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SUPREME COURT OF FLORIDA

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JOHN O'CALLAGHAN, :

Appellant, : Circuit Court Case No. 80-9519-CF-10-B

- against - :

STATE OF FLORIDA, :

Appellee. : Case No. 70,112

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(Substitute)

BRIEF OF APPELLANT

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- against -	:	
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BRIEF OF APPELLANT

I. STATEMENT OF THE CASE AND FACTS

John O'Callaghan appeals from a series of orders in this capital case denying his motions for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. At issue is whether he received ineffective assistance of counsel at his trial and whether the trial judge's remarks and instructions improperly denigrated the jury's sentencing role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

A. Procedural History

In March and April 1981, O'Callaghan was jointly tried with Walter ("Beau") Tucker for the murder of Gerald Vick. The trial took place before the Hon. Thomas M. Coker, Jr., of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. O'Callaghan's trial counsel was William

B. Seidel. O'Callaghan was convicted of first degree murder and Tucker was convicted of second degree murder. R.I 1134-35.[1] The jury recommended a death sentence (R.I. 1170), and the trial judge sentenced O'Callaghan to death (R.I 1184-91). Tucker was sentenced to a 20-year prison term. R.I 1176-83.

After this Court affirmed his conviction and sentence in O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), O'Callaghan moved, pursuant to Rule 3.850, to set aside the conviction and vacate the death sentence. On May 24, 1984, the Hon. Arthur J. Franza, of the Circuit Court, denied that motion without an evidentiary hearing. That ruling was reversed by this Court, which remanded the case for an evidentiary hearing on whether O'Callaghan had received ineffective assistance of counsel at his trial. O'Callaghan v. State,

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[1]As this case has been before this Court on a number of occasions, the Court has entered an order permitting the parties to rely upon the records in all prior proceedings. In this brief, the record on the original appeal (No. 60,704) is referenced as "R.I ___"; the record on the appeal from denial of Rule 3.850 relief without a hearing and on the 1984 petition for habeas corpus relief and leave to file a petition for a writ of error coram nobis (Nos. 65,353, 65,354 and 65,355) as "R.II ___"; the records on this appeal (No. 70,112) as "R.III ___" and "Supp. R.III ___"; the Record on this Court's 1987 remand as "Remand R.III ___"; and the record in the Seidel Disciplinary Proceedings (relating to O'Callaghan's trial counsel) as "Seidel Disc. Pro. R. ___." In addition, we have prepared an Appendix in accord with Rule 9.220 of the Florida Rules of Appellate Procedure. The Appendix is referenced as "A.__."

461 So.2d 1354 (Fla. 1984). That hearing was held before Judge Coker on January 9 and 10, 1986.[2]

Judge Coker denied O'Callaghan's Rule 3.850 motion in an order dated January 20, 1987 (R.III 745 [A. 1-5]), from which this appeal is taken. That order also denied O'Callaghan's motion for reconsideration as to Judge Coker's remarks and instructions to the jury on the Caldwell v. Mississippi claim.

O'Callaghan then took this appeal, but while it was pending, discovered that his trial attorney, William B. Seidel, was the subject of disciplinary proceedings before this Court, based mainly on charges that Seidel's ability to practice law had been impaired by alcoholism. O'Callaghan moved to remand the case to the Circuit Court for further findings on Seidel's alcoholism and his ability to render effective assistance of counsel. That motion was granted, but on remand, the Circuit Court refused to conduct a hearing and again denied relief. See Remand R.III 5-6 (A. 6-7). O'Callaghan moved for rehearing of that denial and proffered

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[2]O'Callaghan moved, pursuant to Rule 3.230 of the Florida Rules of Criminal Procedure, to disqualify Judge Coker from conducting the Rule 3.850 hearing, but that motion was denied. O'Callaghan appealed the denial by a petition for writ of prohibition to this Court. That petition was also denied. O'Callaghan proceeded at the Rule 3.850 hearing without prejudice to his position that Judge Coker should be disqualified. R.III 14. That position is expressly preserved here as well.

evidence of the effect of Seidel's alcoholism on his ability to defend the case (Remand R.III 7-35 [A. 49-58]), but the motion for rehearing was denied, again without an evidentiary hearing (id. 36 [A. 8]). This appeal was then renewed.[3]

B. Facts

1. Facts Adduced at Trial in 1981

O'Callaghan and the co-defendant, Tucker, were indicted for the premeditated murder of Gerald Leon Vick by shooting him with a handgun. They were tried jointly. The facts shown at trial were as follows:[4]

The victim was employed as the bodyguard of Jim Long, the owner of the Finish Line Bar in Hallandale, Florida, where O'Callaghan worked as the night manager. Long had lost money to Tucker at a card game. In apparent retaliation, Long had Vick shoot out the windows of Tucker's house on several occasions. On one such occasion, Tucker's girlfriend, Cyndi LaPointe, was almost hit by the bullets and flying glass. On August 20, 1980, Tucker enlisted

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[3]O'Callaghan has also filed a Petition for a Writ of Habeas Corpus based upon erroneous sentencing instructions on non-statutory mitigating circumstances and the trial court's failure to consider evidence of such circumstances in violation of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). O'Callaghan has moved to consolidate that petition with this appeal.

[4]These facts were generally accepted by this Court on direct appeal. See 429 So.2d at 692-94.

O'Callaghan's assistance in identifying Vick and setting up a meeting. O'Callaghan, Tucker, LaPointe, and Alan Wheatley (Long's stepson) went to the trailer where Vick was living and left a note requesting that Vick come to the Finish Line Bar that evening. When Vick arrived, O'Callaghan went across the street to a bar owned by LaPointe to get Tucker and LaPointe, who then went over to the Finish Line Bar together. LaPointe delivered a plate of clams to Vick, who was sitting in a booth with O'Callaghan. LaPointe then went over to the bar and began a conversation with the barmaid, Leslie Knuck.

Exactly what happened next is still in dispute. According to some witnesses, O'Callaghan disarmed Vick while he was sitting at the booth and then ushered him into the small kitchen at the back of the bar at gunpoint, where he and Vick were joined by Tucker. According to O'Callaghan and Knuck (whose prior testimony in this regard was not used by Seidel at the guilt phase), Tucker entered the bar, walked up to Vick, put a gun to his head, said "I am going to blow your fucking head off," and took Vick at gunpoint into the kitchen.[5]

Once in the kitchen, Tucker shouted loudly at Vick for shooting out his windows and then struck him in the head,

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[5]This discrepancy is significant to the claims of ineffective assistance of counsel. See pp. 9-21 infra.

knocking Vick to the floor. While Vick lay on the floor, Tucker kicked him. An accomplice, Anthony Cox, violently stomped on Vick several times. (Cox was given immunity and testified at trial.) Both Tucker and Cox are tall and heavy-set, while Vick was a short, slight man. The trial testimony established beyond any doubt that, although present, O'Callaghan took no part in the beating.

When the beating was finished, O'Callaghan went back into the bar and asked Wheatley for the keys to a van used by the bar. He brought this van to the back by the kitchen, and Vick's motionless body was placed in it. O'Callaghan, Tucker, Cox and LaPointe got in the van and drove to a deserted dirt road in nearby Pembroke Park, where Vick's body was removed from the van. According to the trial testimony of Tucker, Cox and LaPointe, O'Callaghan took a gun, shot Vick twice in the back of the head, and then handed the gun to Tucker. Tucker said he then tried to fire but the gun jammed.[6] According to O'Callaghan's trial testimony, Tucker and Cox both fired the gun before it was handed to him. When

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[6]Tucker has recanted this testimony and, in an affidavit, admits that he fired the shot that killed Vick. See defendant's exhibit in evidence at the Rule 3.850 hearing (hereinafter "Def. Exh.") 39 (A. 40). (Exhibits to which reference is made in this Brief are from the Rule 3.850 Evidentiary hearing, unless otherwise noted. The exhibits were lodged with this Court concurrent with the transmittal of the record on appeal.) When examined on the contents of this affidavit at the Rule 3.850 hearing, Tucker invoked the Fifth Amendment and refused to testify. R.III 323.

O'Callaghan attempted to fire, he was unable to do so because the gun was empty.

At trial, the two central issues were the relative roles played by Tucker and O'Callaghan and the cause of death. Vick's body was not found for almost a month; thus, only the decomposed remains were available to the State's medical examiner, Dr. Shashi Gore, for autopsy. Dr. Gore found entrance and exit bullet holes in the skull and a bullet in the chest cavity. Dr. Gore testified for the State at trial and concluded that the cause of death was gunshot wounds to the head and chest, but, on cross-examination, conceded that there was a possibility that death had resulted from the beating. R.I. 698, 713.

At trial, O'Callaghan called Dr. Abdullah Fateh, a former Broward County deputy medical examiner, as an expert witness. In preparation for his testimony, Dr. Fateh had reviewed some of the pretrial depositions of the witnesses recounting the events of the night of the murder as well as Dr. Gore's autopsy report. (He was unable to examine Vick's remains, which had been cremated.) Dr. Fateh testified that, to a reasonable medical certainty, Vick was killed by the beating in the bar and not by the gunshot wounds. He cited the slight size of the victim, the severity of the beating, the great loss of blood (there was a good deal of blood in the kitchen [see, e.g., R.I 883]), and the fact that the victim was not heard to breathe or moan at any time during

the 30 to 45 minute ride to the shooting site. Dr. Fateh disputed Dr. Gore's testimony that the beating could not be the cause of death in the absence of evidence of broken bones.[7] Rather, he testified that, in his experience, death often results from internal injuries that would not have been apparent at the autopsy because of the decomposition of the body. R.I. 886.

Anthony Cox and Cyndi LaPointe both received immunity. See Def. Exhs. 12 and 20. At trial, Cox testified that, from the time Vick was struck and lay on the floor of the kitchen until the body was shot in Pembroke Pines, Vick did not move, breathe, moan, or make any other sound. R.I 752-54. However, at trial LaPointe testified that, while in the van, "I did see him move. I saw his leg move and it looked as if he was breathing, but you know. I can't swear to it. I looked back and turned back around fast." R.I 783-84.

The jury was instructed to consider the charges of premeditated murder, felony murder during the course of kidnapping, second degree murder, and other lesser included

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[7]Although Dr. Gore testified that there were no broken bones, Norman Bieger, of the Hallandale Police Department, had testified at a deposition that Dr. Gore had told him that the victim's jaw was broken, and that he (Bieger) had seen the broken jaw when he viewed the body at the morgue. Def. Exh. 13, 28 (A. 25). Bieger was never called as a witness, and this evidence was not introduced at trial.

offenses. R.I. 1109-1112. The jury returned a verdict of first degree murder for O'Callaghan and second degree murder for Tucker. R.I. 1134-35.

2. Facts Relevant to O'Callaghan's Claims of Ineffective Assistance of Counsel

Evidence of ineffective assistance of counsel was offered through 15 witnesses at the Rule 3.850 hearing. In addition, the Circuit Court received documentary evidence, by stipulation or O'Callaghan's offer, pertinent to the claims of ineffective assistance.[8] The following facts relevant to O'Callaghan's claims were established:

a. O'Callaghan's Indictment, Arrest, and Retention of Counsel

O'Callaghan had great difficulty in retaining counsel, a factor particularly relevant to his claims of ineffective assistance.

Tucker was arrested in November 1980. From his arrest and through trial, he was represented by Robert Wills and Evan Baron, of the Office of the Public Defender. See generally, R.I; R.III 299. As early as December 2, 1980, the prosecutor was providing Tucker's counsel with police reports and other discovery materials. See Def. Exh. 44A, pp.

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[8]The Circuit Court could also take judicial notice of all of the prior court records in this case. See Fla. Evidence Code §90.202(6).

893-94.[9] Commencing in December 1980, either Wills or Baron was present at each of the depositions taken in the case. See generally, Def. Exhs. 44A and 44B.

O'Callaghan was arrested in California in November 1980. R.III 408. He waived extradition and voluntarily returned to Florida on or about December 8, 1980. See R.III 408; Def. Exhs. 46 and 47. Upon his return to Florida, he was immediately incarcerated in the Broward County Jail, where he remained until the completion of his trial and sentencing, after which he was sent to Florida State Prison to await his execution. R.III 455-6.

From the time of his arrest until the eve of his trial, O'Callaghan was indigent. R.III 410. On December 9, 1980, he was brought before Judge Coker, who read the indictment to him. R.III 410. By Findings and Order dated December 9, 1980 (R.I. 1204), Judge Coker found probable cause to believe that O'Callaghan had committed first degree murder and first degree kidnapping and directed that he be held without bail. By the same order, Judge Coker declared O'Callaghan indigent and appointed the Office of the Public Defender to represent

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[9]The file of O'Callaghan's counsel was received as Def. Exh. 30 and the file of Tucker's counsel (excluding allegedly privileged material) was received as Def. Exhs. 44A and 44B. In turn, these files bear stamped control numbers, and references herein to documents within these files is to those control numbers.

him. The next day, the Public Defender moved to withdraw from representing O'Callaghan because of the conflict of interest created by its representation of the co-defendant, Tucker. R.I. 1205. In an order dated December 11, 1980 (R.I. 1206), Judge Coker granted the Public Defender's motion and appointed Michael Gelety as Special Public Defender to represent O'Callaghan.

However, Gelety did not contact O'Callaghan, and in fact, nothing was done for O'Callaghan until over a month later when, on or about January 14, 1981, he again appeared before Judge Coker. By this time, Gelety had neither filed a notice of appearance nor contacted O'Callaghan. See generally R.I; Gelety Affidavit dated October 23, 1985 (Def. Exh. 41) ("Gelety Aff."); R.III 411.[10] Apparently confused, on January 14, 1981, Judge Coker entered another order declaring O'Callaghan indigent and again appointing as counsel the Public Defender, which had previously moved to withdraw from representing O'Callaghan. R.I. 1207. Inexplicably, the

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[10]It appears that the reason that Gelety did not contact O'Callaghan in December 1980, when he was first appointed, is that he was never notified of the appointment. Both Gelety's affidavit (Def. Exh. 41, ¶5) and O'Callaghan's testimony (R.III 411-12) confirm this point. One reason that O'Callaghan had moved to disqualify Judge Coker from hearing the Rule 3.850 motion was because he may have been the only witness who could have clarified the point.

Public Defender, by Evan Baron (who was still representing Tucker), signed a notice of appearance for O'Callaghan. Id.

Almost immediately, it appears that the Public Defender moved again to withdraw from representing O'Callaghan because, by order dated January 15, 1981 (R.I. 1208), Judge Coker granted a motion to withdraw, and again appointed Gelety as Special Public Defender. Gelety finally served a Notice of Appearance on January 16, 1981, but the document was not filed until January 21. R.I. 1209. Sometime after that, and over six weeks after O'Callaghan's arrest, Gelety began to confer with his client. See R.III 412; Gelety Aff. ¶5 (Def. Exh. 41). At this point, the trial was set to begin on February 23, 1981. R.I 4.

Gelety's Petition for Discharge, Costs and Attorneys Fees shows that, by the original February 23 trial date, Gelety had seen O'Callaghan three times, beginning on January 22. Def. Exh. 4; cf. R.III 413. Gelety's trial preparation consisted primarily of reviewing the depositions taken by Tucker's lawyers, at which O'Callaghan had not been represented. See Def. Exhs. 4 and 41. Gelety also noticed four depositions -- those of LaPointe, Knuck, Theresa Barker (sic; should be Barber) and Diane Cox. See Def. Exh. 3. However, neither Seidel's file (Def. Exh. 30) nor the Public Defender's file (Def. Exhs. 44A and 44B) contains transcripts of these depositions.

O'Callaghan was not represented at the depositions of the following witnesses, among others: Norman Bieger (Def. Exh. 13), Leslie Knuck (Def. Exh. 18), and Cyndi LaPointe (Def. Exh. 19).

By the February 23, 1981 trial date, O'Callaghan lacked confidence in Gelety because he was concerned that Gelety was not adequately preparing his case. R.III. 517-19. In particular, O'Callaghan testified that Gelety was not interviewing or locating witnesses and did not appear to be aware of all of the depositions taken in the case. In addition, Gelety was not providing O'Callaghan with copies of those depositions and related statements and police reports which, O'Callaghan knew from his conversations with Tucker, were available. See R.III 417-8; see also R.I 50. On February 23, 1981, O'Callaghan moved, pro se, to discharge Gelety. R.I 43. Judge Coker granted the motion and set about to find replacement counsel. R.I 52-53. At least two lawyers subsequently referred by Judge Coker saw O'Callaghan but refused to take his case. See R.I 88; R.III 422.

After O'Callaghan had again been without counsel, this time for eleven days, Judge Coker, on March 6, 1981, appointed Jeffrey Smith as Special Public Defender. Def. Exh. 51. Smith filed a notice of appearance on March 9, 1981. Def. Exh. 52. The trial was set to begin in three weeks, on March 30, 1981. Id. According to his own testimony at the Rule 3.850 hearing, Smith did little to prepare the case beyond

reading the materials in Gelety's file. See R.III 49-50. In a subsequent letter to another client, Smith also conceded that he did nothing at defendant's trial, other than to sit with William Seidel -- defendant's eventual trial counsel -- at counsel table. See Def. Exh. 33 (A. 65-66). Smith's Motion for an Order Allowing Compensation (Def. Exh. 5) shows 36.5 hours of preparation, much of which involved reviewing Gelety's file.

Because Smith did not appear prepared to pursue his defense vigorously, O'Callaghan lacked confidence in him. R.III 424, 430. On the Thursday before the Monday that the trial was set to begin, O'Callaghan received some funds and retained William Seidel, a private practitioner, to represent him. R.III 431. Seidel entered an appearance in the case on March 26, 1981. R.III 432; Def. Exh. 53. Judge Coker permitted Seidel to represent O'Callaghan but denied Seidel's motion made on March 31, 1981 to continue the trial so that he could prepare for it. R.I 87-89. At the same time, Judge Coker ordered that Smith continue to represent O'Callaghan as well (R.I 69); but Smith never played a meaningful role at trial (see generally, R.I; R.III 56-57, 124; Def. Exh. 33 [A. 65-66]).

b. The Nature of Trial Preparation by O'Callaghan's Counsel

i. The Guilt Phase

The files of Seidel (Def. Exh. 30) and the Public Defender (Def. Exhs. 44A and 44B) reveal that O'Callaghan

was not represented at any depositions appearing in those files, except those of Cox and of Dr. Gore, which were attended by Gelety, who did not participate at trial. trial. Gelety did not otherwise perform any substantive, independent discovery or witness preparation.

Seidel testified that he began to prepare the case at about the time he appeared as O'Callaghan's lawyer on March 26, 1981. See R.III 113. Even then, Seidel's preparation consisted mainly of reviewing the file, which he received from Smith sometime during the weekend before the trial began. See R.III 119-120. In addition, Seidel visited the site where Vick's body had been found, and he consulted with Dr. Fateh, who would be his medical expert on the cause of Vick's death (and O'Callaghan's only witness other than himself). See R.III 171. Thus, Seidel's preparation consisted almost exclusively of reviewing the discovery and evidence adduced by the Public Defender, as counsel for Tucker, or provided by the prosecutor.

There was little conclusive evidence at the Rule 3.850 hearing as to what materials were available for Seidel to review. For example, Seidel testified that he did not recall having seen LaPointe's deposition (see R.III 135); and, indeed, that deposition did not appear in the file that Seidel identified as his (Def. Exh. 30). At the same time, handwritten notes in Seidel's file (Def.

Exh. 30, pp. 288-89) make specific reference to the LaPointe deposition, and thus it would appear that it was available to Seidel.[11]

In sum, neither Gelety, Smith nor Seidel did any independent investigation or preparation of O'Callaghan's case. Gelety may have taken a few depositions of witnesses who were never called to testify, and he attended two others, but he otherwise prepared from the Public Defender's depositions and the materials provided by the prosecutor. In turn, Smith and Seidel worked from Gelety's file. In contrast, Tucker's two lawyers were present at every deposition and had been working continuously on his defense since early December 1980. See R.III 301-303; Def. Exhs. 44A and 44B.

A review of the materials that were or should have been available shows that Seidel failed to develop evidence crucial to O'Callaghan's two central defenses: (1) that Vick was dead when he was shot, and (2) that it was Tucker, and not O'Callaghan, who beat and shot Vick, and

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[11]Seidel was unable to identify these notes (see R.III 137), but from the remarks in the margins and the initals "AF" it would appear that they were prepared by Dr. (Abdullah) Fateh. Additionally, in his trial testimony, Dr. Fateh made a brief reference to the LaPointe deposition, indicating that he had seen it. See R.I 893. It is possible that Seidel gave LaPointe's deposition to Fateh and never got it back.

was the prime mover in Vick's death. Had Seidel identified this evidence and developed it, there is a reasonable probability that the jury's verdict would have been different and O'Callaghan would have been convicted of a non-capital offense (see pp. 30-38 infra). Certainly, the jury would have had a reasonable doubt as to O'Callaghan having been guilty of first degree murder.[12]

ii. The Penalty Phase

There was absolutely no preparation for the penalty phase of the trial until the conviction for first degree murder, and even then, there was no effective preparation for the penalty phase, which began less than 24 hours after the guilt verdict was returned.

Seidel's file (Def. Exh. 30) is devoid of any evidence of attempts to obtain the type of information admissible to prove mitigating circumstances under the Florida death penalty statute, Fla. Stat. Ann. §921.141(6) (West 1985). Counsel did not seek information regarding O'Callaghan's family background, learning disabilities, abuse as a child, history of drug and alcohol use, medical problems, academic problems, and the like. See R.III 174. Nor did counsel attempt to contact O'Callaghan's friends

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[12]Indeed, at least one justice of this Court shares this view. See O'Callaghan v. State, 429 So.2d at 697 (McDonald, J. dissenting).

or family to develop mitigating evidence. See R.III 175; Def. Exh. 28B, pp. 5-6 and Exh. 1 thereto, ¶16. In addition, although the trial court entered an order permitting Tucker to be examined by a psychiatrist and was willing to enter such an order as to O'Callaghan (see R.I 599-602, 816-17), O'Callaghan's counsel did not seek such an examination, nor was one conducted, even though it would have been privileged and paid for by the State. See R.III 454.

The only evidence submitted by Seidel at the penalty phase was the testimony of Leslie Knuck -- the barmaid at the Finish Line Bar -- at a prior hearing to the effect that Tucker had put a gun to Vick's head and said that he would blow Vick's head off. R.I 1145-49 (A. 32-37). This testimony was not utilized at the guilt phase of the trial although, at least by the middle of the trial, Seidel was aware of it. See R.I 817-21. In his recommendation as to sentence submitted to Judge Coker, Seidel conceded most of the State's aggravating circumstances and argued no mitigating circumstances at all, other than the Knuck testimony and, possibly, the relative culpability of Tucker. See Def. Exh. 27.

As to the alleged aggravating circumstances, Seidel erroneously stipulated into evidence a prior conviction for statutory rape (Def. Exh. 21 [A. 67]; see R.I 1144), an offense that did not involve violence (see Def. Exh. 24

[A. 68-69]) and was therefore not an aggravating circumstance under Florida law. See Fla. Stat. Ann. §921.141(5)(b).

At the Rule 3.850 hearing, testimony by O'Callaghan's father (by deposition) and mother (by affidavit A. 59-64]), and three psychiatrists, as well as independent medical records (Def. Exh. 26) demonstrated that evidence of a number of statutory and non-statutory mitigating circumstances was available and could have been developed at trial, but was not even pursued. This evidence would have established that O'Callaghan was under the influence of extreme mental or emotional disturbance (see Fla. Stat. Ann. §921.141(6)(b)), that O'Callaghan may have acted under duress or under the substantial domination of another person (i.e., Tucker) (see id. §921.141(6)(e)), and that O'Callaghan's capacity to appreciate the criminality of his acts might have been substantially impaired (see id. §921.141(6)(f)). In addition, O'Callaghan's background, medical history, history of alcohol and drug abuse and relative culpability would have constituted non-statutory mitigating circumstances as well.[13] Trial counsel completely failed to develop any of this evidence.

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[13]This evidence is described in detail at pp. 51-55 infra. The trial court's failure to consider non-statutory mitigating evidence also forms the basis for O'Callaghan's Petition for a Writ of Habeas Corpus, which is a companion to this appeal.

Had he done so, there is a reasonable probability that the jury would not have recommended a death sentence.

c. Facts Relevant to Trial Counsel's Alcoholism

Although on remand the trial judge refused to hold a hearing on it, Seidel's alcoholism is an overarching issue in this case.

In 1987 this Court disciplined Seidel, finding that he suffered from severe alcoholism that impaired his ability to practice law. See The Florida Bar v. Seidel, 510 So.2d 871 (Fla. 1987) (the "Seidel Disciplinary Proceedings").

Upon remand for consideration of this issue, the Circuit Court refused even to hold a hearing, instead summarily denying relief. O'Callaghan then proffered affidavits of three witnesses who would have testified about the extent of Seidel's impairment contemporaneous with the time of O'Callaghan's trial. See Remand R.III 22-31 (A. 49-58). These witnesses were Seidel's former law partner and two secretaries who had worked with or for Seidel at or about the time of the trial. In the face of this evidence, the Circuit Judge again denied the requested evidentiary hearing and, of course, the requested relief. See Supp. R.III 36 (A. 8).

3. Facts Relevant to O'Callaghan's Claims Under Caldwell v. Mississippi

Throughout the trial, the judge instructed the jury

that its decision on sentencing was merely advisory and amounted only to a "recommendation," and that the court was under no obligation to follow that recommendation. During the voir dire and jury selection, the judge told the prospective jurors that "Jurors do not condemn people to the electric chair. Judges do." R.I 163. At the guilt/innocence phase of the trial, the judge instructed the jury that, with respect to sentence, "Your opinion in this event is advisory only with the ultimate responsibility resting upon the Court." R.I 1107. At the start of the sentencing phase, the judge instructed the jury, "Final decision as to what punishment shall be imposed rests solely with the judge of this Court;..." R.I 1143. And in final instructions during the sentencing phase, the judge told the jury, "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge;..." R.I 1163.

In sum, the jury was consistently instructed that its verdict on sentencing was subject to being overruled by the trial judge. The record is devoid of any statement or instruction that the trial judge's power to override the jury recommendation is restricted or that there are any considerations that must be applied in overriding a jury recommendation as to a death sentence.

D. The Decision of the Circuit Court

By an order dated January 20, 1987, the Circuit Court

denied O'Callaghan's motions for post-conviction relief. R.III 745 (A. 1-5). The order rejected O'Callaghan's claims of ineffective assistance of counsel and violations of Caldwell v. Mississippi.

The Circuit Court's five-page order contained only conclusions, not findings of specific facts. Thus, for example, the decision on ineffective assistance at the guilt phase of the trial takes up only one paragraph. The whole of the conclusion that Seidel was not ineffective at the guilt phase ("facts" and all), appears in the following excerpt from that paragraph:

> The Court finds that the Defendant's trial counsel, William Seidel (with the assistance of Jeffrey Smith, who sat as co-counsel) has been shown to be a thoroughly competent, and experienced capital litigator. The Court finds that Mr. Seidel, as evidenced by his own testimony and by the actual representation he gave his client, had adequate time to prepare for trial....The Court further finds that Mr. Seidel, both through his testimony and through the actual representation evidenced by the record, clearly understood the mechanics and procedure of capital litigation, and that he was experienced in handling first degree murder trials. His extensive cross-examination of witnesses belies the claim that he was not prepared for trial....The Court was further persuaded by the testimony of Attorneys Jeffrey Smith and Richard Garfield, who testified that Seidel had discussed the case with Smith in advance of trial, and that Seidel appeared at all times to be prepared during trial. An example of this is counsel's detailed and skillful cross-examination of witness Cindy LaPointe, a witness extensively impeached on cross-examination by Seidel....The Court simply finds no basis whatsoever in the record or in the testimony and evidence presented before this Court to support the Defendant's claim that his

> trial counsel was legally ineffective during the guilt phase of his trial.

R.III 746-47 (A. 2-3).

The decision as to ineffective assistance at the penalty phase is only slightly more elaborate, and offers few facts to support the legal conclusion that Seidel was not ineffective at that phase either. The Circuit Court concluded that Seidel had no reason to believe that O'Callaghan suffered from a mental infirmity at the time of the crime. It found that, even if there was evidence available regarding O'Callaghan's harsh childhood, family background, and history of mental illness, Seidel was justified in not even pursuing this information because (1) it would have contradicted O'Callaghan's own testimony, and (2) it would have opened the door to evidence about O'Callaghan's prior arrest history. R.III 747-48 (A. 3-4). Finally, Judge Coker found that Seidel was not ineffective for failing to develop and present evidence of a mental impairment. He reached this conclusion by rejecting the evidence of two psychiatrists and a psychologist that there was a mental impairment as being "speculative" and "cumulative of other evidence." R.III 748 (A. 4).

Finally, as to O'Callaghan's Caldwell claim, the Circuit Court merely noted that Mississippi's sentencing scheme was different from Florida's and concluded, without

explanation, "the jury was not mislead [sic] as to their role and the importance of their determination at the penalty phase of the Defendant's trial." R.III 749 (A. 5).

II. SUMMARY OF ARGUMENT

The decision below requires reversal because it ignores an overwhelming record of ineffective assistance of counsel. In contravention of Rule 3.850, the Circuit Court made no findings of fact, but merely reached conclusions that are unsupported by the record. See Point 1, infra. At both the guilt and penalty phases, Seidel's conduct fell well below any reasonable standard for an attorney in a capital case, and these failings prejudiced O'Callaghan. See Point 2, infra.

The Circuit Court's refusal on this Court's remand either to grant relief or hold an evidentiary hearing on Seidel's alcoholism was a clear violation of Rule 3.850, as O'Callaghan's proffered evidence either supported his right to relief or raised issues of material fact. See Point 3 infra.

Finally, the Circuit Court's comments and jury instructions violated Caldwell v. Mississippi by denigrating the jury's role in Florida's sentencing scheme. See Point 4 infra.

III. ARGUMENT

POINT 1

THE ORDER BELOW DID NOT FIND FACTS SUFFICIENT TO SUPPORT ITS VAGUE AND ERRONEOUS CONCLUSIONS

Rule 3.850(f) provides, in pertinent part:

> If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and...determine the issues and make findings of fact and conclusions of law with respect thereto. (emphasis added)

It is therefore axiomatic that, especially in death penalty cases, specific findings of fact must be made to support the denial of post-conviction relief. No such findings were made in this case.

For example, the Circuit Court stated that "Seidel, as evidenced by his own testimony, and by the actual representation he gave his client, had adequate time to prepare for trial." Order at 2 (A. 2) (emphasis added). But at the hearing, Seidel repeatedly testified that he had not had enough time to prepare. For example:

> Q. When you took the case [on or about March 27] you knew it was going to trial on March 31?
>
> A. When I took this case I fully expected the court to grant me a continuance.
>
> To be perfectly honest with you, if I had known at the time that I was not going to get that continuance, I don't think I would have taken the case.
>
> I don't think there was enough time to properly prepare.

R.III 119. See also R.III 102, 121, 122, 125, 130, 131, 189.

The Circuit Court's conclusion that Seidel had enough time to prepare was also refuted by an affidavit by Seidel, which the Circuit Court inexplicably refused to consider as impeachment of any suggestion by Seidel that his omissions might have been tactical ones. See R.III 176-81. In that affidavit (Def. Exh. 34 [proffered] [A. 41-48]), Seidel stated:

> I felt ill-prepared to try the case in the time given me by Judge Coker to prepare it. I was unable to interview any witnesses, other than O'Callaghan, unable to visit the Finish Line Bar, and unable to conduct such other investigations as I would normally have performed in a case such as this one. In addition, because of time pressure, I was unable to review the file in adequate detail. Thus, I was unaware of or missed certain statements by key witnesses, which, if known to me, I would have used at trial.

Def. Exh. 34 (proffered) ¶10 (A. 45).[14]

The Circuit Court's only specific reference to Seidel's trial performance is:

> An example of this [Seidel's preparation] is counsel's detailed and skillful cross-examination of witness Cyndi LaPointe, a witness extensively impeached on cross examination by Seidel.

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[14]The refusal to permit examination of Seidel on his affidavit was error, significantly impeding O'Callaghan's ability to impeach Seidel on critical points as to which he became adverse and to develop additional evidence of Seidel's ineffectiveness. See Fla. Evid. Code §90.608(2); McNeil v. State, 433 So.2d 1294 (Fla. Dist. Ct. App. 1983). To the extent that Seidel's affidavit was inconsistent with any of his testimony, it may also have been error for the court below to refuse to receive it under Fla. Evid. Code §90.801(2)(a).

R. III 746 (A. 2). Yet, as is demonstrated infra (at pp. 30-34), Seidel's cross examination of LaPointe was woefully inadequate, altogether ignoring prior deposition testimony and police reports contradicting her trial testimony.

But for the passing but undocumented reference to Seidel's cross examination of LaPointe, the order below is devoid of facts to support its conclusions. In these circumstances, the order must be reversed.

POINT 2

O'CALLAGHAN WAS DEPRIVED OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL

A. General Legal Principles

Under Strickland v. Washington, 466 U.S. 668 (1984), O'Callaghan must show (1) that "counsel's representation fell below an objective standard of reasonableness" (466 U.S. at 688), and (2) that there is a reasonable probability that, "absent the errors, the factfinder would have had a reasonable doubt as to guilt" or "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" (id. at 695). Both aspects of the Strickland test are satisfied here.

B. Ineffective Assistance at the Guilt Phase

1. Errors By Counsel Below An Objective Standard of Reasonableness

Courts have repeatedly held that "[a]n attorney does not provide effective assistance if he fails to investi-

gate 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).[15] Counsel have been found ineffective for failing to raise objections, failing to move to strike and failing to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983), cert. denied, 464 U.S. 1053 (1984); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938, 943 (8th Cir. 1976); for taking actions that result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113, 1122 (1st Cir. 1978); for failing to object to improper

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[15]Accord, Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983), vacated and remanded, 568 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-05 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (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"), cert. denied, 460 U.S. 1098 (1983).

questions, Goodwin, 684 F.2d at 816-17; and for failing to object to improper jury argument, Vela, 708 F.2d at 963.

Even if counsel provides effective assistance in some respects, counsel may still be ineffective in others. Washington v. Watkins, 655 F.2d 1346, 1355 rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Under certain circumstances, even a single error may be sufficient to warrant relief. Nero v. Blackbaum, 597 F.2d 991, 994 (5th Cir. 1979) ("[s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard."). In Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), on facts similar to this case, counsel's failure to impeach two key state witnesses with pretrial statements was found to have been ineffective, and a new trial was granted.

With these principles in mind, it would be difficult to envision a case in which trial counsel so woefully ignored or failed to find and develop evidence supporting his client's defenses: first, that Vick was killed by the beating administered by Tucker at the Finish Line and not by shots at Pembroke Pines, and second, that Tucker, not O'Callaghan, shot Vick. The evidence Seidel missed was central, unique and definitely not cumulative. It would have shown that Tucker, not O'Callaghan, was the leader in this crime, in both the beating and shooting of Vick.

a. Cyndi LaPointe

LaPointe was the State's star witness. She was also instrumental in absolving Tucker of much of the responsibility for Vick's death. Like Cox, LaPointe received immunity in exchange for her testimony (see Def. Exh. 20), although Seidel never brought this to the attention of the jury. See generally, R.I 775-823.

At trial, LaPointe testified that she had seen Vick's body move in the van on the way to Pembroke Park. R.I 783-84. She testified that O'Callaghan, not Tucker, had shot Vick. R.I 785. She equivocated on whether Tucker was armed at the time of Vick's death. R.I 781. She had no recollection of Tucker threatening Vick with a gun at the Finish Line Bar. R.I 775-823. All of this testimony was almost certainly false and would have been subject to impeachment by various means, if Seidel had developed and used the proper evidence.

At trial on the crucial issue of whether the victim was still alive in the van, LaPointe testified--to O'Callaghan's disadvantage--that she heard Vick breathe and saw him move while he lay in the van on the way to the Pembroke Park site. R.I at 783-84. However, in the deposition taken by Baron on behalf of Tucker (at which O'Callaghan was not represented), LaPointe had testified that Vick did not move or breathe in the van. Def. Exh. 19, p. 26 (A. 17.1). She also testified that, when she

entered the kitchen, Vick "was laying very still, and I thought at this point, that he was already dead." Id., p. 19 (A. 14). She clearly stated that she never saw Vick move and never heard him make a sound at any time after the group left the kitchen, either in the van or out on the road where Vick was shot. Id., p. 26, 45-47 (A. 19-21). Seidel did not use this prior testimony when he cross-examined LaPointe at trial. See R.I at 790-805.

In addition, at trial, LaPointe testified that she did not see whether Tucker had a gun. R.I at 781. In her deposition, she testified that: "Beau always had a gun. For me to say that he didn't have one, I would be lying." Def. Exh. 19, p. 16 (A. 13). She also testified at her deposition that, when they entered the van, Tucker had a gun in his belt. Id., p. 22 (A. 16). Seidel never used the deposition as to this crucial issue either.

Regarding what Tucker did when he entered the bar, at trial LaPointe denied knowledge of Tucker having threatened Vick in the bar. See R.I 775-823. But LaPointe's deposition testimony corroborated O'Callaghan's account. When asked whether she saw Tucker hold a gun to Vick's head and threaten to blow his brains out, LaPointe replied: "I didn't see that. My back was to that section, but Beau did brag to that situation afterwards, in my bar. I heard him say it.... He told everybody in the bar that he did that...." Def. Exh. 19, p. 45 (A. 19). Seidel

failed to adduce this corroborative evidence at trial.

Similarly, LaPointe's deposition should have been used to show that Tucker had a plan to kill Vick, to retaliate against Vick's employer, Long. A few days before the murder, according to LaPointe's deposition testimony, Wheatley told Tucker that it was Vick who was shooting at his windows and that Vick had been hired to do so by Long. Def. Exh. 19, pp. 9-10 (A. 10-11). Subsequently, but before the murder, Tucker met Long in the bar. Tucker ordered drinks for himself, Long, and LaPointe. According to LaPointe's deposition, Tucker placed his gun on the bar and toasted Long:

> A. He said, "Here's to your health, what's left of it."
>
> Q. Who was saying that?
>
> A. Beau said that to Jim [Long]. At this point, he told me that he was going to get Jim.

Def. Exh. 19, p. 11 (A. 12).

LaPointe's deposition testimony contradicted that which she gave at trial in another crucial respect. At trial, she equivocated when asked if Tucker had threatened her regarding her testimony, saying that he had just asked her about what she had told the grand jury. R.I 800-01. But in her deposition she told a different story, that "he called me every day from the jail, and wanted me to come up and tell me what to tell the grand jury." Def. Exh.

19, p. 43 (A. 17.2) (emphasis added). This testimony was not used by Seidel.

Finally, as to LaPointe, Seidel had available -- but never used -- a devastating Davie Police Department Report, which stated:

> The above complainant [LaPointe] stated that she is in fear of her life and the welfare of her family because the above subject [Tucker] has threatened to kill them. The victim said that her ex-boyfriend (subject) is on parole for shooting someone, and that she also has first-hand knowledge that he shot and killed an unknown person in the "Finish Line" bar in Hallandale....The victim lives in Davie, and stated that the subject has been to her house and knows where she lives. The murder she spoke of was supposed to have occurred about two weeks prior to this report. Victim said that the subject beat her up at about 2:30 A.M. this date, and threatened at that time to kill her and her children if she "opened her mouth."

Def. Exh. 8 (A. 38-39)(emphasis added). This police report was in Seidel's file (see Def. Exh. 30, pp. 565-66), but he never attempted to introduce it as a business record (see Fla. Evid. Code §90.803(6)) or to utilize it to cross-examine LaPointe.[16]

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[16]The statement would have been admissible either as a business record or to impeach LaPointe, whose testimony was to the effect that Tucker had not killed Vick. See Fla. Evid. Code §§90.803(6), 90.608(1)(a).

In Smith v. Wainwright, supra, counsel was found ineffective for having failed to use prior inconsistent police statements to impeach the State's two key witnesses. 799 F.2d at 1444-45. In this respect, Smith is almost indistinguishable from the instant case. As in Smith, the fact that Seidel failed to use a statement by possibly the State's most damaging witness that "she has first hand knowledge that [Tucker] shot and killed [Vick]" is inexplicable in view of the primary line of defense that it was Tucker and not O'Callaghan who shot and killed Vick.

b. Leslie Knuck

Leslie Knuck was the barmaid at the Finish Line on the night of the murder. Because Tucker was on probation from a prior prison term when this killing occurred, he was tried in December 1980 (also before Judge Coker but without a jury) for violating his probation by carrying a firearm the night Vick was killed. At that hearing (the "VOP" hearing), Knuck testified that she had seen Tucker come into the Finish Line and put a gun to Vick's head on the night of Vick's death. Def. Exh. 17, p. 26 (A. 33). According to Knuck, Tucker said to Vick, "I want to blow your [fucking] head off." Id. at 36 (A. 36). In a pre-trial deposition, Knuck testified that Tucker had said "I'm going to blow your fucking head off" (Def. Exh. 18, pp. 10-11) [A. 29]; and she had said the same thing, in

substance, in two statements given by her to the police (Def. Exh. 14, p. 1, and Exh. 15, p. 3). The testimony would have supported O'Callaghan's defense (1) because it proved that Tucker had the intent to kill Vick, and (2) because it contradicted Tucker's testimony that he did not put a gun to Vick's head at the Finish Line and that he had no intention of killing Vick. See R.I 903-46.

Knuck was not available to testify at the trial. Thus, the prosecutor attempted to introduce her VOP testimony against Tucker in lieu of live testimony, but the trial court sustained Tucker's objection to this evidence. R.I 817-21. Prior to this point, Seidel appears to have been unaware of the testimony. See R.III 151, 183. When he learned of it, he did not even participate in the arguments on its admissibility, although it would have been in his client's interest to adduce Knuck's corroborative testimony, which supported O'Callaghan's defense by proving Tucker's intention to shoot Vick. Id. Seidel could have conclusively argued the admissibility of Knuck's VOP testimony or Knuck's deposition under Section 90.804(2)(a) of the Florida Evidence Code, which provides:

> (2) Hearsay Exceptions. The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:
>
> > (a) Former testimony.
> > Testimony given as a witness at another at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the

> same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fla. Evid. Code §90.804(2)(a). Every provision of this exception to the hearsay rule would have been applicable to either Knuck's VOP testimony or her deposition. First, Knuck was unavailable. See R.I 817-18. Second, the VOP testimony was at another hearing "...of a different proceeding," and the deposition was "in the course of the same proceeding." And third, both parties against whom the testimony would have been offered -- the State and Tucker -- were present at the VOP hearing and the deposition and "had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."[17] It would be difficult to envision evidence more clearly exculpatory and more clearly admissible under Section

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[17]The State did not pursue its attempt to utilize the VOP testimony and never attempted to use the deposition testimony. See R.I 817-21. In turn, the trial court made no clear ruling on the State's attempt to use the VOP testimony. Id. What is clear is that, at the guilt phase, Seidel never attempted to use either the VOP testimony or the deposition testimony.

90.804(2)(a) of the Florida Evidence Code; yet Seidel made no attempt to introduce it at the guilt phase.[18]

Seidel did not refer to Knuck's VOP testimony until the penalty phase of the trial, and he did so then only because Richard Garfield, the prosecutor, reminded him about it directly before the penalty phase began. See R.III 184; 315-17.

c. Norman Bieger

Norman Bieger, of the Hallandale Police Department, was involved in processing the crime scene. At a deposition (Def. Exh. 13) that was in Seidel's file (Def. Exh. 30, pp. 003-038), Bieger testified:

> Q. Did you have any proof one way or the other to determine whether Vick was actually killed prior to being dumped on Flamingo Road or after?
>
> A. That would be up to the medical examiner; the medical examiner advised that he did have a broken jaw and we had information that he had received a beating. One of the witnesses said that they cleaned up a lot of blood.
>
> * * *
>
> Q. Did you ever see the body at at the morgue?
>
> A. Parts of it.

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[18]Tucker's statement to the effect that he would "blow Vick's head off" was admissible on other grounds. See Fla. Evid. Code §90.801(1)(c) (statement not hearsay unless it is offerred to prove the truth of the matter asserted) and §90.803(3)(a) (hearsay exception - statement of intent, plan, motive or design).

Q. I mean the body was in pieces at the morgue or what you saw of it?

A. What I saw was his jaw broken and stuff like that.

Def. Exh. 13, pp. 26-27, 28 (A. 23-25) (emphasis added).

Bieger's testimony directly contradicted that of the State's medical examiner, Dr. Gore, who testified that he saw no fractures (R.I 699) and that, because of this, he had ruled out beating as a cause of death (R.I 709). Neither Seidel, Smith nor Gelety ever interviewed Bieger, took his deposition, reviewed his records or called him as a witness on this crucial issue. Had they done so, Dr. Gore's credibility would have been seriously impeached and a reasonable doubt would have been raised as to whether Vick had been shot or beaten to death.

d. Failure to Make Timely Objection to the State's Prejudicial and Improper Statements at Closing Argument

At the closing argument, the prosecutor made the following remarks as to defendant's expert witness, Dr. Fateh:

> As to the cause of death; first of all, Dr. Gore, you have acting in his official capacity, medical examiner, official report, public report, reasonable medical certainty. Now, on the other hand, you have Dr. Fateh and you can reject what I am about to say because it is just a statement of an attorney and it is not evidence, but I submit to you that Dr. Fateh is a prostitute. That is a phrase that goes around for people like him. Some of you have been around and you know that. You have heard of these things called the battle of the experts and you know and I know there are

> people in this world who abuse the fact that they have a higher education and have occupied certain positions and for a price or whatever they come in and basically testify to whatever is called for for $125.00 an hour.

R.I 1048 (emphasis added).

Seidel made no objection to this remark, no motion for a curative instruction, and no motion for a mistrial. For this reason alone, this Court deemed any objection to have been waived. See O'Callaghan v. State, 429 So.2d, at 696. The failure to make such an objection is a classic example of ineffective assistance of counsel. See Vela v. Estelle, supra, 708 F.2d at 963. Given the fact that Dr. Fateh was O'Callaghan's only witness, other than himself, it is astounding that Seidel would permit the State to impeach him in such a patently improper manner.

2. Prejudice as the Result of the Errors and Omissions of Counsel at the Guilt Phase

The second element of ineffective assistance of counsel is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. at 688. Here, this question must be answered in the affirmative.

a. The Cause of Death

When deliberating, the jury asked to see the medical experts' reports and the testimony of Dr. Gore and Dr. Fateh. R.I 1130-32. There were no medical reports in

evidence, and the trial court refused to permit the jurors to review the medical testimony. Id. But the jurors' inquiry and requests establish that they were seriously concerned about the cause of Vick's death. Thus, any evidence tending to establish that Vick was already dead in the van was critical to O'Callaghan's case, and it is likely that the jurors would have entertained a reasonable doubt respecting O'Callaghan's guilt if they had heard (1) LaPointe's deposition testimony to the effect that Vick had not moved, breathed or made a sound in the van, and (2) testimony from Bieger that he had seen Vick's broken jaw and that Dr. Gore had told him it was broken -- both supporting O'Callaghan's claim that Vick was fatally beaten and impeaching Dr. Gore's testimony that there were no fractures.

And, given the facts that the jury asked for the expert testimony and that Dr. Fateh was defendant's only expert witness, Seidel's silence in the face of the prosecutor's statement that Fateh was a prostitute was equally prejudicial.

b. The Issue of Tucker's Involvement, Motive and Intention

Seidel's failure to adduce compelling evidence of the full extent of Tucker's involvement in the killing of Vick prejudiced the defense that Tucker, and not O'Callaghan, was the prime actor in the crime. Seidel failed to show:

1. That Tucker had put the gun to Vick's head and threatened to blow his head off;

2. That Tucker was armed;

3. That Tucker had motive (he had been shot at by Vick and had threatened Vick's employer, Long); and

4. That the State's own immunized witness had reported to the Police (a) that she had first-hand knowledge that Tucker, not O'Callaghan, killed Vick, and (b) that Tucker had threatened her and her children to coerce her to testify favorably on his behalf.

All of these facts could have been proven from the materials that were available to Seidel. This evidence would have raised a reasonable doubt as to whether it was Tucker, and not O'Callaghan, who took the lead in killing Vick.

The point is confirmed by two facts manifest from the Trial Record. First, the jury found Tucker guilty of the lesser included offense of second degree murder. Thus, they believed him to have been culpable and sufficiently involved in the crime to be guilty of second degree murder, but not sufficiently culpable to have been guilty of first degree murder. Conversely, the jury obviously felt that O'Callaghan's culpability warranted the first degree murder verdict. The quantum of additional evidence that Seidel failed to adduce would likely have been sufficient to reverse the jurors' findings -- leading to a lesser conviction for O'Callaghan and a more severe

one for Tucker. Second, we know now that Tucker did kill Vick -- either by beating him at the Finish Line or shooting him at Pembroke Park -- because at trial, Tucker conceded that he beat Vick (see R.I 940-43), in his recantation, Tucker concedes that he fatally shot him (see Def. Exh. 39 [A. 40]), and in the Davie Police Report, LaPointe said that Tucker had shot and killed him (see Def. Exh. 8 [A. 38-39]).

Where there is a close question as to the weight of the evidence supporting the challenged verdict or sentence, it takes but one or a few errors to prejudice a defense. Thus, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland v. Washington, 466 U.S. at 696. Here there was not "overwhelming record support" for a finding that O'Callaghan was guilty of first degree murder, and the evidence that convicted him of this charge was subject to impeachment that was never effected.

In sum, there was ample evidence that Vick was dead when O'Callaghan allegedly shot him. In addition, Tucker beat Vick, Tucker now concedes that he shot Vick, Tucker bragged that he killed Vick, LaPointe reported to the Davie Police that Tucker killed Vick, and Knuck testified that Tucker said he would kill Vick. If the proper

evidence had been before the jury, there can be little doubt that the verdict would have been different.

C. Ineffective Assistance at the Penalty Phase

1. Errors by Counsel Below an Objective Standard of Reasonableness

Defense counsel must discharge significant responsibilities at the sentencing phase of a capital trial. 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 never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In Gregg and its companion cases, the Supreme Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Trial counsel in capital sentencing proceedings has a duty to investigate and prepare mitigating evidence for the jury's consideration, to object to inadmissible evidence or improper jury instructions, and to make an adequate closing argument. Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, 107 S. Ct. 1292

(1987).[19] O'Callaghan's counsel performed none of these duties adequately.

Two facts are beyond dispute: (1) none of O'Callaghan's lawyers gave any serious consideration to developing a defense to a death sentence, and (2) Seidel did not present any evidence at the penalty phase of the trial in serious opposition to a death sentence.

Any competent lawyer should have recognized from the outset that the case would involve the death penalty. The indictment for first degree murder was notice to this effect. From there, competent counsel should have considered the possibilities (1) that the State would seek the death penalty, and (2) that the State would allege and attempt to prove aggravating circumstances under the Florida death penalty statute, Fla. Stat. Ann. §921.141(5) (West 1985). See testimony of Richard Lubin, Esq., R.III 229-31.

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[19] See also Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985), cert. denied, 474 U.S. 1026 (1985); Blake v. Kemp, 758 F.2d 523, 533-535 (11th Cir. 1985), cert. denied, 474 U.S. 998 (1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d at 1554-58; Goodwin v. Balkcom, 684 F.2d 794; Young v. Zant, 677 F.2d 792, 797 (11th Cir. 1982); Holmes v. State, 429 So.2d 297 (Fla. 1983).

In turn, at or before first contact with O'Callaghan, counsel should have recognized the potential for one or more of the following aggravating circumstances: (1) that O'Callaghan had previously been convicted of a felony involving the use or threat of violence to the person (Fla. Stat. Ann. §921.141(5)(b) (West 1985)); (2) that the capital felony was committed in the course of a kidnapping (id. §921.141(5)(d)); (3) that the capital felony was especially heinous, atrocious or cruel (id. §921.141(5)(h)); and (4) that the capital felony was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification (id. §921.141(5)(i)).[20]

Under the Florida death penalty statute, the sentencer must find:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Fla. Stat. Ann. §921.141(3) (West 1985). Thus, defense counsel faced with a likelihood that the State will show

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[20]By Answer to O'Callaghan's Demand for Discovery Relative to Sentencing (Def. Exh. 54), the State gave written notice of the convictions it would seek to use as evidence of prior violent felonies at the penalty phase as well as the other aggravating circumstances that it intended to argue.

one or more aggravating circumstance can have but one strategy to avoid the death penalty for his client: to develop evidence of mitigating circumstances that outweigh the potential aggravating circumstances. Seidel did not even attempt to do this.

The Trial Record is devoid of an offer or a proffer of any evidence of either statutory or non-statutory mitigating circumstances, other than the VOP testimony of Leslie Knuck, which should have been presented at the guilt phase.

Indeed, neither Seidel nor his predecessors even inquired of O'Callaghan about the availability of mitigating evidence, beyond asking, directly prior to the sentencing hearing, whether or not O'Callaghan thought that his family -- all of whom were living at great distances from Florida -- would testify for him. See R.III 445. Specifically, counsel did not obtain any of the usual information -- family history, school records, medical records, information on drug or alcohol problems and the like -- that would have provided a basis for establishing evidence in mitigation of a death sentence.

In attempted support of his utter failure to defend against a death sentence, Seidel testified that he did not believe that there were any mitigating circumstances. R.III 116-17. Seidel's conclusion was apparently based on O'Callaghan's alleged statement to him that he did not see

how his family could help him. See R.III 187. This statement would not be surprising, even if it had been made; O'Callaghan was not a lawyer and had no knowledge of the tactical considerations in a capital case. Seidel never went beyond O'Callaghan's opinion, never attempted to contact the family or document the family history, and never attempted to explain to O'Callaghan the critical significance of mitigating circumstances, even though Seidel had to have known that he was facing from one to four aggravating circumstances that he had to rebut. See R.III 162-3.

Trial counsel's obligation to conduct an independent and reasoned analysis of the defenses available to his client is even more important in a capital case, where the client's own evaluation is particularly suspect due to the anxiety and emotion attendant to the prospect of the death penalty. "Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advice." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). Yet Seidel's testimony (R.III 187, 199) shows that he followed his client's suggestions and virtually abandoned any defense to the State's demand for a death sentence, without making any independent assessment of his own.

Moreover, Seidel did not even turn his attention to the sentencing implications until the guilt verdict had been rendered -- less than a day before the penalty phase began. See R.III 159-60. "[T]alking to the defendant in the space of an hour before the sentencing phase of the trial does not meet the standards of effective assistance." Douglas v. Wainwright, 714 F.2d at 1556.

Equally glaring an omission was Seidel's failure to have O'Callaghan examined by a psychiatrist, even though the court was willing to order that this be done. See R.I 599-602, 816-17. Although Seidel testified at the Rule 3.850 hearing that he had O'Callaghan examined by a psychiatrist, this testimony was beyond belief; and the record is quite clear that no exam was performed.[21]

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[21]Seidel's testimony in this regard was rambling, confused and incredible. At first he testified that he had consulted with Dr. Fateh as to O'Callaghan's state of mind. R.III 67, 171. Of course, Dr. Fateh was a pathologist, not a psychiatrist. R.I 874-76. Then Seidel testified that he had O'Callaghan examined by Dr. Arnold Eichert (R.III 169); but, when called as a witness, Dr. Eichert testified that he never examined O'Callaghan (R.III 389). O'Callaghan testified that, before and during his trial, he was not seen by a psychiatrist in connection with his defense. R.III 454. And the court file is devoid of any application by Seidel or Smith (as a special public defender) for reimbursement for the expenses of a psychiatrist. Thus, contrary to Seidel's confused recollection, no psychiatric exam was performed at any time prior to or during trial.

The Trial Record contains the following colloquy on April 6, 1981 as to the appointment of a psychiatrist:

> MR. WILLS: I told Mr. Seidel we thought it would be in the best interest if the Court appoint somebody, it being a different doctor [than the doctor appointed for Tucker].
>
> THE COURT: Have you discussed this with Mr. O'Callaghan?
>
> MR. SEIDEL: No, I haven't.
>
> THE COURT: This particular one [the order of appointment being submitted as to Tucker] is only as to Mr. Tucker.
>
> MR. WILLS: We made a copy of the order.
>
> MR. SEIDEL: I have a copy with the Defendant.
>
> THE COURT: You discuss it sometime with Mr. O'Callaghan. If he wishes me to enter that order, I shall do so.

R.I 816-17. The Trial Record contains no further reference to a psychiatric examination of O'Callaghan and no indication of any order entered in this regard.

As if it were not enough to fail to develop evidence in mitigation, Seidel permitted a prior conviction for statutory rape, which involved no violence, to go to the jury as evidence of a prior conviction of "a felony involving the use or threat of violence to the person." See Fla. Stat. Ann. §921.141(5)(b) (West 1985). A certified conviction that was admitted at the sentencing phase as a "felony involving the use or threat of violence to the person" was a 1963 conviction for "carnal knowledge of female child in violation of Section 53-238" of the

then existing Connecticut General Statutes. Def. Exh. 21 (A. 67). In fact, a conviction of this sort under this statute would not have involved violence. See Connecticut General Statutes §53a-72 (Historical Note) (repealed by P.A. 75-619, §7, 1975) (set out in Def. Exh. 24 [A. 68-69]) (the relevant language of the statute is underscored at A. 68). Seidel stipulated that this conviction was to be admitted (R.I 1144). As a result, a conviction which, under the Connecticut statute, did not involve violence, became evidence of a violent felony. This was plain error. See Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, 445 U.S. 972 (1980).

In sum, counsel failed to investigate, develop, offer or proffer any meaningful evidence in support of mitigation, and permitted improper evidence of a prior conviction to be placed before the jury. O'Callaghan was prejudiced by these errors and omissions because, had the proper evidence been developed, there is a reasonable likelihood that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland v. Washington, 466 U.S. at 695.[22]

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[22]It is not appropriate for this Court, in reviewing a Rule 3.850 motion, to consider whether the trial court
Footnote continued/

2. Prejudice as the Result of the Errors and Omissions at the Penalty Phase

a. Family History

At the Rule 3.850 hearing, evidence of O'Callaghan's family history was received from O'Callaghan's father (by deposition [Def. Exh. 28B]) and mother (by affidavit [Def. Exh. 28B, Exh. 1][A. 59-64] adopted by his father at his deposition), and from O'Callaghan. In addition, in reaching their conclusions and rendering their opinions, the psychiatric and psychological experts (Drs. Perlswig, Zager and Krop) considered and recounted O'Callaghan's family history as told to them by O'Callaghan and as discerned from documents, records and reports.

If utilized at the penalty phase of the trial, the evidence of family history would have made a compelling case for mercy. From the deposition of O'Callaghan's father (Def. Exh. 28B)[23] and the affidavit of his mother (Def. Exh.

/Footnote continued
would have imposed a different sentence based upon the evidence received at the hearing. Had the jury recommended life, the trial court would have been bound by much stricter standards in imposing the sentence. See Richardson v. State, 437 So.2d 1091 (Fla. 1983); Tedder v. State, 322 So.2d 908 (Fla. 1975).

[23]The State stipulated that the testimony of O'Callaghan's father could be received in evidence as if he had testified at the hearing. Def. Exh. 28B, p. 3. O'Callaghan's father was too ill to travel to Florida from his home in Connecticut; but he was able to give testimony
Footnote continued/

28B, Exh. 1 [A. 59-64]),[24] it was established that, had they been contacted in 1981, they would have been available[25] to give the following evidence:

1. O'Callaghan suffered a number of head injuries at his birth and thereafter.

2. O'Callaghan had a serious vision problem, which went undiagnosed for a number of years, causing him to be held back in school for two years. Even after it had been corrected, O'Callaghan was never able to catch up.

3. O'Callaghan was physically and mentally abused at the elementary school that he attended.

4. O'Callaghan was sent early on to a Connecticut reformatory ("Cheshire") at which he suffered further abuse. Because of economic circumstances, his family was unable to visit him there.

5. O'Callaghan developed a drug habit at Cheshire from which he never fully recovered.

/Footnote continued
at his home there by deposition at which the State was present and able to cross examine. See Def. Exh. 28B.

[24]Due to overall poor health and a heart condition in particular, O'Callaghan's mother (who died in 1987) was not able to testify at all at the Rule 3.850 hearing in 1986. These health problems were certified in an affidavit by her physician. See Def. Exh. 32.

[25]O'Callaghan's father and mother were healthy in 1981 and stated that they would have testified on O'Callaghan's behalf then. See Def. Exh. 28B, p. 6, and Exh. 1 thereto, ¶16 [A. 63].

6. O'Callaghan's half-brother was mentally ill, as was his paternal aunt.

See generally, Def. Exh. 28B and Exh. 1 thereto (A. 59-64).[26]

O'Callaghan's difficult childhood and drug problem would have supported a finding of extreme emotional or mental disturbance (Fla. Stat. Ann. §921.141(6)(b) (West 1985)), as well as a non-statutory mitigating circumstance based on his background in general (see, e.g., Eddings v. Oklahoma, 455 U.S. 104, 107-08, 115 (1982)).

b. Psychiatric History

Compelling evidence in mitigation could also have been developed at trial from psychiatric and psychological experts. Prior to the Rule 3.850 hearing, O'Callaghan was examined by three such experts. Dr. Krop and Dr. Perlswig were O'Callaghan's witnesses; Dr. Zager was court-appointed and reported in a non-confidential manner to the Circuit Court and to counsel. The conclusions of these experts were uniform and consistent: each found that there was psychiatric or psychological evidence that should have been considered in mitigation. All agreed that O'Callaghan acted under duress and the domination of Tucker (Fla. Stat. Ann.

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[26] O'Callaghan's background is set out in more detail in his mother's affidavit (Def. Exh. 28B, Exh. 1[A. 59-64]).

§921.141(e) (West 1985)). See R.III 272, 339-40, 270 and 271-72; Def. Exh. 43. In addition, they all found it likely that he was acting under the influence of a pronounced drug dependence that would have caused a severe mental or emotional disturbance. Fla. Stat. Ann. §921.141(6)(b); see R.III 266, 334-336, 368; Def. Exhs. 28A and 43. The experts found his drug history, family history, and background in general to be a basis for non-statutory mitigating circumstances as well. R.III 272-274, 342-343, 371-377; see also Def. Exhs. 37 and 43.[27]

c. The Lack of Involvement By O'Callaghan Sufficient to Support A Death Sentence

Fla. Stat. §921.141(6)(d) provides a mitigating circumstance in cases in which the defendant "was an accomplice in the capital felony committed by another person and his participation was relatively minor." Had Seidel properly developed the evidence of LaPointe, Knuck and Bieger at trial, he could have established that Tucker, and not O'Callaghan, was the principal actor in

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[27]It was also established at the Rule 3.850 hearing that independent evidence was available which would have corroborated the drug problem. Thus, for example, O'Callaghan was committed for over a month to Norwich State Hospital in Connecticut for treatment in a drug abuse program. Medical records were available to prove this point (Def. Exh. 26), but trial counsel never obtained them. Significantly, O'Callaghan's commitment for drug abuse in 1971 coincided with his only two convictions for a prior violent felony (robbery). Compare Def. Exhs. 22, 23 and 26.

Vick's death; that Tucker had the motive to kill Vick, and had either beaten Vick to death or had shot him to death. Even if O'Callaghan had been convicted of first degree murder, had this evidence been before the jury at the guilt phase, Tucker's substantial involvement in Vick's death would have provided grounds for mitigation under Fla. Stat. §921.141(6)(d) and for non-statutory reasons as well (see, e.g., Bell v. Ohio, 438 U.S. 637 (1978).[28]

d. The Prior Conviction for Statutory Rape

It would be difficult to envision more prejudicial evidence at a capital sentencing hearing than a prior conviction incorrectly characterized as "child rape" that in fact did not involve violence at all. As O'Callaghan's proffered expert on capital defense representation

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[28]Dr. Zager also testified that he believed that Fla. Stat. §921.141(6)(d) was applicable, i.e., that O'Callaghan "was an accomplice in the capital felony committed by another person and his participation was relatively minor." See R.III 338-339. Dr. Zager had examined Tucker at the 1981 trial on a confidential basis and based his opinion at the Rule 3.850 hearing not only on what O'Callaghan told him in 1985 but also on what Tucker had told him in 1981. See R.III 345. Dr. Zager could not have testified as to the content of what Tucker told him in 1981 because of the lawyer-client privilege (Fla. Evid. Code §90.502) (which Tucker refused to waive) [see R.III 323-325]) and the psychotherapist-patient privilege (Fla. Evid. Code §90.503). However, since Dr. Zager heard both Tucker's and O'Callaghan's accounts, his conclusion that O'Callaghan's account was true -- i.e., that O'Callaghan was an accomplice in a crime committed by Tucker -- is strong evidence of a fact in mitigation.

testified, other than a prior conviction for murder, sex offenses are the types of prior crimes that tend most to inflame juries and induce death recommendations. See R.III 234.[29] Sex offenses against children are even worse.

The stipulation of this conviction into evidence was prejudicial error below any reasonable standard of competence.

D. Absence of Tactical Considerations

In its cross examination, particularly of Seidel, the State sought to imply that the errors and omissions were merely the result of tactical decisions to forego certain lines of inquiry. No such tactics were proven.

It would be incredible that, in pursuing a defense based upon the cause of death, a lawyer would forego or avoid evidence that the victim had been badly beaten and did not exhibit signs of life at times crucial to that

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[29]In 1983, the State publicly took the position that the rape conviction was a factor justifying the death penalty. When O'Callahan's clemency petition was under consideration, the Assistant State Attorney, Paul Zacks, is reported to have said: "[O'Callaghan's] arrest and conviction record is extensive and runs the gamut from rape to robbery with violence.... Defendant does not care about other human beings. He has no consideration for the sanctity of life. The way he has lived his life he hasn't earned clemency." Fort Lauderdale News, Nov. 9, 1983, p. 10B (emphasis added).

defense; yet that is exactly what Seidel did when he failed to use LaPointe's and Bieger's deposition testimony.

It would be equally incredible for counsel pursuing a defense based upon culpability of the co-defendant to ignore evidence that the co-defendant threatened to blow the victim's head off, that the co-defendant was armed, that the co-defendant had bragged about the killing, and that the co-defendant's girlfriend had called the police and stated that the co-defendant had killed the victim. These are not facts that counsel would avoid developing for tactical reasons.

And no tactical consideration could justify a complete failure to put on evidence in mitigation of a death sentence when the State alleged four aggravating circumstances.

In fact, the State did not adduce any evidence on cross examination that Seidel's errors and omissions were based on tactical considerations; but even if such evidence had been adduced, Seidel had already conceded in a prior affidavit -- which the Court inexplicably refused to receive in evidence -- that time considerations, not tactics, governed his actions in this case. See Def. Exh. 34 (proffered)[A. 41-48].

Finally, this Court's prior finding of Seidel's alcoholism should remove from this case any presumption

that a particular decision may have been "strategic," as opposed to ineffective. Certainly the record in the Seidel Disciplinary Proceedings generally, and the affidavits proffered below in particular (Remand R.III 22-31[A. 49-58]), demonstrate an impaired attorney whose decision-making capacity was limited in the extreme.

E. Other Evidence of Ineffective Assistance

Any discussion would be incomplete without consideration of compelling additional evidence of ineffective assistance. Perhaps the most telling evidence in this case came from Seidel himself, who demonstrated by his testimony that he had little familiarity with the Florida death penalty statute and no appreciation of capital procedure.

Although he testified at the Rule 3.850 hearing that he had tried numerous capital cases (R.III 97), Seidel was in fact quite confused when confronted with questions about the death penalty.[30] Thus, for example, Seidel testified that bifurcated proceedings came into effect in 1981 (R.III 105), when in fact Fla. Stat. §921.141 was

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[30]We conducted a search on Lexis to ascertain whether any reported decisions exist in which Seidel is listed as counsel for a defendant in a capital case. Only one such case was found, Griffith v. Florida, 171 So.2d 597 (Fla. Dist. Ct. App. 1964), which had been tried in 1962 and in which Seidel appears to have been co-counsel.

adopted in 1972. See Fla. Stat. Ann. §921.141 (Historical Note) (West 1985). Similarly, Seidel was hard pressed to convey an understanding or recognition of aggravating and mitigating circumstances until these were read to him at the hearing. See R.III 114, 160. At O'Callaghan's sentencing, Seidel remarked, "This being the first time I have ever had this sentencing in several odd years." R.I 1192. Plainly, Seidel had scant experience in handling capital cases, and no experience under the post-Furman statute.

Even Jeffrey Smith, who was at counsel table with Seidel throughout almost all of the trial, agreed that the case was not properly handled. In a letter to another client, Smith wrote of defendant's trial:

> [I]f handled properly it could have possibly resulted in a victory or subsequently reversal on appeal. However, the way it was handled, I'm not sure what the Appellate status is.

Def. Exh. 33 [A. 66].

POINT 3

THE CIRCUIT COURT'S REFUSAL TO GRANT RELIEF OR HOLD A HEARING ON SEIDEL'S ALCOHOLISM WAS ERROR

The record in the Seidel Disciplinary Proceedings confirms that Seidel's alcoholism was chronic, and continued during the time he represented O'Callaghan. In particular, at a hearing held on December 23, 1986 in the Seidel Disciplinary Proceedings, Seidel testified:

> Q. For how many years prior to January of this year [1986] had you been consuming heavy quantities of alcohol?
>
> A. Well, I began drinking back at the time when I was sixteen years of age [about 1940][31], just starting as a freshman in college when I began my consumption of alcohol. And it has continued on until I recently have undergone some treatment for it [in 1986]. That is quite a bit of time to consume and quite a bit of alcohol to consume.

Seidel Disc. Pro., Dec. 23, 1986 Tr. at 9-10. The Disciplinary Proceedings show that Seidel was so impaired by alcohol that he could not even defend himself in an $1,800 civil suit as to which he had meritorious defenses. Id. at 20-22. Certainly this record casts serious doubt upon Seidel's ability to defend a capital case, if he could not even defend a small civil one. As the attorney for the Florida Bar stated at the hearing:

> [W]e think this establishes a pattern of an impaired attorney who had problems at that time [1983 and 1984] also, not just currently.

Id. at 22.

The transcript in the Disciplinary Proceedings also makes it quite clear that Seidel's drinking problem affected his ability to practice law over a long period of time. For example, he testified:

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[31]At the hearing in 1986, Seidel testified that he was 62 (Tr. at 8). Thus he was born in 1924 and was sixteen in 1940.

> The only thing that I want to make known to the Court that I have -- yes, obviously, there was some lax practice that was done here. I have to acknowledge that because the record is fairly clear. And this was attributable to two things. I was conducting a very heavy practice at that time out of a one-man office, part of which probably led to my exasperation which eventually led to my consumption of alcohol. And I'm not going to try to put the blame on anybody other than myself. But that is exactly what happened.
>
> And I can now look back on it and realize what was happening back in those days. It was more than any human being should have undertaken. Those are the things that lead people of some disposition to indulge or overindulge in alcohol. It's a relief. Sometimes it gets you away from this. I can see what has happened in the past on this. I now understand it. I understand what has happened.

Id. at 23-24.

Thus, the Disciplinary Proceedings establish longstanding alcoholism that pre-dated Seidel's representation of O'Callaghan, which ran from March 1981 to 1984. As the Report of the Referee (adopted by this Court in its final Order) concluded: "The spector [sic] of alcoholism has consumed Respondent and was a causative factor of his disciplinary violations." Seidel Disc. Pro., Report of Referee dated January 29, 1987 at 4.

The Circuit Court appears to have based its refusal to hold a hearing on its erroneous belief that, because the Disciplinary Proceedings post-dated O'Callaghan's trial, Seidel's alcoholism must have post-dated the trial as well. Remand R.III 5 (A. 6). O'Callaghan refuted this

supposition when he proffered, by affidavits, testimony of three witnesses to the effect that Seidel was impaired by alcoholism in 1981, when O'Callaghan's case was tried. Seidel's former secretary stated:

> During 1981, Mr. Seidel had a drinking problem which was quite severe. There were many times when he did not show up at the office. On those occasions, I would call his home and the phone would ring many times before he would answer it. Often Mr. Seidel would say he was on his way to the office; sometimes he would arrive, sometimes he would not. When Mr. Seidel did not show up at the office, I would have to cover for him by making several telephone calls and, in some instances, meet the clients and go over the details of the case on Mr. Seidel's behalf.
>
> There were times when Mr. Seidel was too intoxicated to drive. I would drive to his house, pick him up and take him to the airport because he was to [sic] intoxicated to drive. I also recall him missing several flights due to his drinking and, therefore, not remembering to catch his flights. There were many times he would arrive at the office obviously intoxicated.
>
> There were many times when clients would come to the office for appointments or to check on the status of their cases and Mr. Seidel would not be there....

Affidavit of Deborah McCabe, Remand R.III 22-24 [A. 49-51].

Seidel's former partner provided corroborating evidence:

> From my personal experience with Mr. Seidel, I know him to be a chronic alcoholic with a severe drinking problem. During the two and a half years when I was associated with Mr.

> Seidel [1982 to 1984], I had an opportunity to observe the way in which his drinking affected his practice of law and I believe that, at many times, it seriously impaired his abilities as an attorney. In particular:
>
> a. There were times when Mr. Seidel simply did not show up at the office as a result of having been drinking. During these times, he would stay at home, miss court appointments and appointments with clients, and would neglect other professional obligations.
>
> b. When Mr. Seidel was drinking heavily, he did not focus his attention on his legal work. Legal motions which should have been filed often were not prepared, and legal technicalities and strategies which should have been pursued were not considered.
>
> c. Mr. Seidel's drinking also affected other functions incidental to his practice. Thus, on occasions he was unable to drive, and on other occasions he was unable to remember where he was going or how to get there.
>
> d. There were numerous times when I or our office staff were required to make motions or appearances in order to cover Mr. Seidel's obligations, which he was unable to meet because of his alcoholism.

Affidavit of C. Craig Stella, Remand R.III 27-29 [A. 52-54].

In light of this evidence, the Circuit Court's summary denial of the motion without a hearing on Seidel's alcoholism was plainly erroneous.

POINT 4

THE TRIAL JUDGE'S INSTRUCTIONS AND REMARKS TO THE JURY VIOLATED CALDWELL V. MISSISSIPPI BY UNCONSTITUTIONALLY DIMINISHING THE JURY'S RESPONSIBILITY FOR ITS SENTENCING RECOMMENDATION

The facts set forth at pp. 20-21 supra show a clear violation of the constitutional rule established in Caldwell v. Mississippi, 472 U.S. 320 (1985); and we submit that O'Callaghan is entitled to relief from his death sentence under the principles established in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied, 816 F.2d 1493 (1987), pet. for cert. granted, 108 S.Ct. 1106 (1988), and Mann v. Dugger, 1988 U.S. App. Lexis 5397 (11th Cir. 1988).

We are aware of this Court's decision in Copeland v. Wainwright, 505 So.2d 425 (Fla.), vacated and remanded on other grounds sub nom. Copeland v. Dugger, 108 S.Ct. 55 (1987), but respectfully submit that Copeland was incorrectly decided. On the present record, this case is controlled by Adams and Mann, and not by Copeland; but in view of the stated grounds for the decision in Copeland and the pendancy of United States Supreme Court review in Adams, it would be wasteful of the Court's time to develop arguments of these points here. Therefore, O'Callaghan presents the issues in reliance on the record and the authorities cited herein with the intention of preserving them fully. Should this Court wish to receive further argument so it may revisit its holding in Copeland, we would be pleased to provide it.

IV. CONCLUSION

For all of the foregoing reasons, O'Callaghan's Motion for Relief Pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure should be granted. The orders below should be reversed, and the case remanded with instructions that O'Callaghan's conviction and death sentence be vacated and a new trial granted.

Dated: New York, New York
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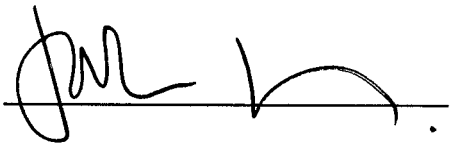
By: 

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