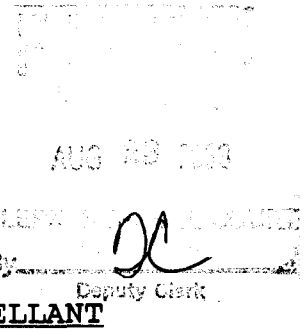
SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN,	:	
Appellant,	:	Circuit Court Case No. 80-9519-CF-10-B
-against-	:	
STATE OF FLORIDA,	:	
		Case No. 70,112
Appellee.	:	



REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I. INTRODUCTION

The State has submitted an Answer Brief (the "State's Br.") that finds little support in the record or the applicable law. We will not attempt here to refute every point that the State has tried to make. Rather, we will address those issues that have the most significant bearing on this case.

II. ARGUMENT

The State's Brief submits that William Seidel, trial counsel, made no substantive errors, or that, even if he did, they were harmless. The State ignores or glosses over Seidel's most egregious errors altogether, and fails to grapple successfully with the prejudicial nature of the errors that it does implicitly recognize. The State's arguments and interpretation of the record simply do not stand up to careful scrutiny.

There can be little doubt on the record in this case that

Appellant, John O'Callaghan, should have been found less culpable than his co-defendant, Beau Tucker. Nonetheless, Tucker was found guilty of second degree murder and will likely be released from prison soon; O'Callaghan was found guilty of first degree murder and, if post-conviction relief is not granted, will be executed. The reason for this result is clear: O,Callaghan's lawyer was ill-equipped and ill-prepared to try his case.

POINT 1

TRIAL COUNSEL'S ERRORS FELL BELOW THE STANDARD SET IN STRICKLAND v. WASHINGTON

The State repeatedly confuses form with substance in attempting to bolster trial counsel's performance. Very much like the Circuit Judge below, the State argues that Seidel was "aggressive" or "vigorous" in his cross-examination. See, e.g., State's Br. at 20, 21. Through verbal legerdemain, the State would like to have this Court find that effectiveness is synonomous with aggressiveness or vigor. But it is for precisely this reason that the decision below cannot withstand scrutiny, as the Circuit Court did not find that Seidel was effective; it only observed, perfunctorily and without explanation, that his cross-examination of some witnesses was "extensive" or "skillful" or "detailed." See Order dated January 20, 1987 at 2 (R.III 746 [A. 2]). The court below made no finding of fact that could be a reasonable basis for its conclusion that Seidel was not ineffective. Nor could it have done so, as there could be no foundation for such a holding either in law or fact.

Strickland v. Washington, 466 U.S. 668 (1984), sets a very

clear standard for effective representation:

> In giving meaning to the requirement [of effective assistance]...we must take its purpose -- to ensure a fair trial -- as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

466 U.S. at 686. Thus, the proper standard is not, as the State would have it, how trial counsel looked, but rather, how he performed. By this standard, Seidel was plainly deficient.

A. Cross-Examination of Cyndi LaPointe

The State's own description of Seidel's cross-examination of Cyndi LaPointe all but concedes ineffectiveness:

> Seidel significantly, vigorously and somewhat successfully impeached Lapointe's reliability and credibility as a witness.

State's Br. at 20-21 (emphasis original). The State damns Seidel with this faint praise. Certainly the standard under Strickland is not that counsel be "somewhat successful," counsel must be effective. The State cannot seriously argue that this was the case with respect to LaPointe.

The State concedes that "[a] major aspect of LaPointe's testimony was her statement that she saw Vick move, while in the van, and that he looked to be breathing." State's Br. at 21. Indeed, in view of the fact that the jury specifically requested information about the cause of death during its deliberations, the State correctly recognizes how pivotal LaPointe's testimony was in this regard. See Brief of Appellant ("Appellant's Br.") at 39-40.

The State then ignores the fact that Seidel completely missed LaPointe's prior deposition testimony, in which she said Vick was not breathing, and that Seidel failed to use that testimony to impeach her.[1] Instead the State extols how well Seidel nibbled around the edges of LaPointe's story to the extent, for example, that he elicited testimony that she was drinking and taking drugs on the day of the crime and that she had been threatened by Tucker. See State's Br. at 22.

This analysis fails to recognize that Seidel's chosen defenses turned not upon LaPoint's recollection of particular events, but instead upon an affirmative demonstration that Vick was killed by Tucker at the Finish Line Bar and that O'Callaghan was only an incidental actor. The only way to succeed with this defense was to establish through LaPointe and others that Vick was dead in the van. Then, even if O'Callaghan helped dispose of the body -- indeed, even if he shot it -- there would be a good chance that the jury would find Tucker guilty of the higher crime and O'Callaghan guilty of the lesser one.

Contrary to the State's assertion (State's Br. at 23), LaPointe's deposition testimony was not "cumulative" on the issue of the cause of death; it was pivotal. There was little other

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[1]The State argues, quite erroneously, that Seidel had the LaPointe deposition for use at trial. See State's Br. at 24 fn. 2. Seidel testified at the Rule 3.850 hearing that he did not recall whether or not he had the deposition at trial. See R.III 136-37. All evidence seems to indicate that Seidel had the deposition at some point prior to trial, but gave it to his expert witness, Dr. Fateh, who never returned it. See Appellant's Br. at 16 fn. 11. There was no questioning of Dr. Fateh by Seidel with respect to the LaPointe deposition, indicating that Seidel made no effort to use the deposition to buttress his expert's opinion. See R.I 873-88.

evidence to bolster O'Callaghan's theory that he could not possibly have been the cause of Vick's death. As Justice McDonald noted in his dissent on the direct appeal in this case:

> O'Callaghan's testimony that Vick was dead when placed in the van is disputed only by the testimony of LaPointe.

O'Callaghan v. State, 429 So.2d 691, 697 (Fla. 1983) (McDonald, J., dissenting). Evidence as to a central issue that is subject to disputed testimony should not be deemed cumulative simply because similar evidence was adduced from another witness.[2]

The State seems to believe that once a fact is arguably proven in a trial, any other evidence of that fact is "cumulative." This notion is patently fallacious. As Justice McDonald noted, without LaPointe's trial testimony that Vick moved in the van, there was no evidence to prove conclusively that he was alive when he was shot. It is hard to see how any evidence on so crucial a point could be cumulative.

Every trial, and particularly this one, involves disputed facts and conflicting accounts by witnesses. If a fact could be proven by the first witness every time, trials would be appreciably shorter than they are. The reality is that juries evaluate more than one account in most trials and hear much evidence that is cumulative. But this does not mean that once a fact is arguably proven, any other evidence of that fact is

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[2]The only witness to testify at trial that Vick was not breathing was Anthony Cox (see R.I 751-54), which means that, at best, there were two conflicting accounts as to this central issue. Thus, if Seidel had impeached LaPointe's account, he would have bolstered the favorable testimony of Cox, leaving it the only credible testimony on the point.

redundant. On the contrary, the jury is entitled to consider the fact that more witnesses support one account than another. Indeed, as the trial judge instructed the jury in this case, "A witness may be discredited or the weight of his testimony weakened by proof that...the statement of the witness is inconsistent with the testimony of other witnesses." R.I 1105. Thus, the concept of cumulative evidence can only apply to collateral facts that are not worthy of extensive elaboration and certainly should not be applied to this case. See Dukes v. State, 442 So.2d 316, 317 (Fla. App. 2d Dist. 1983) (where credibility of adverse witness is a "critical issue," evidence that witness was biased against the defendant could not be cumulative of defendant's testimony to the same effect).

In addition, there can be no possible justification for Seidel not using the Davie Police Report in which LaPointe is quoted as having said that Tucker killed Vick. See Appellant's Br. at 33. This evidence was unique and not cumulative, and the State concedes as much by ignoring it in its brief. LaPointe testified at trial that she had seen all of the events and that O'Callaghan, not Tucker, was the killer. Defense counsel for O'Callaghan had available an admissible statement that Tucker had done the killing, yet he never used it. It is hard to imagine a clearer departure from the Strickland standard.

The whole of the State's argument with respect to LaPointe hinges on the notion that, simply because Seidel arguably impeached her in some respects, the case is saved from the ineffective assistance claim even though the jury, through

Seidel's omissions, was denied critical evidence on two dispositive issues. Given the recognized centrality of the issues of the cause of death and Tucker's involvement, that Seidel happened to have shown that LaPointe was drunk or afraid of Tucker is simply irrelevent to this Court's inquiry.

Indeed, the argument that the State makes here was rejected by the Eleventh Circuit in quite similar circumstances in Smith v. Wainwright, 799 F.2d 1442, 1443-44 (11th Cir. 1986):

> At no time during [the trial] was the jury made aware of the fact that Johnson had given a detailed statement to the police confessing that he was the principal actor in the killing of the victim and making no assertion that Smith was either present or involved in the crime....
>
> In this case the only way for the defendant to prevail would have been successfully to impeach Johnson. It is true that some effort was made to impeach him. He was shown to be one whose integrity was questionable; he had confessed to three murders; he had struck a plea bargain with the state. But nothing came to light indicating that Johnson's story had ever been anything but the version which he told at trial.

In sum, Seidel's cross-examination of LaPointe was far from "staggering" (State's Br. at 24 fn 3); rather, it was, as the State more credibly concedes, "somewhat successful[]" (id. at 20-21). Most important, it was not effective. If it had been, the result in this case would almost certainly have been different.

B. Testimony of Leslie Knuck

The State does not attempt to justify Seidel's failure to recognize the value of Leslie Knuck's prior testimony about Tucker's threat to kill Vick directly before the murder. See State's Br. at 25-26. Instead, the State argues that this testimony too was merely "cumulative." Id. For the same reasons

as those set out directly above, this could never be the case with Knuck's unutilized testimony, which went to the core issue of Tucker's intent to kill Vick.

POINT 2

THE STATE HAS SEVERELY UNDERSTATED THE THE PREJUDICE SUFFERED BY O'CALLAGHAN AS A RESULT OF TRIAL COUNSEL'S MISTAKES

As the State seems to concede trial counsel's errors for the most part, much of its brief is devoted to attempting to show that the result of the trial would not have been changed even if Seidel had performed adequately. In taking this approach, the State would have this Court place itself in the jury box.

In a case that was as close as this one, this Court should not speculate on what the jury would have done had the additional evidence been before it. The question on this appeal is whether the first degree murder verdict and death sentence were rendered unconstitutionally unreliable by counsel's ineffective assistance. See Strickland, 466 U.S. at 686-87. This case was plainly a close one. Although we would not dispute that O'Callaghan was involved in the crime to a degree beyond that of an innocent bystander, we submit that he was not involved at the same level of culpability as Tucker, who had the motive and intention to kill Vick and who, by his own account and recantation, either beat Vick to death (see R. I 940-43) or shot him to death (see Def. Exh. 39 [A. 40]).[3]

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[3]The State miscites the record in asserting that O'Callaghan said that "they were going to get Vick." See State's Br. at 3 (citing R.I 535-36, 548). In fact, the testimony cited by the

The degree of doubt as to O'Callagahan's culpability was substantial enough to elicit a strong dissent from Justice McDonald on the direct appeal in this case:

> Vick had been brutally beaten, kicked and stomped upon in the kitchen of the Finish Line Bar. He had lost a large amount of blood and was clearly unconscious when he was wrapped in plastic and placed in the van driven by O'Callaghan. The only possible evidence that there was any life in Vick while being transported was a statement by the female, LaPointe, when she said, "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." No one else saw any sign of life in Vick. O'Callaghan's testimony that Vick was dead when placed in the van is disputed only by the testimony of LaPointe.
>
> On appellate review we do not indulge in judgingthe credibility of witnesses; nevertheless, even that possibly truthful statement of LaPointe is insufficient to prove that Vick was alive when he reached the end of his journey. There is ample evidence that O'Callaghan fired shots into Vick's body, and it is logical to question why this was done if Vick was no longer living. This may be sufficient to raise a doubt in favor of the State on this issue, but is still inadequate to prove beyond a reasonable doubt that the shooting killed him when there is strong evidence to the contrary.

O'Callaghan v. State, 429 So.2d at 697 (McDonald, J., dissenting)

State -- that of Alan Wheatley -- makes it quite clear that Tucker, and not O'Callaghan, made this statement:

> Q I want to know who said that or what the exact words were, who said it?
> A Beau [Tucker] said that they were going to get him [Vick] and Jim [Long] both.

R.I 536.

> Q When you say "they", I want you to be specific. Did any one of them indicate to you a reason for anger or for whatever happened?
> A Beau [Tucker] did.

R.I 548.

(emphasis added). If one member of this Court was skeptical of LaPointe's testimony and doubtful about the reliability of the verdict in this case before trial counsel's errors came to light, this Court as a body should now be even more doubtful and should order a new trial, especially since one of the very issues as to which trial counsel was most clearly ineffective -- the cause of death -- is the issue that troubled Justice McDonald so deeply.

The State's argument about the prior testimony of Leslie Knuck also underestimates the effect that Knuck's testimony would have had if it had been elicited. This Court should not ignore the fact that the co-defendant Tucker got off as lightly as he did. The only explanation for this patently unjust result is that the jury misunderstood Tucker's role in the crime. Knuck's testimony about Tucker's threat to kill Vick directly before the murder, with a gun to Vick's head and violent words evidencing that intent to kill, would surely have affected the jury. Since the jury obviously believed that O'Callaghan was the principal actor without this evidence, it is fair to predict that the jury would have thought otherwise had it known of Tucker's actual actions.

The State would have us believe that the outcome would have been exactly the same no matter what Seidel had proved, but plainly this cannot be.[4] The outcome of this case turned on two

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[4]The cases cited by the State (State's Br. passim) for the proposition that Seidel did not fall below the Strickland standard or that O'Callaghan was not prejudiced are easily distinguished in that they involve situations in which the guilt of the defendant on the charge in the indictment was amply proved by independent evidence. For example, in Cave v. Florida, slip. op. No. 72,637 (Sup. Ct. Fla. July 1, 1988), the defendant had

issues: how Vick was killed and who intended to kill him. LaPointe's testimony was crucial to the first issue and Knuck's testimony was crucial to the second. O'Callaghan is entitled to have an informed jury -- and not the State or even this Court -- weigh whether or not he should die as a result of his actions, and that jury should have all of the relevant evidence before it, especially that of LaPointe and Knuck.[5]

POINT 3

THE STATE HAS FAILED TO REFUTE THE FACT THAT THE ADMISSION OF O'CALLAHAN'S PRIOR CONVICTION FOR STATUTORY RAPE WAS ERRONEOUS AND PREJUDICIAL

The State argues that Seidel's failure to challenge the introduction of O'Callaghan's prior conviction for carnal knowledge of a female child was not ineffective because the other two prior convictions for armed robbery were sufficient to prove the aggravating circumstance of a prior violent felony. See State's Br. at 40. The State also argues that the statutory rape conviction, under Florida law, is a violent felony. See Id. at 40 fn. 11. The first argument defies human experience; sex crimes against children are inflammatory and, if wrongly

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given a detailed confession, which was held to have been amply supported by corroborating evidence. And in Middleton v. Florida, 465 So.2d 1218, 1222 (Fla. 1985), the defendant's own testimony was found to have been so incredible and unbelievable that there was no reasonable probability of a different result.

[5]Of course there were at least two other errors by Seidel at the guilt phase of the trial. He failed to elicit the crime scene processor's prior testimony that he had seen Vick's body at the morgue with a broken jaw, and he failed to make a timely objection to the prosecutor's characterization of O'Callaghan's expert witness as a prostitute. These errors are discussed in detail in Appellant's Brief (at 37-39).

admitted, per se prejudicial. The second argument defies the Constitution. If Florida law makes a violent aggravating circumstance out of a statutory rape conviction that by definition does not require proof of violence, it fails to narrow the class of death-eligible defendants in the type of rational capital sentencing scheme required by United States Supreme Court precedent. See Zant v. Stephens, 462 U.S. 862, 877 (1983). Cf. Gregg v. Georgia, 428 U.S. 153, 196-97 (1976); Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988).

It is impossible to equate the two 11-year old robbery convictions, which were admissible, with the carnal knowledge conviction, which was not. It is one thing for a jury to know -- correctly -- that some time in the past the defendant engaged in an armed robbery. But for the jury to believe -- incorrectly -- that the defendant is a violent child rapist is another thing altogether. Child rape is different, unique, and has a particular potential to set the jury against the defendant. Cf. Coker v. Georgia, 433 U.S. 584, 607-08 (1977) (Burger, C.J., and Rehnquist, J., dissenting) (rape is "inherently one of the most egregiously brutal acts one human being can inflict on another"). Indeed, even after Furman v. Georgia, 408 U.S. 238 (1972), and Coker, child rape was still a capital offense in at least three states, including Florida, and it is still a capital crime in Mississippi, which is indicative of the severe response that the crime elicits from the populace.[6]

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[6]Florida, Tennessee and Mississippi maintained or enacted statutes providing for the death penalty for child rape. Florida's statute (former Fla. Stat. Ann. Sec. 794.011(2) (1977))

The State's suggestion (State's Br. at 40 fn. 11) that any nonviolent but illegal intercourse constitutes violent rape and is thus an aggravating circumstance under Florida law is doubly erroneous. First, it misstates Florida law, which holds that a prior conviction of a felony involving violence must be clearly established, as by the indictment, conviction and victim's testimony. See Mann v. State, 453 So.2d 784 (Fla. 1984).

Second, the use of a nonviolent prior conviction to enhance a sentence would be unconstitutional. As the Supreme Court held in Zant v Stephens, supra:

> [A capital sentencing scheme must] genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

462 U.S. at 877 (Fn. omitted). See also, Gregg, supra; Lowenfield, supra. Almost every person convicted of murder has a prior criminal record. The import of Gregg and Zant v. Stephens (recently reaffirmed in Maynard v. Cartwright, 108 S.Ct. 1853 (1988)) is that this group must be rationally narrowed to the few convicted defendants who are death-eligible. If the State is correct and O'Callaghan's statutory rape conviction is a per se violent felony under Florida law, then the Florida statute as

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was declared unconstitutional by this Court in Buford v. State, 403 So.2d 943, 951 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982). The Tennessee statute (Tenn. Code Ann. Sec. 39-3702 (1974)), in effect when Coker was decided (433 U.S. at 595), was maintained until it was eliminated in 1982 (Tenn. Code Ann. Sec. 39-2-603, 605 (1982)). Mississippi's statute (Miss. Code Ann. Sec. 97-3-65 (Supp. 1987)) is still in effect.

reinterpreted by the State is unconstitutional.[7]

POINT 4

THE STATE HAS ALSO UNDERESTIMATED THE THE EXTENT OF THE DAMAGE DONE BY TRIAL COUNSEL'S ALMOST COMPLETE FAILURE TO DEVELOP AND PRESENT EVIDENCE IN MITIGATION OF A DEATH SENTENCE

The State's argument with respect to trial counsel's failure to investigate and present evidence in mitigation of the death penalty ignores the substantial evidence that was available to convince a jury that O'Callaghan should be spared. In addition, the State's argument turns largely upon evidence that it says would have turned the jury against O'Callaghan, even though much of this evidence could never have been placed before the jury because it comes from materials prepared after the trial.

The State does not dispute Seidel's shortcomings at the penalty phase.[8] There is no rejoinder to O'Callaghan's

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[7]The State's wrongly cites Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) (State's Br. at 40), for the suggestion that any rape, even statutory rape, is considered in Florida to be a violent felony. Mason involved two violent rapes of adult women, Id. at 376-77, and contains no suggestion that a prior, unrelated nonviolent sex offense could be an aggravating circumstance. Id. at 379.

[8]The cases cited by the State for its proposition that Seidel did not fall below the Strickland standard at the penalty phase are distinguishable because in each case the lawyer had engaged in a modicum of investigative effort. For example, in Burger v Kemp, 107 S.Ct. 3114, 3123-24 (1987), the lawyer had interviewed the defendant's mother, a family attorney and a psychologist who had examined the defendant. In Clark v. Dugger, 834 F.2d 1561, 1567-68 (11th Cir. 1987), cert. denied, 108 S.Ct. 1282 (1988), the lawyer had interviewed the defendant's friends and determined that they would have been hostile to him. In Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), the lawyer had "sought out [defendant's] relatives, friends and employer." In Tafero v. Wainwright, 796

demonstration that Seidel did not contact a single witness -- even for a telephone interview -- who could testify on O'Callaghan's behalf. Nor does the State dispute that such witnesses were available. It would be difficult to do so inasmuch as both of O'Callaghan's parents indicated that they would have testified. See Appellant's Br. at 52 fn. And the State could not seriously dispute that Seidel fell below the Strickland standard when he ignored the trial judge's offer of a confidential psychiatric examination for O'Callaghan. The trial record is simply too clear for the State to argue this point. See Appellant's Br. at 49.

Instead, the State argues the prejudice prong of the Strickland test. In so doing, the State would have us believe that O'Callaghan was a violent career criminal, well suited for the death penalty. The State's characterization is erroneous.

We have already shown that there was much in O'Callaghan's background and psychological make-up to justify mercy. Indeed, three mental health experts --including one appointed by the Circuit Court -- found substantial evidence of mitigating circumstances. See Appellant's Br. at 53-54. In addition, the evidence of family history, as set out in O'Callaghan's mother's affidavit and confirmed in his father's deposition, would have

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F.2d 1314, 1319-1320 (11th Cir. 1986), cert. denied, 107 S.Ct. 3277 (1987), the lawyer had questioned the defendant's mother. And in Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988), the lawyer had been in constant contact with the defendant's mother. Even in Strickland, the lawyer had interviewed the defendant's wife and mother and made at least one unsuccessful attempt to meet with them. See 466 U.S. at 672-73. Here, Seidel made no effort to speak, by telephone or otherwise, with anyone except for O'Callaghan.

been compelling. Id. at 51-53. Yet the State argues that this evidence could not matter because it could have shown that O'Callaghan deserved death anyway.

The way the State seeks to achieve this result lies primarily in the use of materials created after O'Callaghan was sentenced to death.[9] The State erroneously posits that this evidence would have tilted the scales against mercy more than O'Callaghan's proffered evidence would have done otherwise. This argument has two flaws. First, it assumes that the jury would have seen the evidence at all, which takes something of a leap of faith. Second, many of the post-trial materials on which the State relies so heavily contain uncounselled statements of O'Callaghan to prison authorities that were made after he had been sentenced to death. In those circumstances, in which O'Callaghan had limited and bleak prospects to say the least, those statements lose much of their reliability.

More importantly, it is hard to see how the existence of some adverse character evidence would counsel against putting on any evidence at all -- or even investigating that possibility --

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[9]The State relies primarily on a July 12, 1981 Classification and Admission Summary prepared when O'Callaghan was processed into Florida State Prison to await his execution, and a Psychological Screening Report also prepared at Florida State Prison after O'Callaghan's sentencing was complete. See State's Br. at 35. The State also relies on a Pre-Sentence Investigation, which was available to the trial judge but not the jury. Of course, even if the information in the pre-sentence investigation could have had some adverse effect on the judge's view of O'Callaghan, it could not have adversely affected his prospects with the jury; and if the jury had recommended life, the judge would have been governed by the stricter standard of Richardson v. State, 437 So.2d 1091, 1094-95 (Fla. 1983), and Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), in determining the sentence.

given the fact that the State was likely to establish two to four aggravating circumstances. A look at the evidence that the State argues would have been so damaging shows that it almost certainly would not have jeopardized O'Callaghan's chances enough to warrant the total default on mitigating evidence that took place at his trial.

The State's proffered adverse evidence relates primarily to O'Callaghan's prior criminal record and some school and prison disciplinary problems. Even assuming that this evidence would have found its way to the jury, it could not have seriously refuted the mitigating evidence available. O'Callaghan's prior criminal record was devoid of any violent crime, except for two closely timed convictions for armed robbery, both of which had taken place in 1970, 11 years before Vick's murder and close to the time when O'Callaghan underwent treatment for his drug problem. See Def. Exh. 26; Appellant's Br. at 54 fn. 27.[10] (The State has consistently and erroneously argued that a prior statutory rape was also a violent crime, but this has been demonstrated to be wrong. See Appellant's Br. at 55-56 and Point 3 supra.)

Thus, O'Callaghan's involvement in the Vick killing was aberrational, even when viewed in the context of his prior criminal record. For the State to suggest that this record,

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[10]The other crimes that the State says it could have used for impeachment were for minor offenses against property, involved possession of drugs or intoxication, or involved possession (but not the use of) a weapon. See State's Br. at 36 and Exhibits to State's Response in Opposition to Petition for Writ of Habeas Corpus.

which involves a moderate amount of anti-social behavior, would have branded him a long-term threat to society (see State's Br. at 44) is simply not enough to explain why Seidel failed to investigate and present any evidence of a mitigating nature, thereby leaving his client exposed to the certainty of a death sentence.[11]

POINT 5

THE STATE HAS ALSO UNDERSTATED THE SIGNIFICANCE OF THE SEIDEL DISCIPLINARY PROCEEDINGS TO O'CALLAGHAN'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The State argues that the court below was correct in concluding (without a hearing) that Seidel's demonstrated alcoholism did not impair his ability to defend O'Callaghan. In support of this argument, the State incorrectly observes that O'Callaghan's claim is based upon impairment that occurred after the trial. See State's Br. at 48. In fact, O'Callaghan proffered affidavits of two witnesses who would have testified that Seidel suffered alcoholic impairment during the time period of the trial. See Affidavits of Deborah McCabe (Remand R.III 22-24 [A. 49-51]) and Genevieve Windle (Remand R.III 25-26 [A. 57-58]); see also, Appellant's Br. at 61-62. Seidel's alcoholism constitutes further evidence to show that he performed at a level below the Strickland standard. It was error for the court below to decide otherwise.

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[11]The State's suggestion that Seidel's failure to investigate could have been a tactical decision (State's Br. at 42-43) is ludicrous. A lawyer cannot make a tactical decision about the use of evidence of which he is unaware.

III. CONCLUSION

For all of the foregoing reasons, as well as those set out in Appellant's Brief, 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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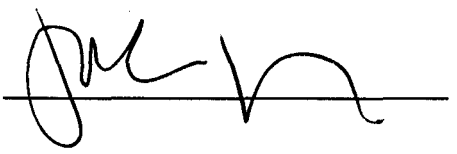
By: 

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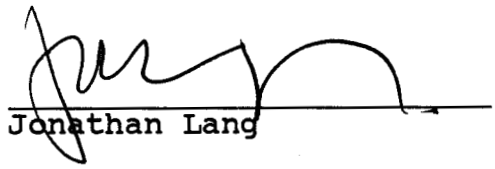

Jonathan Lang