IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA	)	
vs.	)	No. 69,557
ROBERT BRIAN WATERHOUSE	)	

APPELLANT'S BRIEF IN CHIEF

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TABLE OF CONTENTS

page

QUESTIONS PRESENTED. 1

STATEMENT OF THE CASE. 2

I. BY WITHHOLDING EXCULPATORY EVIDENCE UNTIL THE LAST MINUTE AND BY FAILING TO DISCLOSE OTHER EXCULPATORY EVIDENCE ALTOGETHER, THE PROSECUTION VIOLATED MR. WATERHOUSE'S RIGHTS UNDER THE UNITED STATES CONSTITUTION AND FLORIDA LAW. 3

II. ROBERT WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL 12

III. THE RELIANCE UPON AN UNCONSTITUTIONAL PRIOR CONVICTION FOR TWO OF THE AGGRAVATING CIRCUMSTANCES AGAINST MR. WATERHOUSE DEPRIVED HIM OF HIS RIGHTS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 34

CONCLUSION 42

TABLE OF AUTHORITIES

page

Cases

Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53, 106 S.Ct. 1087 (1985). 13,17

Arango v. State, 467 So.2d 692 (Fla. 1985) 8

Beck v. Alabama, 447 U.S. 625 (1980) 38

Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). 13

Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977) 9

Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976) 8

Bounds v. Smith, 430 U.S. 817 (1977) 33

Boykin v. Alabama, 395 U.S. 238 (1969) 39

Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). 10

Burgett v. Texas, 389 U.S. 109 (1967). 37

Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985) 32

Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979) 9

Castro v. State, 419 So.2d 796 (DCA 3 1982). 28

Chapman v. California, 386 U.S. 18 (1976). 38

Cheatham v. State, 364 So.2d 83 (Fla. DCA 3 1978) 28,36

Coleman v. Alabama, 399 U.S. 1 (1970). 35

Collis v. State, 685 P.2d 975 (Okl. Cr. 1984). 26

Commonwealth v. Grove, 324 A.2d 405
(Pa. 1974). 24

Daigre v. Maggio,. 705 F.2d 786
(5th Cir. 1984) 35

Davis v. Alabama, 596 F.2d 1214
(5th Cir. 1979) vacated as moot
446 U.S. 903 (1980) 23

Eddings v. Oklahoma, 455 U.S. 104
(1982). 30,38

Ex Parte Scott, 581 S.W.2d 181
(Tex. Ct. Crim. App. 1979). 29

Gardner v. Florida,
430 U.S. 349 (1977) 38

Gideon v. Wainwright, 372 U.S. 335 (1963). 37

Gilpin v. United States, 415 F.2d 638
(5th Cir. 1969) 41

Gladden v. Unsworth, 396 F.2d 373
(9th Cir. 1968) 41

Goodwin v. Balkcom, 684 F.2d 794
(11th Cir. 1982). 28

Gregg v. Georgia, 428 U.S. 153 (1976). 27

Griffis v. State, 472 So.2d 834
(Fla. 1st DCA 1985) 12

Grizzell v. Wainwright, 692 F.2d 722
(11th Cir. 1982). 38

Haley v. Ohio, 332 U.S. 596 (1948) 41

Hernandez v. State, 348 So.2d 1224
(Fla. DCA 3 1977) 8

Huckelbury v. State, 337 So.2d 400
(Fla. 2d DCA 1976). 36

Hudson v. State, 375 So.2d 355 (Fla. DCA 3, 1979). 36

Hussick v. State, 529 P.2d 938 (Ore. 1975) 26

In Re Gault, 387 U.S. 1 45 (1967). 41

In re Ossinsky, 279 So.2d 292 (Fla. 1973). 37

Johnson v. Zerbst, 304 U.S. 458 (1938) 39

Jones v. Estelle, 622 F.2d 124 (5th Cir.) cert. denied 449 U.S. 996 (1980) 38

Kirby v. Illinois, 406 U.S. 682 (1972) 35

Lockett v. Ohio, 438 U.S. 586 (1978) 31,38

Loper v. Beto, 405 U.S. 473 (1972) 37

Marrow v. State, 483 So.2d 17 (Fla. DCA 2 1985). 9

Matter of Suffolk County Bar Association v. LaFreniere, 26 A.D.2d 946 (1966) 35

Matthews v. United States, 449 F.2d 985 (D.C.Cir. 1971). 33

McCarthy v. United States, 394 U.S. 459 (1969) 39

Mincey v. Arizona, 434 U.S. 1342 (1977). 41

Miranda v. Arizona, 384 U.S. 436 (1966). 41

Mullins v. Evans, 622 F.2d 504 (10th Cir. 1980). 33

Napue v. Illinois, 360 U.S. 264 (1959) 7

Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979). 12

Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981) 26

Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). 26,32

People v. Brown, 709 P.2d 440 (Cal. 1985) 19

People v. Harbold, 464 N.E.2d 734 (Ill.App. 1984) 19

People v. Redmond, 278 N.E.2d 766 (Ill. 1972) 25

People v. Savvides, 136 N.E.2d 853 (NY 1956) 10

People v. Shells, 483 P.2d 1227 (Cal. 1971) 29

People v. Young, 391 N.W.2d 270 (Mich. 1986) 18,19

Pilla v. American Bar Association, 542 F.2d 56 (8th Cir. 1976) 36

Porterfield v. State, 472 So.2d 882 (Fla. DCA 1 1985) 9

Powell v. Alabama, 287 U.S. 45 (1932). 35

Quillun v. State, 626 S.W.2d 414 (Mo. App. 1981) 29

Roberts v. Louisiana, 428 U.S. 325 (1976). 27

Solina v. United States, 709 F.2d 160 (2d Cir. 1983). 36

State v. Myles, 389 So.2d 12 (La. 1980). 33

Stein v. New York, 346 U.S. 156 (1953) 41

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 12,13, 37,38

Taylor v. Montgomery, 539 F.2d 715 (7th Cir. 1976) 36

Teague v. United States, 499 F.2d 38 (7th Cir. 1974) 10

The Florida Bar v. Riccardi, 304 So.2d 444 (Fla. 1974) 37

Turner v. American Bar Association, 407 F.Supp. 451 (W.D.Wis. 1975) 36

United States ex rel. Washington v. Vincent, 525 F.2d 262 (2d Cir. 1976) 9

United States v. Auten, 632 F.2d 478 (5th Cir. 1980) 24

United States v. Barham, 595 F.2d 231 (5th Cir. 1979) 10

United States v. Butler, 567 F.2d 885 (9th Cir. 1978). 9

United States v. Bynum, 567 F.2d 1167 (1st Cir. 1978) 9

United States v. Dayton, 604 F.2d 931 (5th Cir. 1979) 39

United States v. Gouveia, ___ U.S. ___, 81 L.Ed.2d 146 (1984) 35

United States v. Hammonds, 425 F.2d 597 (D.C.Cir. 1970) 33

United States v. Hoffman, 733 F.2d 596 (9th Cir. 1984). 36

United States v. Irwin, 561 F.2d 198 (10th Cir. 1977). 36

United States v. Iverson, 637 F.2d 799 (D.C.Cir. 1981) 10

United States v. Librach, 520 F.2d 550 (8th Cir. 1975) 8

United States v. Pollack, 534 F.2d 964 cert. denied, 429 U.S. 924 (1976) 11

United States v. SanFilippo, 564 F.2d 176 (5th Cir. 1977). 10

United States v. Tucker, 404 U.S. 443 (1972) 37

United States v. Wade, 388 U.S. 218 (1967) 35

United States v. Wilhelm, 570 F.2d 461 (3d Cir. 1978). 36

United States v. Wright, 568 F.2d 142 (9th Cir 1978). 36

Waterhouse v. State, 429 So.2d 301 (Fla. 1983) cert. denied, 464 U.S. 977 (1983) 3

Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984). 12

Woodson v. North Carolina, 428 U.S. 280 (1976) 27,31, 34,38

Wright v. State, 446 So.2d 208 (DCA 3 1984). 26

Young v. Zant, 677 F.2d 792 (11th Cir. 1982) 28

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Fla. Stat. 921.141(5)(a) 34

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Yeshion, Thermal Degradation of Erythrocyte Acid Phosphotase Isozymes in a Case Sample 25 Jou. For. Sci. 695 (1980). 21

A.B.A. Standards Relating to Discovery and Procedure Before Trial, 11-2.1(c) 11-2.2(a) (1982). 11

A.B.A. Standards Relating to the Prosecution Function 3-3.11(a) (1982). 11

QUESTIONS PRESENTED

1. Whether the failure to disclose information regarding the credibility of a key prosecution witness and the withholding of exculpatory evidence for eight months until the eve of trial, violated Mr. Waterhouse's rights under Fla. R. Cr. P. 3.220 and to due process of law?

2. Whether Robert Waterhouse was denied effective assistance of counsel at his trial where, inter alia, defense counsel (a) failed to consult with independent experts thereby allowing the prosecution to present unreliable opinion testimony; (b) failed to investigate Mr. Waterhouse's background and, as a result, did not present a wealth of mitigating evidence in his behalf; and (c) at the penalty phase, gave the closing argument held unconstitutional in Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985)?

3. Whether the prior conviction used as two aggravating factors against Mr. Waterhouse is valid where the lawyer who represented Mr. Waterhouse at the time was not a member of the bar, the guilt plea was not knowing and voluntary and was entered based in part on statements illegally obtained from Mr. Waterhouse.

SUMMARY OF THE ARGUMENT

First, prosecutor Merkle's deliberate failure to disclose the names of exculpatory witnesses until the working day prior to trial, combined with the calculated suppression of impeachment evidence critical to the jury's evaluation of the evidence, deprived Mr. Waterhouse of his rights under Fla. R. Cr. Pro. § 3.220 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Second, trial counsel's failure to make any meaningful effort to prepare to confront the expert witnesses against him, to investigate and eliminate his unconstitutional prior conviction, and to discover and present compelling mitigating evidence, combined with counsel's prejudicial closing argument, deprived Mr. Waterhouse of his right to the effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution.

Finally, the use of an unconstitutional prior conviction in sentencing deprived Mr. Waterhouse of his fundamental rights where the conviction was obtained in contravention of Mr. Waterhouse's right to counsel, where his guilty plea was not shown to be voluntary, and where it was premised on statements coerced from him.

STATEMENT OF THE CASE

The case is before the Court on appeal from the denial of a motion for post-conviction relief in the Circuit Court for the Sixth Judicial Circuit in Pinellas County.[1] Robert Brian Waterhouse contends that he was convicted of first degree murder and sentenced to death in violation of the law of Florida and the Constitution of the United States.

Mr. Waterhouse was arrested on January 9, 1980 and charged with the murder of Deborah Kammerer, whose body was found on January 3 on the shore of the Tampa Bay in St. Petersburg. She had suffered numerous wounds from a blunt instrument.

The prosecution presented a circumstantial case which rested on evidence suggested that Mr. Waterhouse had a propensity toward anal sex, R. 1319, 1794,[2] and that the decedent disliked anal intercourse (the medical examiner testified that it appeared the decedent had experienced anal sex prior to her death); the testimony of numerous expert witnesses regarding scientific tests, blood analysis, blood splatters, and the analysis of hair and fibers recovered from Mr. Waterhouse's car and the decedent's clothes; the testimony of police officers and an inmate from the jail regarding statements allegedly made by Mr. Waterhouse; and testimony by a bartender that Mr. Waterhouse left a bar with the

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1. This matter was previously before this Court on the State's motion to vacate the stay of execution entered by the Circuit Court. This Court denied the motion. State v. Beach, No. 66,725 (March 18, 1985).

2. All references to the eight-volume record on appeal from Mr. Waterhouse's post-conviction hearing will be cited "(Tr. ___)". References to the record on direct appeal, incorporated into this record by joint agreement of the state and the defense, will be cited "(R. ___)".

decedent on the night of the homicide, R. 1112.

The defense was provided with the names of two exculpatory witnesses on the Friday before the trial was to begin. According to the two, Mr. Waterhouse did not leave the bar with the decedent on the night of the homicide. On the following Monday, counsel was notified that the court had changed its ruling suppressing one of Mr. Waterhouse's statements. Counsel was still attempting to locate one of the two witnesses and to obtain reports of some of the state's experts. Because of these factors, counsel moved for a continuance. R. 597. The motion was denied.

The jury found Mr. Waterhouse guilty of murder on September 2, 1980. The jury recommended a sentence of death on the following day, and the court entered an order sentencing Mr. Waterhouse to death on September 15, 1980. This Court denied his direct appeal on February 17, 1983. Waterhouse v. State, 429 So.2d 301 (Fla. 1983), cert. denied, 464 U.S. 977 (1983).

I. BY WITHHOLDING EXCULPATORY EVIDENCE UNTIL THE LAST MINUTE AND BY FAILING TO DISCLOSE OTHER EXCULPATORY EVIDENCE ALTOGETHER, THE PROSECUTION VIOLATED MR. WATERHOUSE'S RIGHTS UNDER THE UNITED STATES CONSTITUTION AND FLORIDA LAW.

The record developed in the court below makes it clear that prosecutor Robert Merkle breached his duty to disclose evidence to the defense in several material respects. Merkle withheld the names of two witnesses who could provide exculpatory testimony until the eve of trial. He failed to disclose that a witness against Waterhouse had sought favorable treatment on his pending charges in exchange for testimony against Mr. Waterhouse. The

pending cases were continued until after Mr. Waterhouse's trial with the understanding that what the witness would get would depend upon his testimony against Waterhouse. When the witness testified, he denied that he had ever been involved in extortion at the jail. The prosecution failed to provide a police report disclosing that the witness had been engaged in extortion and successfully blocked any cross-examination by defense counsel about the extortion. The prosecution's actions violated Mr. Waterhouse's constitutional and statutory rights and requires a new trial.

One of the state's key witnesses against the defendant was Kenneth Young, a prisoner who had been housed in the same cell as Mr. Waterhouse at the Pinellas County Jail. Mr. Young testified that Mr. Waterhouse attempted to sexually assault another inmate, and immediately afterwards made incriminating admissions to Mr. Young regarding both the sexual assault and the homicide itself. (R. 1784-93) Neither the victim of the alleged assault nor other prisoners in the cell were called to testify.

The attempted assault allegedly took place on July 13, 1980. (R. 1788) During the next couple of days, Detective Bolle of the Pinellas County Sheriff's Department, who was assigned to the jail, interviewed several of the inmates housed in the cell regarding the incident, including the alleged victim, Clark, and Young. According to Bolle's report of these interviews (Tr. 1032, Defense Exhibit 1), Clark stated that Young and another inmate devised an extortion racket, offering to protect Clark in exchange for Clark's commissary. The report also indicates that

when Young was told Clark's version, he stated that he would tell more and testify against Mr. Waterhouse regarding the jail incident as well as the murder, "if a satisfactory agreement was concluded" with the State Attorney's Office:

> However, Young said he wanted an agreement made between his attorney and [the State's Attorney's office] before he would discuss the incident. Young also advised he could testify on the Waterhouse murder case and would if a satisfactory agreement was concluded. Writer notified [State's Attorney] Jack Hellinger of the above information and also notified Young's attorney Joseph Donahey. . . .

Id. at 3.

Young indicated that a "satisfactory agreement" would be sentences on his two pending charges -- for attempted escape and smuggling dynamite into the jail -- concurrent with other sentences he was serving and a recommendation of work release. (Tr. 793) This was communicated to the prosecutors (Tr. 797), who refused to make any explicit agreement with Young, but did not reject Young's proposal. (Tr. 798). The prosecution continued Young's sentencing on his two pending charges until after Mr. Waterhouse's trial. (Tr. 1038) The purposes of these continuances was "to see whether Mr. Young performed at Mr. Waterhouse's trial. . . ." (Tr. 801) Young's attorney assured him that based on his years of working with the prosecutors he would get what he wanted if he cooperated. (Tr. 795, 799)

Young "performed" well, and did indeed receive concurrent sentences on the charges pending, which his attorney Joe Donahey considered an exceptionally good deal. (Tr. 802) Donahey testified at the hearing that had Young not receive the light sentence, he would have "filed a Motion to withdraw his plea."

(Tr. 803)

Young was not totally satisfied with the manner in which he was serving his sentence, however, and his attorney filed a Motion for Clarification of Sentence, which included the following allegation:

> That the Defendant, KENNETH E. YOUNG, served as a state's witness in the first degree murder trial of Robert Brian Waterhouse. That it was the understanding of the Defendant when he agreed to be a witness for the State he would receive a sentence in the charges pending against him at the time that would run concurrent with the sentence that was previously imposed upon him.

(Tr. 1037, Motion for Clarification of Sentence at 2)

This was not the only evidence regarding Young's credibility in the possession of the prosecution. Young had filed and served on the State's Attorney a pro se motion containing the following:

> . . . I had[] also told the officers many lies like I was a member of the USN Seal's team and I was the Florida State Black Belt champ and that the gun that I had[] concealed was never loaded and I was just trying to sell the gun to the officers.

(Tr. 1033, Motion for PCR Pursuant to Rule #3.850, 25 June, 1980) The motion was not disclosed to the defense.

Despite the fact that the trial court had granted defendant's motion for exculpatory evidence and motion to compel production of police reports and notes (R. 81, 83),[3] neither

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3. The defense filed several discovery motions. For example, on February 6, 1980, defense counsel filed a demand for discovery, requesting everything required or permitted under Fl. Cr.R. 3.220. (R. 18) On May 12, 1980, counsel filed a motion to compel exculpatory evidence, which the trial court granted on May 20, and which the state answered on May 23. (R. 72, 83, 123-250)

Det. Bolle's report nor its contents were disclosed to defense counsel. (Tr. 884) Nor did the prosecution reveal any evidence of Young's agreement, nor any evidence of Young's prior admissions of lying.

Moreover, when defense counsel questioned Young at trial regarding suspicions that there was an extortion plot, Young denied it and prosecutor Merkle objected in front of the jury on the grounds that the question "assumes and implies facts which do not exist", successfully preventing any cross-examination along this line. (R. 1800) Even when Young subsequently testified that he had never been involved in an attempt to extract money from Clark, prosecutor Merkle failed to provide defense counsel with Det. Bolle's report regarding the extortion. (R. 1808)

The defense argued that Young's story was a self-interested fabrication. (R. 2160-62) However, prosecutor Merkle argued to the jury that there was no basis in the record to doubt Young:

> Kenny Young, [defense counsel] attacks Kenny Young. There's no evidence in the case which maligns Kenny Young. . . . He's got no interest against Mr. Waterhouse. He's got no axe to grind. He's sticking his neck out . . . . Mr. Young gave you his testimony under oath.

(R. 2190; see also, Tr. 2106) Now, however, it is clear that prosecutor Merkle was less than forthright with the court, with the jury, and with the defense.

This misconduct falls squarely within the rules laid down in Napue v. Illinois, 360 U.S. 264, 269-270 (1959), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S.Ct. 763 (1972). This Court has

rigidly enforced the concepts embodied in these cases:

> Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Arango v. State, 467 So.2d 692, 694 (Fla. 1985), vacated, ___ U.S. ___, 106 S.Ct. 41, 88 L.Ed.2d 34 (1985), adhered to on remand, 497 So.2d 1161 (Fla. 1986).

There are three basic themes of the Brady cases which were violated in this case.

First, there is the simple issue of withholding exculpatory evidence from the defense. The Court has specifically held that nondisclosure of evidence affecting "the witness' credibility rather than . . . defendant's guilt" falls within this general rule of Brady. Napue v. Illinois, 360 U.S. at 269. See also, Antone, 355 So.2d at 778; United States v. Librach, 520 F.2d 550, 553 (8th Cir. 1975); Hernandez v. State, 348 So.2d 1224 (Fla. DCA 3, 1977).

Second, it is apparent that the evidence withheld concerning Young's extortion and his attempts to elicit a deal from the prosecution was critical to the jury's evaluation of Young as a witness. As the court held in Boone v. Paderick, 541 F.2d 447, 450 (4th Cir. 1976):

> Whether Giglio applies depends upon whether the jury may have been falsely led to believe that [the witness] was motivated solely by conscience and altruism, and that there was no deal when in truth he responded to . . . promises.

Young had every reason to curry favor with the prosecution in order to obtain what he wanted at his sentencing. Waterhouse was entitled to bring out this incentive for fabrication for the

jury's consideration in weighing Young's credibility. Courts have roundly condemned any "apparent effort [on the part] of the prosecution to conceal the true nature of these dealings with its key witness . . . ." United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978). Where the witness clearly expected a deal, but the prosecution refused to put it in writing and say exactly what it was, this:

> only increased increased the significance, for the purpose of assessing his credibility, of his expectation of favorable treatment. Since a tentative promise of leniency could be interpreted by the witness as being contingent on his testimony, there would be an even greater inventive for him to 'make his testimony pleasing to the prosecutor.'

Porterfield v. State, 472 So.2d 882, 884 (Fla. DCA 1, 1985), quoting, Campbell v. Reed, 594 F.2d 4, 8 (4th Cir. 1979). In accord, Marrow v. State, 483 So.2d 17, 19-20 (Fla. DCA 2, 1985); United States ex rel. Washington v. Vincent, 525 F.2d 262, 265 (2d Cir. 1976); Blankenship v. Estelle, 545 F.2d 510, 513 (5th Cir. 1977)(courts "will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses."); United States v. Bynum, 567 F.2d 1167, 1169 (1st Cir. 1978). The failure to disclose the discussions surrounding Young's efforts to obtain a deal deprived Mr. Waterhouse of his right to a fundamentally fair trial.

Finally, prosecutor Merkle had an absolute duty to disclose Young's extortion to the jury when he denied it.

> It is of no consequence that the falsehood bore upon the witness' credibility rather than

> directly upon the defendant's guilt. A lie is a lie, no matter what it's subject, and, if it is in any way relevant to the case, the district attorney has a duty to correct what he knows to be false and elicit the truth.

Napue v. Illinois, 360 U.S. at 269-270, quoting People v. Savvides, 136 N.E.2d 853, 854, 855 (NY 1956). See also, Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); United States v. Iverson, 637 F.2d 799 (D.C.Cir. 1981); United States v. San-Filippo, 564 F.2d 176 (5th Cir. 1977); Teague v. United States, 499 F.2d 38 (7th Cir. 1974); United States v. Barham, 595 F.2d 231 (5th Cir. 1979).

Neither was withholding of information on Young the only discovery violation. In response to a defense motion, the state made the specific representation prior to trial that it was aware of no evidence indicating that the act was committed by someone other than the defendant. (R. 123)

However, on the Friday before the Monday trial, the prosecution first disclosed the names of two witnesses, Leon Vasquez and Steven Spitzig, both of whom could provide testimony that tended to show that Mr. Waterhouse was not the perpetrator of the homicide. (R. 598) Vasquez was also able to provide information that a person about whom there had been a previous complaint of rape had been harassing the decedent only hours before she disappeared. The record shows that the state was aware of both of these witnesses in January, soon after the murder, but withheld both names until the eve of trial in August. (R. 1947, 2002; Tr. 974-79)

The failure to disclose the names of these witnesses vio-

lated the Fifth and Fourteenth Amendments to the United States Constitution, and Florida's discovery rules. See, Brady v. Maryland, 373 U.S. 83 (1963); Fla. R. Cr. P. 3.220.

Brady requires that upon request of the defendant, the state disclose all information within its control that is or is likely to lead to information which is material and favorable to the accused. Disclosure of Brady material is supposed to be made at such time that the defense has adequate opportunity to use the material effectively. United States v. Pollack, 534 F.2d 964, cert. denied, 429 U.S. 924 (1976). See also, American Bar Association Standards Relating to Discovery and Procedure Before Trial, 11-2.1(c), 11-2.2(a) (1982) (disclosure of Brady material "as soon as practicable" after the indictment); Standards Relating to the Prosecution Function, 3-3.11(a) (1982) (disclosure at "earliest feasible opportunity").

Rule 3.220 sets out an even broader requirement that the state provide defense counsel with "the names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto". Fla. R.Cr.P. 3.220(a)(1)(ii) [emphasis supplied]. The same rule further requires the prosecutor to disclose to defense counsel "as soon as practicable after the filing of the indictment or information any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged". Fla.R.Cr.P. 3.220 (a)(2)[emphasis supplied].

Failure to disclose the existence of these witnesses

deprived defense counsel the opportunity to adequately investigate and effectively use the information which these witnesses had to offer. Counsel were still attempting to locate Mr. Vasquez in Maryland on the first day of trial. Such tactics denied Mr. Waterhouse a fair trial, and reduced the determination of his guilt or innocence to a sporting contest, not a search for the truth. Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979) (reversal required where prosecutor failed do disclose until the night before trail information he had obtained six or seven days earlier); Griffis v. State, 472 So.2d 834, 835 (Fla. 1st DCA 1985) (reversed where information not provided until day before trial).

Quite apart from the constitutional considerations, the prosecution here violated the rules of discovery and the court's order to produce police reports and notes. Because Mr. Waterhouse did not receive the trial contemplated by the rules and the due process clause, he is entitled to a new trial.

II. ROBERT WATERHOUSE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), the United States Supreme Court held that defense counsel in a criminal case has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688. A person convicted of a crime is entitled to relief where his counsel's deficiencies resulted in "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would be different." Id. at 687, 694.

The record in this case demonstrates that the trial of Robert Brian Waterhouse was not a "reliable adversarial testing process" as required by the Sixth Amendment at either the guilt-innocence stage or the penalty phase.

A. The guilt-innocence phase.

Counsel for Mr. Waterhouse were unable to render reasonably effective assistance at the guilt-innocence phase of his trial because they were unprepared to challenge effectively the scientific evidence offered by the State. In addition, they failed to present witnesses helpful to Mr. Waterhouse, and allowed the introduction of evidence harmful to him either by bringing out such evidence or failing to object when the evidence was brought out by the prosecutor.

1. The expert testimony.

Determination of this aspect of the ineffective assistance claim regarding experts requires a blend of the constitutional principles set out in Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53, 106 S.Ct. 1087 (1985), with those announced in Strickland v. Washington. See, Blake v. Kemp, 758 F.2d 523, 529-533 (11th Cir. 1985).

In Ake the Supreme Court held that where expert testimony is likely to be a factor at trial, the Constitution requires that an indigent defendant be provided with expert assistance in the preparation of the defense. This right is founded on the "interest in the accuracy of a criminal proceeding that places an

individual's life or liberty at risk, [an interest which] is almost uniquely compelling." Ake, 84 L.Ed.2d at 63. In discussing the level of competence required of a defense lawyer in Strickland, the Court similarly noted that "[a] reasonable probability [that the outcome of the trial would have been different] is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Where the trial lawyer does not secure the expert assistance necessary to assure accuracy, therefore, the Strickland standard is met.

Counsel was aware well before trial that the state's case against Mr. Waterhouse relied heavily on scientific evidence. It was thus apparent that counsel would have to be able to either impeach the state's experts or their results, or explain the results in a way consistent with innocence, in order to properly defend Mr. Waterhouse.

Counsel moved before trial for expert assistance, and were authorized to spend $100 on initial consultations. (R. 89) Counsel failed to exhaust even this paltrey sum in preparation for Mr. Waterhouse's defense. Counsel's failure to consult meaningfully with independent experts in the above fields rendered him unable to depose or cross-examine effectively these state witnesses, nor offer any substantive evidence on Mr. Waterhouse's behalf.

Expert testimony was a significant factor in at least five areas at Robert Waterhouse's trial:

(a) Forensic pathology.

The state's pathologist, Joan Wood, offered testimony as to the results of the autopsy which she performed. Several aspects of her testimony was very damaging to the defense, but of questionable validity. Yet because of defense counsel's failure to consult his own pathologist, he was unaware or unable to demonstrate the weakness of her findings either through cross-examination or presentation of his own expert.

For example, Dr. Wood testified that a high level of acid phosphatase was found in the victim's rectum, which she stated was "strongly suggestive" of the presence of semen (R. 1037) and, therefore, of sodomy. This testimony was critical to the prosecution's theory that Mr. Waterhouse was the perpetrator because he supposedly had a predilection for anal intercourse.

However, the vast majority of experts and scientific studies have concluded that a finding of acid phosphatase in the rectum, as opposed to in the vagina, is entirely valueless in confirming sexual abuse. (Tr. 117-18, Affidavit of Robert Stivers, para. 13-15). A positive acid phosphatase test may result from drinking beer, milk, wine and some vegetable juices. Id. In addition, acid phosphatase is found in high concentrations in red blood cells. The mixture of the salt water with the blood from the rectal injuries would necessarily have caused the red blood cells to rupture, explaining the high level found by Dr. Wood. (Tr. 163; See Affidavit of Dr. Diane Juricek, para. 25) Finally, counsel were unaware that the absence of any sperm in the rectum was almost conclusive of a lack of any sexual activity. (Tr. 117, See Affidavit of Dr. Stivers at par. 12)

The importance of presenting an expert who could explain false positives was demonstrated by Dr. Wood's testimony regarding a positive reaction for type B blood group substances on swabs taken of the decedent's rectum. Unlike the positive reaction for acid phosphatase, the B reaction cut against the State's theory of prosecution. Both the victim and Mr. Waterhouse were blood type A secretors. If the B finding indicated anal intercourse with a B secretor, it would have indicated that someone other than Mr. Waterhouse was probably the perpetrator of the crime. However, Dr. Wood, who failed to mention that food could have caused the acid phosphatase found in the rectum, testified that the B finding probably was a false reaction resulting from food consumed by the decedent. (R. 1065, 1076)

Counsel knew before trial that Dr. Wood's opinion on the B reaction was subject to dispute. David Baer, one of the State's serologists, had testified during his deposition that it was unlikely to get a false B reaction in the rectum and that when it is produced by bacteria it is not very strong. See Baer Deposition at 16. However, prosecutor Merkle, who had objected to Baer answering questions about the B reaction at the deposition, blocked any use of Baer for "some sort of collateral attack on Dr. Wood's testimony" when he testified at trial. (R. 1480-81) Thus, since the defense failed to secure its own expert, nobody rebutted Dr. Wood's highly questionable assertion.[4]

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4. The clearest example of counsel's failure to prepare came in his final question to Dr. Wood on his second recross-examination, counsel asked her to "tell me some book that I could

[footnote continued on next page]

Thus, in the absence of any other pathologist, the State was able to present highly unreliable, but nevertheless uncontested and unrebutted opinion evidence from Dr. Wood on two critical factors at trial. Such a one-sided presentation of facts is inappropriate in any case, but it is constitutionally impermissible in a capital case. See Ake v. Oklahoma, 84 L.Ed.2d at 68-69 (Burger, C.J., concurring). For this reason alone, Mr. Waterhouse is entitled to post-conviction relief.

(b) Serology.

Several witnesses testified for the state with respect to different aspects of blood analysis. With respect to these witnesses, counsel's preparation was still more inadequate.

Some bloodstains on his car seat were the only physical evidence the state presented to link Mr. Waterhouse to the crime. David Baer testified the blood types of Mr. Waterhouse and the victim were similar; both were type A, esterase D type 1. However, Mr. Waterhouse's phosphoglucomutase (PGM) was 2-1, while the PGM of the victim was 1. Baer's testing of dried bloodstains found on the car seat yielded results which were type A, PGM 1. He therefore excluded Mr. Waterhouse as the source of the blood. This solitary test, distinguishing one solitary enzyme, was the

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go and read" about food that causes a false B reaction. (R. 1076) Dr. Wood named a book, spelled the name of the author, and offered to let counsel come to her office and see it. (R. 1076-1077) Thus, counsel did not learn of a book on the most critical factor in the case -- the one test reaction that would exclude Mr. Waterhouse as a suspect -- until mid-trial upon completion of his cross-examination of the State's expert. Counsel did not request any such information in his deposition of Dr. Wood before trial.

sole physical link putatively established between Mr. Waterhouse and the crime.

Counsel recognized that it was absolutely critical to challenge this testimony. (Tr. 908-15) The only effort made was to show that the F.B.I. usually performs more tests than Baer did on this occasion. However, counsel had no witness to testify to the procedures used by the F.B.I. Had counsel consulted with an expert, however, this tenuous connection to Mr. Waterhouse could not have stood up under even the most limited scrutiny.

Of all the possible methods for identifying blood, PGM analysis has come under the most criticism. Counsel could have shown that there are a multitude of more reliable tests which could have confirmed more differences between Mr. Waterhouse's and the victim's blood.[5]

Baer said there were only three variants on PGM -- 1, 2 and 2-1. In fact, minimal research would have shown counsel that there are at least ten. See, Sutton, Further Alleles of PGM in Human Semen Detected by Isoelectric Focusing, 23 Jou. For. Sci. 189 (1978). Having an expert who believes this is the scientific equivalent of a criminal lawyer who only knows about three of the first ten amendments to the Constitution.

Baer used electrophoresis to test some dried blood stains.

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5. For example, the National Institute of Justice Sourcebook in Forensic Serology, Immunology & Biochemistry (1983), lists at least forty different tests for bloodstains in common use at the time of Mr. Waterhouse's trial, including at least 25 distinctive genetic markers, with over 100 variations on these markers. Theoretically speaking, therefore, serology may one day be almost as accurate and individualized as fingerprints.

An L.E.A.A. blind testing of 132 crime laboratories nationwide resulted in a 71 percent error rate with this method,[6] which has resulted in a number of courts excluding such serological evidence. See, e.g., People v. Young, 391 N.W.2d 270, 273 (Mich. 1986) (electrophoretic method too unreliable for use in criminal trials); People v. Brown, 709 P.2d 440, 451 (Cal. 1985)(same); People v. Harbold, 464 N.E.2d 734, 746-48 (Ill.App. 1984)(same). Yet counsel did absolutely nothing to begin to challenge this evidence.

Even had the method been acceptable, counsel failed to point out the deficiencies in Baer's application of it. Baer failed to perform any replicate testing or employ independent observation of his test results. (Tr. 159, Affidavit of Dr. Juricek)

As with Dr. Joan Wood, trial counsel did not ask Baer about treatises in his area of expertise until trial. Again, this proved disastrous. After unsuccessfully attempting to impeach Baer,[7] counsel asked him for the treatises he considered to be

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6. See, e.g., Law Enforcement Assistance Administration report, quoted in, Decke, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents, 51 Cinn. L. Rev. 574, 577 (1982). See also, Rees & Strong, Persistence of Blood Group Factors in Stored Samples, 15 Jou. For. Sci. 43 (1975)(50% error rate in stored PGM samples); Rothwell, The Effect of Storage Upon the Activity of Phosphoglucomutase and Adenylate Kinase Enzymes in Blood Samples and Blood Stains, 10 Med.Sci. 230 (1970)(PGM testing error rate up to 50%).

7. Counsel cross examined Baer with a series of questions from some pages he had copied from a book at University of South Florida, but Baer was unwilling to agree with any of the propositions advanced in the questions. (R. 1492, 1496, 1505, 1508) When counsel attempted to impeach Baer with the copied pages, he was unsuccessful because Baer did not know the book from which the pages were copied, and counsel had no defense expert to testify regarding the authoritative quality of the book. (R. 1497-1516)

authoritative and was provided with three authorities.[8] However, as with Dr. Wood, counsel could hardly find and read the treatises in the midst of cross-examination.[9]

Another state witness, Theodore Yeshion tested Mr. Waterhouse's car for the presence of blood, and testified with regard to his findings. Again, Yeshion failed to control for extraneous influences, absent which he results were of dubious validity. (Tr. 156, Affidavit of Dr. Juricek, par. 10) Again, counsel failed to point this out.[10]

Yeshion himself had published an article on the very closely

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8. Culliford, B.J., The Examination and Typing of Bloodstains in the Crime Laboratory, Law Enforcement Assistance Administration, U.S Department of Justice, 1971; Giblett, E.R. Genetic Markers in Human Blood, 1969; and Hopkinson and Harris, Handbook of Enzyme Electrophoresis. R. 1497.

9. Had counsel taken the reasonable step of asking Baer about the treatises during his deposition and studied them prior to trial, he would have found that the very treatises Baer cited to him warn of the possibility of false results in PGM testing. Indeed, the very points which counsel tried unsuccessfully to make on cross examination with his copied pages could have been made from the treatises recognized as authoritative by Baer. For example, counsel tried unsuccessfully to establish on cross-examination that a cleansing agent could alter an enzyme and interfere with the PGM testing. (R. 1518) Culliford states at page 125: "The use of disinfectants . . . or strong soap solution either when taking a blood sample or attempting to clean bloodstaining causes severe interference with PGM typing."

10. The only effort trial counsel made at impeachment was an abortive use of a filter paper he had taken from Yeshion's laboratory. At trial, he used this filter paper to try and impeach Yeshion's results, by showing that it was not the color which Yeshion testified it would have turned had blood been present. (R. 1556, et.seq.) The attempt at impeachment was unsuccessful because Yeshion correctly pointed out that the color change lasts only for a few minutes. (See also, Tr. 155, Affidavit of Dr. Juricek) Thus, as with Dr. Wood, counsel's attempt to impeach a state expert served only to increase the expert's credibility, while decreasing that of trial counsel.

related subject of enzyme detection in dried bloodstains. His own article emphasizes the high rate of error related to certain blood analyses. See Yeshion, "Thermal Degradation of Erythrocyte Acid Phosphotase Isozymes in a Case Sample", 25 Jou. For. Sci. 695 (1980). Counsel failed to ask Yeshion on deposition what authorities he relied upon -- again, the question came at trial, far too late to be of any use.

Thus, the lack of a reasonable investigation and adequate preparation on the part of defense counsel with regard to the crucial aspect of the case dealing with blood testing resulted in severe prejudice to Mr. Waterhouse.

(c) "Blood splatter."

Judith Bunker testified for the state with regard to the blood stains found in Mr. Waterhouse's car. (R. 1589 et.seq.) Once again, counsel's failure to consult an expert in the area of blood stain evidence rendered him unable to discredit effectively this testimony, which is based solely on the examiner's observation, and which many experts scorn as totally devoid of scientific value. (Tr. 120, Affidavit of Dr. Stivers, at para. 27)

(d) Hair & Fiber analysis.

Defense counsel was ineffective at trial in failing to investigate the area of hair and fiber analysis and consult an expert in this field. His failure to do so rendered him unable to (1) rebut the State's evidence with regard to the hair comparison; (2) cross examine the state's hair analyst, and; (3) explain the findings of the state in a way which was consistent

with the defense theory of the case.

Even a cursory study of hair analysis indicates that it involves nothing more than a subjective opinion based on visual interpretation, (Tr. 655-57, Affidavit of Dr. Walter Rowe) There is also much literature in which hair comparison is criticized for its unreliability. See Barnett & Ogle, Probabilities and Human Hair Comparisons, 27 Jou. For. Sci. 279 (April, 1982); Imwinkelreid, The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants, 30 Hastings L.J. 621, 637, n. 145 (1979). Thus examination of the same items by a different expert may well have yielded different results.[11]

The same failings pervaded counsel's attempts to confront the testimony concerning the fibers taken from Mr. Waterhouse's car.[12] As it was, the appearance of some Nylon 66, probably the most common artificial fiber, was all that Ms. Henson found that

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11. Trial counsel did not adequately voir dire Ms. Lasko with regard to her qualifications as an expert. (Tr. 655-56, Affidavit of Walter Rowe, para. 9-11) She had stated that she held a B.S. degree. (R. 1670) Ms. Lasko was not asked what her major field of study was in college. Trial counsel should have elicited that her major was in the field of biology, which has nothing to do with hair comparison. (Tr. 1035, Affidavit of Patricia A. Lasko) Indeed, her laboratory did not have the proper equipment for effective hair analysis. (Id.) Ms. Lasko herself would have admitted that the qualifications of the examiner and the procedures used are critical to the evaluation of the results. (Id.)

12. Trial counsel did not ask a single question regarding Ms. Henson's qualifications as a fiber expert, either while deposing her or at trial. Therefore, trial counsel did not determine whether Ms. Henson had had any training in polymer chemistry and polarized light microscopy, both of which are essential to the fiber analysis performed by Ms. Henson. (Tr. 656, Affidavit of Walter Rowe, para. 12) Had counsel asked, Ms. Henson would have admitted that the laboratory only had a stereo-microscope at that time. (Tr. 1039, Affidavit of Mary Lynn Henson)

might link Mr. Waterhouse to the crime. Had she been asked, she would have admitted that she did not know how common the fiber was (Tr. 1039), and that she was not able to differentiate between Nylon 66 fibers. (Id.) Trial counsel's failure to discover this information left the jury with the impression that the "evidence" was critical, instead of being of little or no probative value.[13]

(e) Experts: Summary

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-1150 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"). In this case, defense counsel failed to subject key aspects of the State's case to a reliable, adversarial testing process. The foregoing demonstrates that counsel's failure severely undermines confidence in the outcome of Mr. Waterhouse's trial.

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13. Had counsel consulted an expert, he would have determined that thin layer chromatography could have been used to distinguish among even batch-to-batch differences in dyes used at the same factory. (Tr. 657, Affidavit of Walter Rowe, para. 15); Grieve, M.S., The Role of Fibers in Forensic Science Examinations, 28 Jou. For. Sci. 877, 880. However, the failure to do this in this case was not brought out to the jury.

2. Other guilt-innocence representation.

Many other aspects of counsels' representation at the guilt innocence phase fell below constitutional standards.

Trial counsel failed to present testimony at the guilt-innocence phase which would have been favorable to the defense.

One of the most critical witnesses against Mr Waterhouse was Kenneth Young, who told the jury that Mr. Waterhouse had "confessed" in his presence. While counsel's cross-examination of Kenneth Young was hampered in large part because the prosecution had failed to disclose impeaching information, counsel also failed to check the file in Young's pending cases. Such an investigation would not only have revealed that Young had sworn under oath that he frequently lied. (Tr. 1033)

Prosecutor Merkle also used Young to present extremely inflammatory testimony that Mr. Waterhouse attempted to rape another prisoner at the jail and then made some incriminating statements. (R. 1784-95) The victim of this alleged rape attempt was never called as a witness. Several of the other occupants of the twenty-person cell would have testified that Mr. Waterhouse was in another part of the cell when the attempted rape and subsequent statements were supposed to have occurred. Six of these men gave sworn statements to this effect within days after the alleged incident, yet they were never called. (Tr. 959-71) See, e.g., United States v. Auten, 632 F.2d 478 (5th Cir. 1980)(failure to investigate and impeach witness ineffective); Commonwealth v. Grove, 324 A.2d 405 (Pa. 1974)(failure to impeach state's witness ineffective); People v. Redmond, 278

N.E.2d 766 (Ill. 1972) (failure to respond to attacks on defendant's character ineffective).

Similarly, the prosecution provided defense counsel with the names of two witnesses, Leon Vasquez and Steven Spitzig, both of whom had exculpatory evidence to which they could testify. Mr. Vasquez testified that on the night of the murder, Mr. Waterhouse left the bar with Mr. Spitzig and another man near midnight, and Mr. Spitzig returned later by himself. (R. 1938-44) Mr. Spitzig would have corroborated this testimony, however, no one called him to testify. (Tr. 974-79)

Not only did counsel fail to offer this favorable testimony, but in closing argument, he stressed the failure of the prosecution to call Mr. Spitzig and the witnesses from the Jail. (R. 2137, 2161) This simply invited the prosecutor to respond in a way that severely prejudiced Mr. Waterhouse:

> . . . Well, Mr. Spitzig was under defense subpoena; he was right outside that courtroom, and if Mr. Spitzig had any relevant information, defense counsel could have put him on the stand. . . He did not put Mr. Spitzig on the stand because he had no relevant information, and defense counsel would rather be satisfied with the specter raised by the name Mr. Spitzig . . .

(R. 2181)(emphasis added) Counsel did the same with regard to the other jail inmates (R. 2161-62), prompting the same reply:

> . . . counsel could have brought those witnesses in in this case with Mr. Young who participated, who observed, people who observed what the defendant did in that case.

(R. 2190-91)

Defense counsel failed to object to testimony about the contents of an anonymous telephone call to the police in viola-

tion of a previous ruling of the Court excluding such evidence. (R. 854-56, 861, 865, 977, 1004-05) As a result, police officers testified to hearsay statements from the telephone call, identifying Mr. Waterhouse's car as the one involved in the incident, in violation of the confrontation clause of the Sixth Amendment and the hearsay rule. See, e.g., Collis v. State, 685 P.2d 975 (Okl. Cr. 1984)(failure to object to "blatant hearsay" ineffective); Hussick v. State, 529 P.2d 938 (Ore. 1975).

Counsel elicited damaging testimony from a state witness that Mr. Waterhouse had beaten a woman on cross-examination, which was otherwise inadmissible, which opened the door for the state to emphasize such evidence on redirect. (R. 1161, 1168) This was done solely because counsel misperceived the admissibility of this and other evidence. (R. 1907-1909) In similar circumstances when counsel's error resulted in the admission of damaging testimony, such an error alone has been found to constitute ineffective assistance of counsel. Wright v. State, 446 So.2d 208 (DCA 3, 1984)(elicitation of evidence of defendant's prior misdemeanor convictions).

Each of the foregoing constitute deficiencies which fall below the standard of reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"). However, taken together, the errors demonstrate that Robert Brian Waterhouse did not receive reasonably

effective assistance of counsel and, as a result, there is a reasonable probability that, but for counsels' deficiencies, the result of the proceeding would have been different. Therefore, his conviction must be vacated.

B. The penalty phase.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never make a sentencing decision". Gregg v. Georgia, 428 U.S. at 190. In Gregg and its companion cases, the Supreme Court has emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Courts have expressly found that trial counsel in capital sentencing proceedings have a duty to investigate and prepare mitigating evidence for the jury's consideration, object to inadmissible evidence or improper jury instructions, and made an adequate closing argument.[14] Mr. Waterhouse's counsel did not

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14. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-535 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, ___ U.S. ___ (1984), 81 L.Ed.2d 358, 104 S.Ct. 3575, adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, ___ U.S. ___, 85 L.Ed.2d 301 (1985);

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meet these constitutional standards.

Defense counsel testified that they were aware that the state planned to introduce petitioner's earlier New York murder conviction in the sentencing phase as early as May 23, 1980, which was four months before the trial. (Tr. 918-20) Counsel was aware from conversations with his client that Mr. Waterhouse's lawyer had been disbarred at some point in the proceedings. (Tr. 920) Counsel was therefore aware of at least one potential basis for invalidating the conviction. See Cheatham v. State, 364 So.2d 83 (DCA 3, 1978)(relief granted where counsel at trial not admitted to the bar). Both counsel viewed this prior conviction as a "monumental problem" in their effort to represent their client. (Tr. 947) Had counsel travelled to New York, or even secured a copy of the transcript of the New York trial, counsel would have found the prior conviction ot be invalid for several reasons. See, infra, Section IV.

Nevertheless, counsel made no effort to go to New York to investigate this conviction. Castro v. State, 419 So.2d 796 (DCA 3, 1982), is instructive. In Castro, counsel failed to investigate the validity of a prior conviction before counselling his client to plead guilty, although counsel was aware that there might be constitutional deficiencies in the conviction. The

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Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, ___ U.S. ___, 82 L.Ed.2d 874, 879, 104 S.Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, ___ U.S. ___, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Young v. Zant, 677 F.2d 792, 797 (11th Cir. 1982); Holmes v. State, 429 So.2d 297 (Fla. 1983).

appellate court found the lawyer ineffective. The same result must pertain in this case. See also, Ex Parte Scott, 581 S.W.2d 181 (Tex. Ct. Crim. App. 1979)(failure to discover invalidity in prior conviction ineffective); People v. Shells, 483 P.2d 1227 (Cal. 1971)(advising client not to take stand without investigating invalid prior convictions ineffective); Quillun v. State, 626 S.W.2d 414 (Mo. App. 1981)(same).

Furthermore, virtually no investigation was done with regard to Mr. Waterhouse's family, friends, schooling, and other aspects of his background. With the exception of his aunt, Lois Foster, and family friend Kenneth Norwood, defense counsel did not interview any of Mr. Waterhouse's friends or family, and did no more than introduce themselves to his mother at the courthouse after the trial had begun. (Tr. 989) Counsel never went or sent an investigator to the community in New York where Mr. Waterhouse was born and lived until a year and a half before trial.

Mr. Waterhouse's mother had eleven brothers and sisters, most of whom still lived in New York near to where he grew up. They and Mr. Waterhouse's brothers, sisters and cousins could have provided invaluable information to the jury which was to consider whether he should live or die. (Tr. 637-52)

Waterhouse was subject to such abuse by his father as a child than he went to live with his aunt and uncle, Lois and Chet Foster in Greenport, New York, a small close-knit village. (Tr. 985) Whatever the true reason for his move, the rumor became rife that Robert had been swapped for a dining room table (Tr. 643), which had indeed simultaneously changed hands from the

Fosters to the Waterhouses. Young Robert was unable to ride the school bus on account of the incessant teasing he suffered over this incident. (Tr. 1002)

Neither was this the sole aberration in Robert's youth. Aged seven, he was sexually abused by an older boy. (Tr. 433) He suffered the dissonance of a father who resented him and abused him at every opportunity (Tr. 649), and two foster parents who both worked, and left him alone for long periods. (Tr. 644) Indeed, when he was twelve, he was the object of school children's spite again because his foster mother was supposedly having an affair. The culmination of this incident was Lois Foster's attempt to take her own life (Tr. 1007), which dramatically scarred young Robert's lonely perspective on the world. (Tr. 433)

While he never had much chance when he was a child, Robert nevertheless did what he could. Once, he saved a friend's life. His brother remembers the many times when Robert, an excellent sportsman, would play softball with him. (Tr. 651)

Had counsel adequately prepared, even Mrs. Foster, Chet Foster, and Mabel Waterhouse, who lived in St. Petersburg, could have given extensive information regarding Mr. Waterhouse's background. (Tr. 982-1013) Instead, the jury heard just two pages of testimony from Mrs. Foster. (R. 2268-70)

There was absolutely no excuse for this lack of investigation and no possible reason not to present the overwhelming evidence of the miserable childhood and adolescence that Mr. Waterhouse suffered. Eddings v. Oklahoma, 455 U.S. 104 (1982) (evidence of abuse as a child critical to mitigation).

Counsel also failed to object to improper argument and to request constitutionally-required instructions at the penalty phase.

In its final instructions to the jury, this Court listed as mitigating factors only those set out in the Florida death penalty statute, Fla. Stat. 921.141 (6). (R. 2296) In his closing argument, the prosecutor commented on the statutory list, and the evidence presented at trial relative to that list. With regard to the evidence which had been presented about Mr. Waterhouse's alcohol problems, the prosecutor argued: "Is that a mitigating factor? I didn't see anything about alcohol [on the statutory list]." (R. 2288)

Defense counsel did not object to either the Court's instruction or the prosecutor's argument, and thus failed to insist on behalf of Mr. Waterhouse that the jury be required to consider "relevant facets of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) [emphasis supplied]; see also Lockett v. Ohio, 438 U.S. 586 (1978).

Counsel also failed to object when the prosecutor improperly argued facts not in evidence during closing argument at the penalty phase. The jury could well have inferred from the facts that Waterhouse was severely disturbed. However, Merkle improperly invoked his prosecutorial expertise to assure them that Waterhouse did not suffer from any emotional disturbance because

"he was not treated, when there are provisions to do such treatment . . . " (R. 2285) However, there was no testimony regarding the availability of any such treatment or Mr. Waterhouse's need for it. Counsel's failure to object to this misconduct falls below professional standards. See, e.g., Nero v. Blackburn, supra (ineffective to fail to object to error in argument).

Counsel's closing argument at the penalty phase clearly fell below professional standards and violated Mr. Waterhouse's constitutional rights. In an exceptionally brief summation, defense counsel told the jury that a recommendation of death by the jury "would set in motion an automatic appeal" to the Florida Supreme Court, "that appeal process would likely be a basis for further appeals that might carry forth as far as the United States Supreme Court" (R. 2291), and that at each stage of the appeals, courts would review the "entire case". (R. 2291) The United States Supreme Court has held that such an argument on appellate review lessens the jury's sense of responsibility and violates the Constitution. Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985).

Counsel did not mention the brief testimony put on by the defense in this phase of the trial, nor offer even one reason why the life of Mr. Waterhouse should be spared. It failed to discuss any aggravating circumstances, or any mitigating circumstances, whether statutory or non-statutory.

Robert Waterhouse was entitled to an advocate for life at the sentencing phase of his capital trial. He did not have one. Accordingly, his death sentence must be set aside. Mullins v.

Evans, 622 F.2d 504 (10th Cir. 1980); Matthews v. United States, 449 F.2d 985 (D.C.Cir. 1971)(casual summation requires reversal even where strong evidence of guilt); United States v. Hammonds, 425 F.2d 597 (D.C.Cir. 1970) ("particularly futile closing argument" ineffective assistance). See, generally State v. Myles, 389 So.2d 12, 27-31 (La. 1980) (failure to introduce substantial evidence in mitigation, perfunctory closing mentioning parole constitutes ineffective assistance of counsel).

C. Mr. Waterhouse was denied assistance necessary to present his ineffectiveness claim.

As the foregoing demonstrates, a determination of Mr. Waterhouse's claim of ineffective assistance of counsel turns to some extent on the failure of counsel to consult with and present experts in a case where such evidence was so crucial. In order to present his claim, Mr. Waterhouse sought funds from the Circuit Court for experts, supporting his request with detailed affidavits regarding the area of expertise and its relation to the issues in this case. (Tr. 370-72, 632-36) Nevertheless, the trial court denied the request.

The court was in error. Indigent prisoners are constitutionally entitled to "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Bounds v. Smith, 430 U.S. 817, 825 (1977). That right must depend upon the circumstances of the case and the right asserted. While every applicant for post-conviction relief would not have the right to funds for experts, the unique circumstances of this case -- a capital case involving a

defendant convicted on an extremely one-sided and questionable presentation of expert testimony -- required the granting of funds. Thus, if this Court does not grant relief based upon the showing made, it should remand this case for the granting of expert assistance and further development of this claim.

III. THE RELIANCE UPON AN UNCONSTITUTIONAL PRIOR CONVICTION FOR TWO OF THE AGGRAVATING CIRCUMSTANCES AGAINST MR. WATERHOUSE DEPRIVED HIM OF HIS RIGHTS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State introduced against Mr. Waterhouse a prior conviction for murder in the second degree (R. 2253), as well as a certified copy of his release on parole. (R. 2254) This was the sole basis for the submission to the jury of those aggravating circumstances enumerated in FLA. STAT. 921.141(5)(a) [crime committed by a person under sentence of imprisonment] and (b) [prior conviction for felony involving violence]. Since the New York conviction was obtained in violation of Mr. Waterhouse's Sixth and Fourteenth Amendment rights, their admission contravened his right to a "reliab[le] . . . determination that death is the appropriate punishment in [his] case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). His sentence must therefore be vacated.

A. Mr. Waterhouse was convicted in New York without the assistance of counsel.

The conviction of Mr. Waterhouse in New York for second degree murder, his only prior conviction, was fatally flawed since he was not assisted by counsel. Since his conviction was obtained in violation of the Sixth Amendment, the Eighth Amend-

ment prohibits its admission in aggravation. Thus, its introduction as the sole foundation for a finding of two aggravating circumstances requires vacation of his sentence of death.

For his New York murder case Mr. Waterhouse was initially represented by Mr. Edward LaFreniere. Mr. LaFreniere conducted the most crucial aspect of the trial, the motion to suppress his statements to the police, held on November 14 and 15, 1966.

Mr. LaFreniere was disbarred on the second day of the hearing. See, Matter of Suffolk County Bar Association v. LaFreniere, 26 A.D.2d 946 (1966). The Bar Association was found to have proved ten charges of accepting fees either without making any efforts to represent his client or with making only token efforts on his client's behalf. At the time that his statements were ruled to be competent evidence against him, therefore, Mr. Waterhouse's representative was not a lawyer.

A criminal accused has the right to an attorney at every "critical stage" of the prosecution. Powell v. Alabama, 287 U.S. 45 (1932). The Sixth Amendment right attaches at the time that adversary judicial proceedings have been initiated against the defendant. United States v. Gouveia, ___ U.S. ___, 81 L.Ed.2d 146, 153-54 (1984); Kirby v. Illinois, 406 U.S. 682, 688 (1972).[15]

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15. Since "the most critical period of the proceedings . . . [is] from the time of the[] arraignment until the beginning of the[] trial," Powell, 287 U.S. at 57, there can be no doubt that Mr. Waterhouse had a right to counsel at the hearing on his motion to suppress. See, e.g., United States v. Wade, 388 U.S. 218 (1967)(post indictment lineup a "critical stage"); Coleman v. Alabama, 399 U.S. 1 (1970)(preliminary hearing); Daigre v. Maggio, 705 F.2d 786 (5th Cir. 1984)(lineup prior to filing bill of information).

Since Mr. LaFreniere was not licensed to practice law when he represented Mr. Waterhouse, he was not a "lawyer". The "guarantee of counsel means representation of an attorney admitted to practice law." United States v. Hoffman, 733 F.2d 596, 599 (9th Cir. 1984)[emphasis supplied]. A criminal accused must receive assistance from "counsel fully accredited by competency and moral standards to practice law." Huckelbury v. State, 337 So.2d 400, 403 (Fla. 2d DCA 1976) (defendant deprived of counsel where represented by law school graduate who failed to meet bar character requirements).[16]

Thus, as a matter of law, Mr. LaFreniere did not qualify as counsel at all, let alone effective counsel. He was disbarred, and therefore without legal qualifications. Cheatham v. State, 364 So.2d 83 (Fla. DCA 3, 1978), is therefore directly on point. In Cheatham, the defendant was granted post-conviction relief where the unrebutted evidence showed that he had been represented at least in part at his aggravated assault trial by a person not admitted to practice law. See also, Hudson v. State, 375 So.2d

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16. Several other courts also have addressed the question of representation by someone who is not licensed to practice law. In Solina v. United States, 709 F.2d 160 (2d Cir. 1983), the Court of Appeals for the Second Circuit, which includes New York, found that a law school graduate who had acted with apparent competence did not act as counsel, and thus granted relief in spite of the overwhelming guilt of the accused. The court held that no conviction may be sustained where the lawyer "was not authorized to practice law . . . [due to] its denial for a reason going to legal ability . . . or want of moral character." Id. at 167. See also, Turner v. American Bar Association, 407 F.Supp. 451 (W.D.Wis. 1975), aff'd. sub nom., Taylor v. Montgomery, 539 F.2d 715 (7th Cir. 1976); Pilla v. American Bar Association, 542 F.2d 56 (8th Cir. 1976); United States v. Wright, 568 F.2d 142 (9th Cir 1978); United States v. Irwin, 561 F.2d 198 (10th Cir. 1977); United States v. Wilhelm, 570 F.2d 461 (3d Cir. 1978).

355 (Fla. DCA 3, 1979)(same). Clearly, LaFreniere's involvement in litigating Mr. Waterhouse's suppression motion -- the most critical aspect of the case, and which subsequent counsel insisted he had bungled -- was therefore the unlicensed practice of law. See, e.g., In re Ossinsky, 279 So.2d 292 (Fla. 1973) (any appearance in court); The Florida Bar v. Riccardi, 304 So.2d 444 (Fla. 1974)(participation in pre-trial conference).

In Strickland v. Washington, 466 U.S. 668, 692 (1984), the Supreme Court held that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel . . . is legally presumed to result in prejudice." Therefore Mr. Waterhouse's conviction in New York must be deemed constitutionally invalid.

Furthermore, the introduction of an invalid conviction to Mr. Waterhouse's sentencing proceeding resulted in a denial of his rights under the Eighth and Fourteenth Amendments. The Supreme Court has unequivocally stated that:

> To permit a conviction obtained in violation of [the right to counsel] to be used against another person either to support guilt or to enhance punishment for another offense is to erode the principle of [Gideon v. Wainwright, 372 U.S. 335 (1963)].

Burgett v. Texas, 389 U.S. 109, 115 (1967) [emphasis supplied]. See also, Loper v. Beto, 405 U.S. 473, 483 (1972); United States v. Tucker, 404 U.S. 443, 447 (1972).

Representation by competent counsel "is one of the crucial assurances that the result of the proceeding is reliable" and in the absence of counsel "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair. . .

." Strickland v. Washington, 80 L.Ed.2d at 697-98. The Supreme Court has continually stressed "the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); in accord: Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)(O'Connor, J., concurring).

The Court expressly mentioned the constitutional infirmity of submitting uncounselled convictions to the jury in Zant v. Stephens, 462 U.S. 862, 887 n.23 (1983), holding that "even in a non-capital sentencing, the sentence must be set aside if the trial court relied at least in part upon . . . prior uncounselled convictions that were unconstitutionally imposed."

In addition, even when Eighth Amendment analysis is not invoked, where the issue is the introduction of an uncounselled prior conviction, the only remaining question is "whether the error was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18 (1976). . . ." Grizzell v. Wainwright, 692 F.2d 722, 726 (11th Cir. 1982), citing, Jones v. Estelle, 622 F.2d 124 (5th Cir.), cert. denied, 449 U.S. 996 (1980). The introduction of a prior murder conviction was clearly the most prejudicial evidence in the case against Mr. Waterhouse, and so his sentence must be vacated.

B. Mr. Waterhouse's plea of guilty to second degree murder in New York was not voluntary.

Mr. Waterhouse plead guilty to second degree murder on March 13, 1967. The Supreme Court decided Boykin v. Alabama, 395 U.S. 238 (1969), two years later. The Court held in Boykin that:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against self-incrimination guaranteed by the Fifth Amendment . . . . Second, is the right to trial by jury. . . . Third, is the right to confront one's accusers. . . .

395 U.S. at 243. The Court continued:

> For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not . . . voluntary and knowing, it has been obtained in violation of due process and is therefore void.

395 U.S. at 243, quoting McCarthy v. United States, 394 U.S. 459, 466 (1969)[emphasis supplied].

The plea colloquy in Mr. Waterhouse's case exposes no "knowing waiver" of his constitutional rights. The record is devoid of any explanation to him of the rights he was waiving. The Supreme Court's admonition in Boykin, 395 U.S. at 243, is therefore controlling:

> We cannot presume a waiver of these . . . important federal rights from a silent record.

Rather, it is "incumbent upon the judge to produce a record on the basis of which [the appellate court] can determine that [the plea is voluntary]." United States v. Dayton, 604 F.2d 931, 939 (5th Cir. 1979); see also, McCarthy, 394 U.S. at 470 ("There is no adequate substitute for demonstrating [a voluntary waiver]

in the record at the time the plea is entered. . . ." [emphasis supplied]).

As previously shown, where a guilty plea is involuntary, it cannot be used to aggravate a conviction of murder. See, e.g., Zant, 462 U.S. at 887 n.23.

C. Mr. Waterhouse plead guilty after an erroneous finding that his statements were not obtained in violation of the Fifth, Sixth and Fourteenth Amendments.

The conviction for murder in New York was further unconstitutional because Mr. Waterhouse plead guilty after an erroneous finding, made by the trial court after the hearing conducted by his disbarred representative, that his statement to the police was not obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

On the evening of Mr. Waterhouse's arrest, he had visited several bars in Greenport, and returned home intoxicated. See, New York Record, [hereinafter "N.Y.R."], 43, 108, 133, 142 (Tr. 1034). Because Mr. Waterhouse was only 19, and intoxicated, Kenneth Norwood wished to stay with him, but was not permitted to. (N.Y.R. 63, 112) The defendant's requests for counsel were ignored (N.Y.R. 110, 111, 134), and he was threatened with bodily harm at Greenport. (N.Y.R. 113, 115, 142, 143) In light of the hostile atmosphere, Mr. Waterhouse was moved to Riverhead. (N.Y.R. 19, 20)

The police officers admitted that Mr. Waterhouse fell asleep from drinking while travelling to Riverhead. (N.Y.R. 69, 71, 116) Upon reaching Riverhead at 3:20 A.M. (N.Y.R. 20, 21, 57, 115), they made Mr. Waterhouse strip naked. (N.Y.R. 171-73; See also,

N.Y.R. 118-19) After he had been psychologically abused by being held naked for approximately two hours (N.Y.R. 119), Mr. Waterhouse was questioned for a long period, and threatened with bodily harm unless he inculpated himself. (See, N.Y.R. 28-32, 75, 92, 121, 142, 143, 160)

A statement elicited under such conditions violates the Fifth, Sixth and Fourteenth Amendments. Since it was critical to the case, the unconstitutionality voids the entire conviction.

Here the New York record establishes that Waterhouse did now make a knowing and voluntarily waiver of his rights. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). Involuntariness and lack of knowing and voluntary waiver may stem from any one factor of coercion, Stein v. New York, 346 U.S. 156, 182 (1953), psychological abuse, Mincey v. Arizona, 434 U.S. 1342 (1977), the youth of the defendant, In Re Gault, 387 U.S. 1, 45 (1967), length of interrogation, especially where it is late at night, Haley v. Ohio, 332 U.S. 596 (1948)(involuntary where youth questioned from 12 A.M. until 5 A.M.), and the defendant's state of intoxication, see, e.g., Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969); Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968). These factors make it very clear that Mr. Waterhouse's statement was not the product of a voluntary decision, but rather of the coercive circumstances.

In conclusion, since the prior conviction was exacted in violation of Mr. Waterhouse's various constitutional rights, it should not have been admitted against him.

CONCLUSION

For the foregoing reasons, the court below erred in denying post-conviction relief to Mr. Waterhouse. This Court should reverse that decision and remand this case for a new trial or sentencing hearing, or, alternatively, for further hearings on the counsel's failure to consults and present experts.

This the 24th day of April, 1987.

Respectfully submitted,

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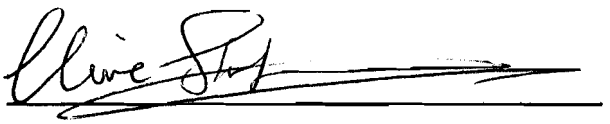
By 

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served this 24th day of April, 1987, by mail upon Assistant Attorney General Peggy Quince, 1313 Tampa Street, Suite 804, Tampa, Florida, 33602, and Assistant State Attorney Bernard J. McCabe, P. O. Box 5028, Clearwater, Florida, 33518.