cosmetic representation by, first, discouraging competent counsel from accepting the instant appointment and, second, by discouraging the incompetent appointee from investing the necessary time and resources to ensure his own competency and to prepare an effective appeal before this Court.

Petitioner's direct appeal before this Court was, in fact, undermined from inception. During the appointment process documented herein, the trial court neglected to consider the experience, skills and attitude of the instant appellate counsel, thereby disregarding its duty to avoid perfunctory or merely formal appointments in violation of petitioner's constitutional right to effective legal assistance. Appellate counsel, for his part, likewise failed to honor his legal and professional duties by affirmatively seeking, and then accepting, appointment to a matter for which he was incompetent and unqualified. Morever, appellate counsel failed to undertake, or even attempt, any arrangements to make himself competent and qualified after accepting the appointment. Similarly, appellate counsel failed to timely advise either the trial court, this Court or his client of his incompetence. Finally, the state statutory limitation on compensation for appointed appellate counsel created the circumstances which forseeably resulted in the appointment of incompetent counsel by creating the situation wherein the trial court was admittedly unable to locate and appoint competent counsel.

The absolutely unrealistic statutory limitation on compensation for appointed counsel also deprived petitioner his constitutional right to equal protection under the law because

it effectively denied him equal access to this Court with regard to each matter, act, or issue which it induced appellate counsel to omit, neglect or compromise as a consequence of its arbitrary economic restraints. The state statutory scheme, in fact, interfered with the appellate process in its entirety, commencing with the appointment process and continuing throughout the appeal's proper. Indeed, it set petitoner and his appointed advocate at odds with each other as the former sought to maximize the appeal's potential and the former sourght to limit his economic investment therein to the statutory limits.

Similarily, the statutory scheme pertaining to aggravating circumstances utilized by the trial court to override the jury and impose the sentence on petitioner violated petitioner's constitutional right to trial by jury for each of the alleged crimes used to justify capital punishment in this case. All of the foregoing, individually and combined, additionally denied petitioner his constitutional right to due process of law. Accordingly, this Court must grant petitioner a new trial and appeal so that his case may finally be zealously -- and effectively -- submitted to the courts of this state for fair resolution of all substantive issues raised herein.

X.

SUPPLEMENTAL AUTHORITY: THIS COURT'S RESOLUTION OF MAKEMSON'S CERTIFIED QUESTIONS

A few days prior to the scheduled filing of this petition, this Court answered the questions certified to it in Martin County v. Makemson, 464 So.2d 1281. While the impending filing deadline made it impossible to adapt the body of the petition in light of this Court's Makemson ruling, petitioner nonetheless addresses that ruling in this brief supplement. Petitioner respectfully requests this Court's indulgence of any inconvenience thereby caused and further requests that the petition be read in conjunction with this supplement whenever appropriate.

In Makemson, 11 F.L.W. 337 (Fla. 1986), this Court found Section 925.036's "fee maximums unconstitutional when applied to cases involving extraordinary circumstances and unusual representation." Id. In defining Makemson's "extraordinary circumstances and unusual representation" standard, this Court specifically identified three concrete factors and one additional consideration to assess the statute's unconstitutional impact on a particular case. This Court specifically declined to provide "more precise delineation." Id. at 339. Nonetheless, Makemson underscores the merits of petitioner's claims.

First, this Court identified the length of time spanned by the subject representation. Id. at 337. Second, this Court identified the gravity of the charges pending against the indigent client of the appointee. Id. Third, this Court identified the complexity of the issues presented and the quantity of work involved. Id. Additionally, this Court considered special or unusual circumstances peculiar to the case (in Makemson, the fact that "because the victim of the crime was a member of a prominent local family, the entire resources of the prosecutor were brought to bear on the case." Id.) When applied to the

instant case, the Makemson factors show that Section 925.036 was unconstitutional as applied to the instant case as well.

Of course, Makemson's procedural posture resulted in a discussion mainly addressing the tension between the inherent rights of trial courts to do justice and the basic rights of appellate counsel to reasonable compensation for their professional labors. Consequently, petitioner's claims are somewhat different from those considered by this Court in Makemson. This Court, however, correctly emphasized in Makemson the crux of petitioner's claims: "More fundamentally, however, the provision as so construed interferes with the sixth amendment right to counsel. In interpreting applicable precedent and surveying the questions raised in the case, we must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably interlinked." Id. at 338 (emphasis supplied).

This Court's express recognition of this inextricable linkage is profoundly important because it is "the criminal defendant whose rights are often forgotten in the heat of this bitter dispute" between trial courts, appointees and county treasurers. Id. In view of the foregoing, petitioner respectfully submits that this Court must now consider directly, for the first time, the claim of an indigent based on the same statutory interference so cogently and recently identified and described by this Court in Makemson.

Petitioner's claims, unlike in Makemson's, are based on direct statutory interference with the appellate process and his rights therein from inception. Specifically, petitioner has asserted a claim in the petition which traces the statutory interference even to the judicial appointment process. That interference, at least in the instant case, resulted in a perfunctory appointment of counsel due, in the words of the instant trial court, to "the inadequate compensation for the time and especially the responsibility involved." (Composite Exhibit A

p.1). In other words, the trial court recognized that the low statutory limitations known well to both the bench and the bar of this state had resulted in its inability to locate and appoint a competent advocate to represent petitioner on direct appeal before this Court.

Petitioner has additionally asserted a claim based on the statute's compounding effects on the ultimate appointee's unilateral deficiencies during the appeal proper. In essence, the statute's unfair limitations prompted the unqualified appointee to either discount difficult issues or personally finance their appeal. Quoting Mackenzie's telling dissent, this Court in Makemson aptly noted: "The link between compensation and the quality of representation remains too clear." Makemson, 11 F.L.W. at 339. Thus the difficult issues in petitioner's case, as documented in the petition, were time after time left unexplored. Additionally, the statutory interference caused an unreasonable, devastating strain in the instant attorney/client relationship by creating artificial and opposing economic interests between the appointee and his indigent client. The statute thus eroded the basic foundation of mutual trust and confidence in the instant attorney/client relationship as well.

Finally, petitioner has asserted a claim that the statutory interference additionally denied him equal protection of the law and due process of the law. Petitioner was denied equal protection with respect to each issue left unexplored due to the statutory interference. Ultimately, the above situation deprived petitioner of his due process rights to a fair direct appeal. None of the above claims were resolved, or even considered, in Makemson and thus require this Court's studied consideration in light of Makemson.

Makemson, although not directly dispositive is, of course, extremely instructive. Moreover, the Makemson factors compel a finding of the statute's unconstitutionality as applied to the instant case. Each of the three specific factors are considered in turn below.

First, is the time period spanned by the subject representation. In Makemson, the time period was nine (9) months. Makemson, 11 F.L.W. at 337. In the instant case, the representation occurred during a span of two and a half (2½) years, from December 22, 1981 through July 5, 1984. The second factor was the exposure for criminal liability. In Makemson, the indigent client was charged with first degree murder, kidnapping and armed robbery. Id. In the instant case, the crime charged was first degree murder. As such, both Makemson and this case involved the gravest of charges and the highest of sanctions: capital punishment.

Finally, is the complexity of the issues and the amount of work involved. In Makemson, this Court specifically noted the voluminous amount of testimony. Of course, petitioner's case focuses on appellate representation, unlike Makemson. Thus, the closest analogy is a reference to the volume of the record on appeal. That record consisted of approximately fifteen hundred (1500) pages, excluding the additional documents and exhibits not specifically designated for inclusion in the record on appeal but nonetheless necessary to a complete understanding of the instant case.

To master the intricacies, both factual and legal, of such a record undeniably would require substantially more than $2,000 worth of legal assistance even if one does not employ a "fair market value" standard of measurement. Undersigned counsel additionally submits for this Court's consideration the enormous volume of work and work-product generated just in this habeas corpus proceeding; clearly, had appellate counsel functioned competently an approximately equivalent volume of work, if not work-product, would have been necessary for his complete understanding and effective presentation of the issues developed only now for the first time in this petition.

The brief analysis outlined above demonstrates that petitioner's case fulfills the Makemson factors. Moreover,

petitioner respectfully directs this Court's attention to its Makemson pronouncement:

> We find that that statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's Sixth Amendment right "to have the assistance of counsel for his defense." The statute, as applied to many of today's cases, provides for only token compensation. The availability of effective counsel is therefore called into question in those cases when it is needed most.

Makemson, 11 F.L.W. at 338. The numerous issues raised by this case since the date of petitioner's arrest and "waiver" of extradition in a foreign jurisdiction, including the various trial court errors, prosecutorial misconduct, pregnancy cramps and other strange procedural or substantive occurrences documented herein, made the instant case one of those where zealous, competent appellate counsel "is needed most," especially in view of the instant trial court override and imposition of the death penalty.

As recognized by this Court, Section 925.036 "provides for only token compensation." Id. The level and caliber of representation devoted by the instant appellate counsel to petitioner amply establishes its outrageously token nature. Thus, petitioner's case is precisely one of those where, as described by this Court, the availability of effective counsel is needed most. That need was underscored by the death penalty already levied on petitioner at the time of the direct appeal. Nonetheless, as seen above, effective legal assistance was simply unavailable in petitioner's case due to the statute's interference, both during and after the instant appointment process, as plainly documented in the petition and the exhibits thereto. In conclusion, petitioner must squarely place his claim in the context of this Court's recent vindication of constitutional rights over pecuniary considerations: "In order to safeguard [an] individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury

and fundamental constitutional rights in favor of the latter." Makemson, 11 F.L.W. at 338. Let it be so in this case, too.

WHEREFORE, petitioner, Dan Edward Routly, respectfully prays for relief in accordance with the foregoing petition and supplement and for such other relief as this Court may deem just and proper.

Respectfully submitted,

SHUTTS & BOWEN
Counsel for Petitioner
1500 Edward Ball Building
100 Chopin Plaza - Miami Center
Miami, Florida 33131

By: Richard M. Leslie
Richard M. Leslie, P.A.

Frank Valdes, Esq.

Thomas B. Buscaglia, Esq.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus and for Other Relief was furnished by regular mail delivery this 25th day of July, 1986 to: THE HONORABLE JIM SMITH, Attorney General, The Capitol, Tallahassee, Florida 32301; RICHARD W. PROSPECT, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014.

Of Counsel

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