

70185

IN THE SUPREME COURT OF FLORIDA

FILED
CLERK SUPREME COURT

MAR 10 1997

CLERK SUPREME COURT
By: *Lanya*

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TED HERRING, :
 :
 Petitioner, :
 :
 -against- :
 :
 LOUIE L. WAINWRIGHT, SECRETARY, :
 DEPARTMENT OF CORRECTIONS, :
 STATE OF FLORIDA, and :
 RICHARD DUGGER, SUPERINTENDENT, :
 FLORIDA STATE PRISON AT :
 STARKE, FLORIDA, :
 :
 Respondents. :
-----x

Case No. _____
PETITION FOR WRIT
OF HABEAS CORPUS

Petitioner TED HERRING, by his undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100, petitions this Court to issue a writ of habeas corpus. Herring is under sentence of death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under the Constitution and laws of the State of Florida, insofar as he was denied the effective assistance of appellate counsel in the preparation, briefing, and argument of his direct appeal to this Court from his conviction and sentence of death.

In support of his petition, in accordance with Florida Rule of Appellate Procedure 9.100(e), Herring states as follows:

I.

JURISDICTION

This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has jurisdiction pursuant to Rule 9.030(a)(3) thereof, and Article V, Section 3(b)(9) of the Florida Constitution.

As described more fully below, Herring was denied effective assistance of appellate counsel in proceedings before this Court at the time of his direct appeal. Counsel failed either to raise or to adequately address issues which, if raised and properly argued, would have required the reversal

of Herring's conviction and death sentence. Because these allegations stem from acts or omissions before this Court, this Court has jurisdiction to hear this petition. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981).

The impact of counsel's deficiencies is now clear: On December 30, 1986 this Court, in a per curiam opinion, affirmed the denial of Herring's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850, finding that twelve distinct and substantial violations of state and federal constitutional law raised therein were not cognizable because they either were raised or could be raised in Herring's initial appeal. Herring v. State, 12 F.L.W. 44 (Fla. Dec. 30, 1986). Of these twelve issues, five were not raised at all by appellate counsel, and three that were raised were argued inadequately.

Assuming this Court finds that Herring's appellate counsel was ineffective -- as it should -- it must thereafter consider on the merits issues that should have been raised earlier. Where the right to a meaningful appeal has been violated due to the ineffectiveness of appellate counsel, the appropriate remedy is a new review of the previously neglected issues. Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969).

II.

STATEMENT OF FACTS

A. Introduction

Early on May 29, 1981, a Seven-Eleven store clerk in Daytona Beach, Florida was shot and killed during a robbery at the store. His body was discovered shortly thereafter. Supp. at 398, 399.* The Medical Examiner concluded that the cause of death had been a bullet wound to the head, that the victim had been shot twice, that both shots were fired within approximately one minute, and that the shot to the head was lethal. Supp. at 481-482. There were no witnesses to the crime and the murder weapon was never found. Supp. at 496, 527.

* References to the transcript of Herring's trial, found in the First Supplement to the Transcript of the Record on Appeal, are indicated by the abbreviation "Supp." followed by the page number appearing in the lower right-hand corner. "R.O.A." refers to the Record on Appeal.

B. Arrest and Interrogation

On the morning of June 12, 1981, Herring was arrested while in possession of a stolen car. Supp. at 11. He was taken to the stationhouse where he was first asked to sign a consent form that would permit the police to question him without representation by counsel. Before he did so, Herring inquired about the scope of the interrogation. Supp. at 22. Herring was explicitly advised that he would be questioned about the stolen car. Id. Only then did he sign the consent form.

Herring was then interrogated for eight hours. In addition to the circumstances relating to his possession of the vehicle, Herring was questioned about a number of convenience store robberies and a homicide in the area. After subjecting Herring to this lengthy and far-ranging interrogation, -- which even included a lineup having no relationship whatsoever to the stolen car -- the three interrogating detectives focused on two particular robberies. Before proceeding with this new area of interrogation, the detectives failed to renew the Miranda warnings given Herring earlier for the sole purpose of obtaining Herring's consent to be questioned about the auto theft charge. Supp. at 31.

After hours of interrogation about matters that ranged far beyond auto theft, Herring confessed to the robbery and homicide at the Seven-Eleven store. Supp. at 102-29. The confession was tape recorded. Supp. at 64-68. Herring stated that he entered the Seven-Eleven store early on the morning of May 29. He first requested a pack of cigarettes. Then he drew his gun and demanded money. Herring then stated that the clerk made a sudden move, causing him to panic and shoot the clerk. The shooting was not intentional and was certainly not planned. Herring stated in his confession: "I shot him, you know, by mistake, but I meant to just put the gun to his head not for it to go off." Supp. at 128.

C. The Homicide Trial

1. The Guilt Phase

In February 1982, Herring was tried for armed robbery and murder in the first degree arising out of the May 29, 1981 incident. State of Florida v. Herring, Case No. 81-1957-CC. The State's evidence consisted of Herring's

confession and a hold-up note found at the scene of the crime which bore Herring's fingerprints. On February 25, 1982, the jury returned a verdict of guilty on both counts. R.O.A. at 70, 71.

2. The Penalty Phase

The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. It lasted approximately two hours. The State's case was very brief. The State offered into evidence the testimony of Mary White, a probation officer who had questioned Herring while in custody awaiting arraignment. She testified that Herring had made a racially inflammatory remark to her concerning the victim in response to her questioning, which was not preceded by mandatory Miranda warnings. Supp. at 777-778. The State also offered Herring's prior armed robbery conviction. Supp. at 779-780.

In Herring's defense, Herring's appointed counsel offered only the testimony of Herring's mother. Supp. at 780-784. Her testimony, and thus Herring's case, lasted only a few minutes and constitutes but three pages of transcript. The jury thereafter returned an advisory sentence of death by an eight-to-four vote. R.O.A. at 72. The trial judge followed the jury's recommendation and sentenced Herring to death on March 1, 1982. R.O.A. at 73-77.

The trial judge found that four aggravating circumstances and two mitigating circumstances applied and that the aggravating circumstances outweighed the mitigating circumstances. R.O.A. at 73-77. The aggravating circumstances found by the trial judge were:

(1) That the defendant had been previously convicted of another capital offense or a felony involving the use or threat of violence to some person;

(2) That the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery;

(3) That the crime for which the defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and

(4) That the crime for which defendant was to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The two mitigating circumstances found by the trial judge were:

(1) The age of the defendant at the time of the crime; and

(2) The defendant's difficult childhood, i.e., that the defendant was raised essentially without a father, that he was hyperactive, had learning disabilities, and had trouble in school.

D. Appeal

On direct appeal, Herring was represented by Michael Becker, an assistant public defender in Daytona Beach, Florida. Becker failed to raise two clear errors that had been preserved for appeal by trial counsel: He failed to argue (a) that the admission of the probation officer's testimony was constitutional error and impermissible under Florida law, and (b) that Herring's confession was constitutionally inadmissible. Becker also failed to raise several other issues that were held cognizable on appeal by this Court in Herring v. State, 12 F.L.W. 44 (Fla. Dec. 30, 1986): He failed to argue (a) that the trial court impermissibly applied two aggravating circumstances on the basis of the same aspect of the shooting; (b) that the jury instructions regarding the imposition of the death penalty were constitutionally inadequate; and (c) that the prosecutor, in her closing argument, improperly argued that Herring was young enough to be out on the streets "to kill and rob again" if given life imprisonment.

In addition, Herring's appellate counsel failed adequately to argue a number of the claims he did choose to raise. He argued that the exclusion of a prospective juror because of his views of the death penalty was error under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), but incorrectly read Witherspoon as applying to guilt, rather than to the sentence alone. He argued that there was insufficient evidence to support the application of two aggravating circumstances, but he ignored more favorable inferences in the record and cited only limited authority in support of his claims. Finally, he neglected to supplement his arguments with significant decisions rendered by this Court in the lengthy period of time between his oral argument and this Court's opinion affirming the conviction and sentence.

This Court affirmed Herring's conviction and sentence on February 2, 1984, with Justice Ehrlich dissenting. Herring v. State, 446 So. 2d 1049 (Fla. 1984), cert. denied, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984). Rehearing was denied on April 11, 1984. Id. On November 5, 1984, the United States Supreme Court denied certiorari, with Justices Brennan and

Marshall dissenting. Herring v. Florida, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984).

E. Post-conviction Proceedings

On April 2, 1985, Herring filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850 in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida, before Judge S. James Foxman. On July 24, 1985, Judge Foxman denied the Motion to Vacate Judgment and Sentence without hearing argument, taking evidence, or providing the requisite record evidence in his opinion summarily denying the relief sought. Herring took an appeal from that ruling to this Court. On December 30, 1986, this Court, in a per curiam opinion, affirmed the trial court's denial of relief. Herring v. State, 12 F.L.W. 44. This Court declined to consider virtually all of the issues raised in Herring's Rule 3.850 motion, finding that they were issues that "either were raised or could have been raised in the initial appeal." 12 F.L.W. at 44. But for appellate counsel's ineffective assistance, many of the substantial errors raised in Herring's Rule 3.850 motion would have been presented on direct appeal. Herring should not be put to death in view of appellate counsel's blatant omissions.

III.

NATURE OF RELIEF SOUGHT

Herring seeks an order of this Court, in light of the indisputable constitutional and statutory violations set forth herein, vacating the sentence of death now imposed upon him and vacating his conviction. In the alternative, Herring seeks an order of this Court vacating the sentence of death now imposed upon him and remanding the case to the trial court with instructions to impose a life sentence. Alternatively, Herring seeks an order of this Court vacating the sentence of death and remanding the case to the trial court for a new sentencing hearing. Alternatively, Herring requests that this Court grant him belated appellate review of the judgment and sentence imposed upon him by the trial court and to permit him to fully brief the issues presented herein.

IV.

BASES FOR THE WRIT

HERRING'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLES ONE AND FIVE OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA STATUTORY LAW TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WERE DENIED BY COUNSEL'S FAILURE TO RAISE AND EFFECTIVELY ARGUE NECESSARY AND CRITICAL ISSUES ON HERRING'S DIRECT APPEAL TO THIS COURT

The failure of Herring's appellate counsel to raise critical issues on his direct appeal to this Court denied Herring his rights to a meaningful appeal and the effective assistance of appellate counsel, guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Articles One and Five of the Florida Constitution and under Florida statutory law. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984).

A criminal defendant will be found to have been denied effective assistance of counsel when his counsel's performance is deficient and prejudicial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the Strickland standard, in order to establish that he was deprived of effective assistance of counsel, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." 466 U.S. 668, 693, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 697. Rather, it need only be shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Moreover, the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." Murray v. Carrier, _____ U.S. _____, 106 S. Ct. 2639, 2650, 91 L. Ed. 2d 397, 413 (1986), citing United States v. Cronin, 466 U.S. 648, 657, n.20, 104 S.Ct. 2039, 2046, n.20, 80 L. Ed. 2d 657, 666-67, n.20 (1984).

In Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), this Court held that

[t]he criteria for proving ineffective assistance of appellate counsel parallel the Strickland standards

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

474 So. 2d at 1163.

Had Herring been properly represented, this Court would have heard very strong arguments in favor of the reversal of both his conviction and his death sentence. It is unfair and plainly unconstitutional to permit Herring to be executed before these arguments are ever addressed.

A. HERRING'S APPELLATE COUNSEL FAILED TO RAISE SEVERAL SUBSTANTIAL CLAIMS ON HIS DIRECT APPEAL WHICH, IF RAISED, WOULD HAVE RESULTED IN REVERSAL

Herring's appellate counsel simply failed to raise obvious arguments that any competent lawyer would have raised. Among these omitted arguments were several that would have compelled reversal.

1. Appellate Counsel Failed to Argue That the Admission of the Probation Officer's Testimony Was Constitutional Error

At the penalty phase of Herring's trial, the trial court, over Herring's trial counsel's objections, permitted Mary White, a probation/parole officer, to testify as to statements made to her by Herring during a post-arrest interview. This testimony was admitted in clear violation of Florida's capital sentencing scheme and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Herring's statements were the product of a custodial interrogation, and, because Herring was not given any Miranda warnings prior to the interrogation, the probation officer's testimony should have been excluded. Moreover, the State's deliberate failure to give Herring notice that it intended to introduce those statements violated the plain mandate of the Florida Rules of Criminal Procedure; it thus resulted in unfair surprise and prevented Herring from preparing an adequate defense. Given the seriousness of the trial court's error, appellate counsel's failure to raise it on appeal is inexcusable.

a. White's Testimony Was Highly Inflammatory

The State's examination of Officer White at the sentencing hearing was as follows:

MS. GRAZIANO:

Q. Miss White, would you state your name and occupation, please?

A. My name is Mary White. I'm a classification specialist at the Tomaka State Prison.

THE COURT: I need you to speak up.

Q. What was your occupation in June of 1981?

A. I was a Probation/Parole Officer with the Pretrial Intervention Program.

Q. Okay. In June of 1981, did you know the Defendant, Ted Herring?

A. Yes.

Q. In that particular month, did you have an occasion to talk with Mr. Herring?

A. Yes.

Q. Where was Mr. Herring, when you had this conversation with him?

A. In the Volusia County Jail.

Q. Did you have occasion to talk with Mr. Herring regarding the murder of one, [sic] Dale Hoeltzel at 205 South Ridgewood, Daytona Beach, Florida?

A. Yes.

Q. At that time, did Mr. Herring express to you any feelings regarding that particular offense?

A. He indicated to me that the young man got what he deserved due to the fact that, him trying to play hero. And that it was just one less cracker.

MR. QUARLES: I'm sorry?

THE COURT: Repeat it.

A. He indicated that the guy got what he deserved due to him trying to play hero. And that, it's just one less cracker.

MR. QUARLES: I'm sorry. The last word?

THE COURT: Ma'm, you need to speak up.

A. One less cracker.

MR. QUARLES: Okay.

Q. Miss White, the term "cracker", is that your term or the term that Mr. Herring used?

A. That was his term.

MS. GRAZIANO: I have no further questions.

The force of this testimony cannot be overstated. Herring is black. All of the members of the jury were white. Recognizing the impact it would undoubtedly have on an all-white jury, the State deemed it unnecessary to present any evidence other than Herring's robbery conviction at the sentencing phase of Herring's trial. Because the testimony unquestionably had a devastating effect on the jury's perception of Herring, and because it was intended solely to inflame the minds of the jury members, it unfairly tainted the entire proceeding. With the introduction of this racial epithet, the State had proved all that it needed to secure a death sentence.

b. The Trial Court Erred in Admitting White's Testimony Because Herring Was Not Given Miranda Warnings Prior to His Interview With the Probation Officer

In Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), the Supreme Court held that the use of psychiatric testimony at the sentencing phase of the defendant's capital murder trial was unconstitutional because the defendant had not been given any Miranda warnings prior to the pretrial psychiatric examination. The Court found that the custodial psychiatric examination was no different from any other "official interrogation" in which the accused would be confronted with "inherently compelling pressures." 451 U.S. at 467, 101 S. Ct. at 1875, 68 L. Ed. 2d at 371-72.

The Court further held that Smith was denied his Sixth Amendment right to effective assistance of counsel as the result of the introduction of the psychiatric testimony into evidence because the examination "proved to be a 'critical stage' of the aggregate proceedings against [him]." Id. at 470, 101 S. Ct. at 1877, 68 L. Ed. 2d at 374. Because defense counsel was not notified as to the scope of the examination, the Court concluded that the accused "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. at 470-71, 101 S. Ct. at 1877, 68 L. Ed. 2d at 374.

The Supreme Court's findings and conclusions in Estelle v. Smith are fully applicable here. Like Smith, Herring was not apprised of his Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel prior to an "official" custodial examination as required by Miranda v.

Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As in Smith, statements by Herring in the course of that interview were used by the State at the penalty phase of a capital murder case -- undeniably a "'critical stage' of the aggregate proceedings" against Herring. And as in Smith, Herring's trial counsel was never notified as to the scope of Herring's interview with the probation officer before Herring submitted to the interview.

Here, the facts are even more compelling than the facts in Estelle v. Smith because Herring was questioned by an officer of the State rather than a psychiatrist. Under these circumstances, it was absolutely essential that Herring be apprised of his Fifth and Sixth Amendment rights and that his counsel be notified of the interview. Because neither Herring nor his counsel were so apprised, the admission of White's testimony violated Herring's Fifth, Sixth, and Fourteenth Amendment rights. The State has never attempted to counter these arguments, nor can it.

In Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986), this Court granted habeas corpus relief because appellate counsel failed to raise as error a ruling of the trial court permitting a jury to separate overnight after it had begun its deliberations despite trial counsel's objection and request that the jury be sequestered. This Court stated: "If appellate counsel had brought the jury separation issue to our attention on appeal, a new trial would have been granted." Id., at 939. Similarly, if appellate counsel here had brought the clear Miranda violation "to [this Court's] attention on appeal," a new sentencing hearing would have been mandatory. Here, as in Johnson, appellate counsel failed to raise on appeal a properly preserved error that would have resulted in reversal.

c. The Trial Court Erred in Admitting White's Testimony
Because of the State's Failure to Give Defense Counsel
Prior Notice

Prior to the Supreme Court's consideration of Smith's claims in Estelle v. Smith, the Fifth Circuit considered, among other arguments, Smith's contention that his death sentence was constitutionally infirm because of the State's surprise use of the psychiatrist as a witness at the sentencing phase of Smith's trial. The Fifth Circuit agreed, finding that the consequences of the psychiatrist's testimony were "devastating," and that the absence of

notice prevented Smith's attorneys from effectively challenging this psychiatric testimony and thus denied him due process and violated his Eighth Amendment rights. Smith v. Estelle, 602 F.2d 694, 699 (5th Cir. 1979), aff'd Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).*

Here too, Herring's claims are identical to Smith's. Herring's counsel was not informed that the State intended to introduce the testimony of the probation officer at the sentencing phase of Herring's trial. Furthermore, the consequences of White's testimony were no less "devastating" here than was the psychiatrist's testimony pertaining to Smith. Like Smith's counsel, Herring's trial counsel, unfairly surprised by this testimony, was prevented from effectively challenging the probation officer's testimony.

Moreover, the admission of this testimony, without prior disclosure to Herring's trial counsel of the identity of the probation officer and the substance of her testimony, constituted a clear violation of Florida law. Rule 3.220 of the Florida Rules of Criminal Procedure requires the disclosure of the identity of "all persons known to the prosecutor" in possession of relevant information regarding the accused as well as any written or oral statements of the accused and the names of any witnesses. Fla. R. Crim. P. 3.220(a)(1)(i), (a)(1)(iii). Sanctions are also imposed for failure to comply with these disclosure requirements. Fla. R. Crim. P. 3.220(j).

Herring's trial counsel filed the requisite demand prior to trial, seeking such disclosure. The State, in violation of Rule 3.220,** failed to disclose the identity of the probation officer or the substance of her

* The Supreme Court did not reach this issue in light of its rulings on the other issues raised by Smith.

** In Lucas v. State, 376 So. 2d 1149, 1151 (Fla. 1979), this Court held that the State's noncompliance with Rule 3.220 does not entitle a defendant to have an unlisted witness excluded as a matter of right, but that the witness must be excluded if the defendant is prejudiced by the introduction of the testimony. The prejudicial impact of Officer White's testimony here could hardly be clearer.

The Court in Lucas further noted that the trial judge may make a determination regarding prejudice only after making an adequate inquiry into the circumstances surrounding the State's noncompliance with Rule 3.220. Here, the trial judge made no such inquiry. Id.

Finally, the Court in Lucas observed that the defense counsel failed to interpose an objection to the testimony. In this case, petitioner's trial counsel explicitly objected to the introduction of the probation officer's testimony at the time it was proffered. Id., at 1151-52.

testimony in response to defense counsel's demand. Even when the State made a proffer of White's testimony at the sentencing hearing, it carefully and deliberately avoided disclosing the inflammatory portion of that testimony.*

Although the trial judge's decision to admit this testimony was clearly erroneous, Herring's appellate counsel never raised this claim. His failure to do so was a substantial deficiency well outside of the range of professionally acceptable performance. See Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Trial counsel's objections were sufficient to alert any minimally competent counsel reviewing the record for appellate purposes. Moreover, this claim was amply supported by many United States and Florida Supreme Court cases available to counsel while he prepared the appeal. Had the argument been raised, the State could not have effectively rebutted it, and Herring's death sentence would have been reversed.

2. Appellate Counsel Failed to Argue That the Admission of Herring's Confession Into Evidence Violated His Fifth, Sixth, and Fourteenth Amendment Rights

Herring's confession, which formed the core of the State's case and was the subject of a separate suppression hearing, should not have been admitted into evidence. This issue was not raised on appeal notwithstanding

* The State's proffer was as follows:

MS. GRAZIANO: . . . Your Honor, the State will be calling Mary White to the stand. The summary of her testimony would be that she had conversations with the Defendant. The Defendant made certain statements to her regarding the crime in question. Evidence and the lack of. And more specifically, Your Honor, too, that the victim got what he deserved. If the guy hadn't played hero, he would not have gotten shot. And too, the Defendant's feeling regarding that incident. And the grounds for that, Your Honor, would be that Chapter 921.141 states that in this proceeding, that evidence may be presented as to any matters the Court deems relevant to the nature of the crime and the character of the Defendant and shall include matters relating to any aggravating or mitigating circumstances.

The State's argument, Your Honor, is that his lack of remorse and his feeling towards what happened certainly go to the nature of the crime and the character of the Defendant.

Supp. at 757-58.

This summary of White's testimony contains one conspicuous omission: it does not mention Herring's remark that the victim's death meant "one less cracker." Without knowing that such testimony would be forthcoming, the trial judge could not have assessed its prejudicial force, as he was required to do under Lucas, supra.

trial counsel's motion to suppress and despite the State's failure at trial to meet its "heavy burden" under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) of proving that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," 384 U.S. 436, 475, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 724. Herring's purported waiver of his rights was ineffective because he was advised that he would be questioned about one crime and was subsequently interrogated about other, more serious crimes. This too is an obvious issue that Herring's appellate counsel simply missed. Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

At the time he was advised of his Miranda rights, Herring asked what he was to be questioned about. He was advised that he would only be questioned about automobile theft. Only then did Herring sign a consent form commonly used by the Daytona Beach Police Department. This form was admitted into evidence as State's Exhibit 6. Supp. at 531.

The description of this course of events was provided by Detective Anderson, one of the interrogating officers. At the hearing on Herring's motion to suppress, Detective Anderson testified that upon being given the waiver form, Herring specifically asked "what he was being charged with," and he was advised that "he was being charged at that time for grand theft for possession of a stolen vehicle." Supp. at 22. Herring's consent was thus limited to questioning relating to the stolen vehicle.

In the eight hours during which Herring was interrogated, however, the questions ranged far beyond the automobile theft charge for which he was arrested. The police questioned him about a series of armed robberies, and Herring confessed to five robberies of convenience stores. He was also questioned about, and ultimately confessed to, the crime that formed the basis for his murder conviction and death sentence. The police failed to give Herring separate Miranda warnings before questioning him about the armed robberies or the homicide.

To be effective, a waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Miranda

v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). It must be the product of a free and deliberate choice rather than intimidation, coercion, or deception. Colorado v. Spring, _____ U.S. _____, 107 S. Ct. 851, ___ L. Ed. 2d ___ (1987). In addition,

the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

___ U.S. at ___, 107 S. Ct. at 857, ___ L. Ed. 2d at ___, quoting Moran v. Burbine, 475 U.S. ___, 106 S.Ct. 1135, 89 L.Ed 2d 410 (1986). Where a suspect is informed that he is to be charged with a particular offense but is actually interrogated about a separate, unrelated offense, the waiver cannot be considered "the product of a free and deliberate choice."*

Here, under the totality of the circumstances, Herring's waiver cannot be deemed effective. Herring was read his constitutional rights at the time he was found in possession of a stolen automobile, at approximately 11:30 a.m. Supp. at 528-533. Herring's consent was limited to questioning regarding the stolen vehicle. A valid waiver was neither sought nor obtained with respect to the robberies or the homicide. His subsequent confession should have been suppressed.

* Colorado v. Spring, supra, is not to the contrary. In that case, the questioning officers remained silent regarding the subject matter of the interrogation, and the suspect never asked about it. When the interrogation shifted from interstate transportation of stolen firearms to murder, the suspect made an incriminating statement. Relying on the officers' silence regarding the substance of the interrogation, the Court found that the defendant's waiver was freely and deliberately chosen. In this case, Herring asked what the subject of the questioning would be, was specifically told by the questioning officers that it would be limited to one crime, and was then questioned about entirely different and far more serious crimes. In Spring, the Court held that the waiver was not invalid because the officers' silence did not constitute "trickery." Here, however, the officers did not remain silent but instead affirmatively told Herring that the interrogation would be limited to a specific charge. Thus, Herring's waiver was not uncoerced or freely chosen.

Moreover, in Spring the arresting officers obtained two waivers, one at the point of arrest and a second waiver at the stationhouse. Subsequently, a third waiver was obtained when the officers later desired a more detailed confession. Here, there was only one waiver obtained, and it related only to the stolen vehicle, not to the armed robbery or the homicide.

Herring's confession was the essence of the State's case. No witness placed Herring at the scene of the crime. No gun was found. Without the confession, the State's case could not have survived a motion to dismiss, and would surely not have resulted in a conviction.

Even though the confession was the critical element of the State's case, and even though the confession was constitutionally assailable, appellate counsel failed to raise the claim on appeal. Indeed, counsel never challenged any of the evidence introduced to establish guilt. Counsel's failure to challenge the trial court's refusal to suppress Herring's confession "cannot be excused as mere strategy or allocation of appellate resources." Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985). As in Wilson, "[t]his issue is crucial to the validity of the conviction and goes to the heart of the case To have failed to raise so fundamental an issue is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Id., at 1163-64.

In Smith v. Wainwright, 484 So. 2d 31 (Fla. App. 4th Dist.), review denied, 492 So. 2d 1336 (Fla. 1986) the court granted a writ of habeas corpus because appellate counsel failed to appeal the denial of a motion to suppress a pre-trial identification made when the defendant was compelled to stand in a line-up without counsel present. The court stated:

While an appellant attorney need not raise every conceivable claim, . . . appellate counsel who fails to raise a meritorious issue which is a fundamental and intrinsic part of his client's case is ineffective. . . . Since the identification issue in Smith's case was prominent and meritorious, . . . counsel's failure to raise the claim resulted in Smith being deprived of effective assistance of counsel.

484 So. 2d at 31 (citations omitted).

Appellate counsel's omission here is no less serious. Like the pretrial identification made in Smith, supra, the confession here was central to the State's case and to Herring's defense to it. The confession issue was "prominent and meritorious," Smith 484 So. 2d at 31, and had also been properly preserved for appellate review. Counsel's failure to raise this claim constitutes ineffective assistance.

3. Appellate Counsel Failed to Argue That the Trial Court Impermissibly Applied Both the Heightened Premeditation and the Witness Elimination Aggravating Circumstances on the Basis of the Same Aspect of the Shooting

In Provence v. State, 337 So. 2d 783 (Fla. 1976) cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977), this Court recognized that the statutory aggravating circumstances that (1) the homicide was committed in the course of the robbery,* and (2) the crime was committed for pecuniary gain,** may not both be applied in the process of weighing aggravating and mitigating circumstances absent unusual circumstances. This Court reasoned:

While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, [these two aggravating circumstances] refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both [aggravating circumstances] refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with the two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Id. at 786 (emphasis in original). The principle announced in Provence has been uniformly applied by this Court. E.g., Francois v. State, 407 So. 2d 885, 891 (Fla.), cert. denied, 458 U.S. 1122, 102 S. Ct. 3511, 73 L. Ed. 2d 1384 (1982); White v. State, 403 So. 2d 331, 337-38 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983); Perry v. State, 395 So. 2d 170, 175 (Fla. 1980).

This Court's reasoning in Provence and its progeny is fully applicable to the case at bar. Both the heightened premeditation and the avoidance of arrest aggravating circumstances were based on precisely the "same aspect of the . . . crime": the firing of the second shot. The trial

* Fla. Stat. Ann § 921.141(5)(d) (West 1985).

** Fla. Stat. Ann § 921.141(5)(f) (West 1985).

judge's Findings Pursuant to F.S. 921.141 could not be more explicit in this regard. Judge Foxman's opinion provides, in pertinent part:

* * *

5. The crime for which Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The Court accepts Detective Varner's testimony wherein the Defendant said he fired the second shot into Norman Dale Hoeltzel because he was still alive and the Defendant did not want a witness to his crime.

* * *

9. The crime for which this Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Norman Dale Hoeltzel was shot in the side of the head at close range. The bullet first passed through his hand. While he lay on the floor wounded, but still alive, the Defendant shot him again in the neck to eliminate any possible witness. The victim was killed because he may have been a possible witness to the robbery.

R.O.A. at 74-75. (Emphasis in original.)

The trial court thus indisputably based two statutory aggravating circumstances upon a single fact. The firing of the second shot forms the sole factual basis for two separate aggravating circumstances; this is precisely what the Provence holding prohibited.* Herring's appellate counsel failed to make this argument. Once again, this claim was ripe for appellate review, was well supported by existing legal authority, and should have resulted, had this claim been raised, in reversal of Herring's death sentence.

4. Appellate Counsel Failed to Argue That the Jury Instructions Regarding the Imposition of the Death Penalty Were Constitutionally Inadequate

Herring's appellate counsel failed to raise any claims whatsoever with respect to the jury instructions -- claims which, as this Court found in Herring v. State, supra, could have been raised on direct appeal. The Eleventh Circuit has squarely held that "the Constitution requires that there be no reasonable possibility that a juror will misunderstand the meaning and function of mitigating circumstances, . . ." Peek v. Kemp, 784 F.2d 1479,

* Because the trial court also found two mitigating circumstances, a reversal of either the heightened premeditation or the avoidance of arrest aggravating circumstance would require that Herring's death sentence be vacated. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977).

1494 (11th Cir.), cert. denied, _____ U.S. _____, 107 S. Ct. 421, 92 L. Ed. 2d 371 (1986). Judge Foxman's instructions were vague and unfocused. He never explicitly defined the concept of mitigation, or the function of mitigating circumstances. Neither was the definition or function of mitigating circumstances clear and unambiguous when the entire charge is considered. In short, the instructions here failed to "guide and focus the jury's consideration of mitigating circumstances." Peek v. Kemp, 784 F.2d at 1494. As such, they fail to meet minimum constitutional requirements. Id., n.16. The failure of a trial judge to provide clear, precise jury instructions constitutes a substantial denial of a federal constitutional right. See Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981), cert. denied, 458 U.S. 1111 102 S. Ct. 3495, 73 L.Ed 2d 1374 (1982); Chenault v. Stynchcombe, 581 F.2d 444, 447-48 (5th Cir. 1978).

This Court has also recognized the fundamental importance of clear, precise jury instructions. In Floyd v. State, 497 So. 2d 1211 (Fla. 1986), this Court reversed a death sentence and remanded for a new sentencing hearing before a jury because the trial judge failed to give adequate jury instructions regarding mitigating circumstances. This Court stated: "We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death. See Peck v. State, 395 So. 2d 492, 496-97 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981)." 497 So. 2d at 1216.

Judge Foxman's sentencing charge failed to provide the clear, precise guidance that this Court has recognized is constitutionally mandated. Because the charge was confusing, incomplete, and ambiguous, the jury remained ignorant of how they were to weigh the various factors that bore upon their decision.

The trial judge's jury instructions began with the following remarks:

THE COURT: Thank you, counsel.

Ladies and gentlemen of the jury:

It's now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of first degree murder.

As you've been told, the final decision as to what punishment shall be imposed, is the responsibility of the Judge. However, it's your duty to follow the law that will now be given you be [sic] the Court and render to the Court

an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstances exist, outweigh the aggravating circumstance [sic] found to exist.

Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

Supp. at 815-816.

This portion of the instruction was deficient in several respects. First, the court failed to define the terms "aggravating circumstance" and "mitigating circumstance" in charging the jury, or explain their nature or function in the sentencing process. The court gave no indication that the aggravating circumstances were factors which distinguished this particular capital felony from most other homicides, and that before an advisory verdict of death could be rendered, the jury had to find the existence of at least one of the statutory aggravating circumstances beyond a reasonable doubt.

The trial court failed to explain that "mitigating circumstances" were any circumstances which "do not justify or excuse the offense, but which, in fairness or mercy, may [have been] considered as extenuating or reducing the degree of moral culpability and punishment." Spivey v. Zant, 661 F.2d at 471, n.8.

The trial court also failed to explain the nature of the balancing process. Although the court indicated that the aggravating and mitigating circumstances had to be "weighed" against one another, the court did not clearly explain how the jury was to undertake such an analysis.* The court

* The court's lack of adequate guidance as to the balancing process is reflected in the instructions pertaining to the weight to be given the aggravating and mitigating circumstances. In addition to the instruction quoted above, the court made the following remarks regarding the weighing process:

Should you find sufficient aggravating circumstance[s] do exist, it will then be your duty to determine whether the mitigating circumstance[s] exist, that outweigh the aggravating circumstance[s].

* * *

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances.

And give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

Supp. at 818, 819.

omitted any reference to Florida's well-settled rule that the weighing process is not a mere "mechanical tabulation" of aggravating versus mitigating circumstances. See Brown v. State, 381 So. 2d 690, 696 (1980), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981); State v. Dixon, 283 So. 2d 1, 10 (1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). Nor did the court explain to the jury how aggravating circumstances could "outweigh" mitigating circumstances, or vice versa. The jury was thus left to conclude that weighing meant no more than a mechanical tabulation.

The instructions were also defective because the trial court provided no explanation or guidance as to the meaning of the particular aggravating or mitigating circumstances that it enumerated. The trial court made no reference to the salient points of law developed by this Court in construing these circumstances, such as that the "cold, calculated and premeditated" aggravating circumstance* requires a showing of heightened premeditation beyond that required for a first degree murder conviction; that the avoidance of arrest aggravating circumstance** requires a demonstration that such was the dominant or sole motive for the capital felony; and that the emotional disturbance mitigating circumstance*** does not require a showing that the defendant was insane. The meaning of these circumstances is not readily apparent to the layman without some further explanation, and the jury was given no explanation or guidance as to their meaning. They were thus left to interpret these circumstances in ways inconsistent with Florida law.

Finally, the trial court failed to state clearly and unambiguously that the statutory mitigating circumstances were not exhaustive. The court's instruction regarding mitigating circumstances was as follows:

Among the mitigating circumstances you may consider if established by the evidence, are:

The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The victim was a participant in the Defendant's conduct or consented to the act.

* Fla. Stat. Ann. § 921.141(5)(i) (West 1985).

** Fla. Stat. Ann. § 921.141(5)(c) (West 1985).

*** Fla. Stat. Ann. § 921.141(6)(b) (West 1985).

The Defendant was an accomplice in the offense for which he is to be sentenced. But, the offense was committed by another person and the Defendant's participation was relatively minor.

The Defendant acted under extreme duress or under the substantial domination of another person.

The capacity of the Defendant to appreciate the criminality of the conduct or conform his conduct to the requirements of law, was substantially impaired.

The age of the Defendant at the time of the crime.

Any other aspect of the Defendant's character or record in any other circumstance of the offense.

* * *

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstance [sic], and your advisory sentence must be based on these considerations.

Supp. at 818, 819. The court's statement that "[a]mong the mitigating circumstances you may consider if established by the evidence, are . . ." certainly did not constitute an explicit statement as required under Lockett that the jury was free to consider any evidence that would justify mercy in Herring's case. In Spivey, the Fifth Circuit stated:

[T]he judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations.

661 F.2d at 471 (footnote omitted). See Chenault v. Stynchcombe, 581 F.2d at 448 ("th[e] constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision.") The judge's jury instruction as to mitigating circumstances fell far below this mark.

The right to clear and precise jury instructions is fundamental. See Floyd, supra. The trial judge's inadequate jury instructions constitute fundamental error and thus were properly reviewable upon appeal. See Clark v. State, 363 So. 2d 331, 333 (Fla. 1978). Counsel's failure to raise this claim on appeal deprived Herring of a meaningful review of the jury instructions.

5. Appellate Counsel Failed to Argue That During Her Closing Argument at the Sentencing Phase, the Prosecutor Improperly Suggested That Herring Might Be Granted Parole If Given Life Imprisonment

During her closing argument at the sentencing phase of Herring's trial, the prosecutor said:

And I will suggest to you, rather than mitigating circumstance, [Herring's age] should be considered as an aggravated circumstance, because Ted Herring, as he stands before you now, is twenty. If he gets life imprisonment, he will be up for parole and possibly out on the streets at forty-five. He will be out on the streets to kill and rob again at forty-five.

Supp. at 805 (emphasis supplied). Because the defendant's youth is not listed as an available aggravating circumstance, this comment amounts to invocation of a non-statutory aggravating circumstance. See Fla. Stat. Ann. § 921.141(5) (West 1985). See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Lucas v. State, 376 So. 2d 1149, 1153 (Fla. 1979). Appellate counsel failed to appeal on this ground despite the obvious danger that Herring's sentence was predicated on the application of a nonstatutory aggravating factor. In reviewing Judge Foxman's summary denial of Herring's motion pursuant to Rule 3.850, this Court found that appellate counsel could have raised this issue on direct appeal, and his failure to do so barred consideration of the claim.

The prosecutor's comments were also highly inflammatory. See Bush v. State, 461 So. 2d 936, 942 (Fla. 1984) (Ehrlich, J., concurring), cert. denied, ___ U.S. ___, 106 S. Ct. 1237, 89 L. Ed. 2d 345 (1986). A prosecutor may not incite a jury when a defendant's life hangs in the balance. In Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 754 (1984), another death penalty case over which Herring's trial judge presided and in which Herring's appellate counsel appeared, this Court vacated the defendant's death sentence and remanded the case for a new sentencing hearing because of the prosecutor's inflammatory comments during his closing argument to the jury. The prosecutor in Teffeteller speculated that, if given life imprisonment, the defendant would be eligible for parole in twenty-five years and if paroled would kill again. This Court concluded that "the remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty." Id., at 845. This Court ordered a new sentencing hearing because "we cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's recommendation of death during the sentencing phase." Id. Here, the prosecutor's comments were identical: she told the jury that unless Herring were sentenced to death, he would "be out on the streets to kill and rob again at forty-five." Supp. at 805.

Counsel's failure to raise this claim on appeal is a substantial omission, and is particularly conspicuous because the same lawyer had successfully raised the same claim in Teffeteller. The prosecutor's comments were improper, inflammatory, and prejudicial. Her appeal to the jury's emotions constituted fundamental error, and counsel should have raised the issue on appeal. Moreover, Teffeteller was decided while the direct appeal in this case was sub judice, yet counsel never bothered to direct this Court's attention to it or to this claim. Had it been raised, Herring's sentence would have been reversed, and a new sentencing hearing would have been granted. Because his appellate counsel neglected to raise a meritorious claim he was surely aware of, Herring's sentence was affirmed, whereas Teffeteller's was reversed.

B. HERRING'S APPELLATE COUNSEL FAILED ADEQUATELY TO PRESENT AND ARGUE OTHER CLAIMS WHICH, IF ADEQUATELY PRESENTED AND ARGUED, WOULD HAVE RESULTED IN REVERSAL

In Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985), this Court stated:

[W]e will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

(Emphasis added.)

Herring's appellate counsel failed to meet this standard of advocacy. In both his written briefs and during oral argument before this Court, counsel demonstrated a substantial lack of preparation and zeal in urging his client's cause. The lack of such preparation and zeal can, and in this case has, rendered appellate counsel ineffective.

Among the issues that appellate counsel did brief were: (1) the improper exclusion of a juror under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); (2) the improper application of the "heightened premeditation aggravating circumstance," Fla. Stat. Ann. § 921.141(5)(i); and (3) the improper application of Fla. Stat. Ann. § 921.141(5)(e). The record demonstrates that each of these issues was inadequately researched and poorly presented by Herring's appellate counsel.

1. Appellate Counsel Failed Adequately to Argue That Herring's Rights Under the Sixth and Fourteenth Amendments Were Violated by the Exclusion of Mr. Cameron Because of His Views on the Death Penalty

A member of the venire panel in this case, Mr. Cameron, was improperly excluded for cause in violation of the principles first articulated by the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). In Witherspoon, the Court established a test for determining whether a prospective juror may be excused for cause, based on his views on the death penalty. The Court stated that such a juror, in a capital case, could be excused for cause only when he is "irrevocably committed . . . to vote against the death penalty regardless of the facts or circumstances," or when "[his] attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's guilt." Id. at 522 n.21, 88 S. Ct. at 1777, n.21, 20 L. Ed. 2d at 785, n.21.

The voir dire of Mr. Cameron indicates quite clearly that Mr. Cameron was improperly excluded. Upon initial examination by the Court, Mr. Cameron acknowledged that under certain circumstances he might vote to impose the death penalty, and that his views would not affect his ability to fairly and impartially determine guilt:

THE COURT: All right. Mr. Cameron, let me ask you this: Would your objections or reservations or doubts about the death penalty interfere with your ability to objectively determine guilt or innocence?

MR. CAMERON: No.

THE COURT: Would you refuse to impose the death penalty under any circumstance?

MR. CAMERON: I can't say I wouldn't under any circumstances. Intellectually I would say that I would not, but I can't predict the future.

THE COURT: Okay.
Are there circumstances where you would impose the death penalty?

MR. CAMERON: I'm sure there must be. I can't think of any now.

* * *

THE COURT: Well, you're sort of straddling a fence and you need to sort of help me out here. There's nothing wrong or right with your views. It's just we need to know where you stand; and my question to you again is, would your objections, reservations or doubts about the death penalty interfere with your ability in the first phase to objectively determine guilt or innocence?

MR. CAMERON: No.

THE COURT: All right.

MR. CAMERON: It would not.

THE COURT: Okay. Now, the second question:
If the Defendant was proven guilty beyond every reasonable doubt, could you return a verdict of guilty knowing that the death penalty was a possibility?

MR. CAMERON: Right now I think I could not. I might change my mind in the middle of the trial. It's a possibility.

Supp. at 337-39. (Emphasis supplied.)

The court then opened up questioning by the parties. Upon questioning by Herring's counsel, Mr. Cameron stated that he could work with the other jurors, and that under certain circumstances then unknown, he would consider imposing a death sentence.

MR. PEARL: Imagine, If you will, that the Defendant on trial for murder were Adolph Hitler or Idi Amin who caused the cold-blooded murder and death of millions of people. If that were true and if either one of these people were found guilty of murder in the first degree, would you consider the death penalty?

MR. CAMERON: I would consider it, but I think I'd find alternatives that I would choose.

MR. PEARL: Well, you cannot choose alternatives except for two, as the Judge has instructed you. There are only two in the event of a conviction of first degree murder. One is life in prison with a minimum of 25 years before parole, and the other is death. There are no other alternatives. There are no social engineering things that you can apply. There's no way you can change the person involved, in that sense. So, all you can do is choose one of those two alternatives as a juror, and you have said that you would follow the law.

MR. CAMERON: Uh-huh.

* * *

MR. PEARL: Well, you would be amongst eleven other jurors. You would be one of the twelve.

MR. CAMERON: Yes.

MR. PEARL: On the one hand, would you exercise independent judgment in your thinking?

MR. CAMERON: Yes.

MR. PEARL: And, on the other, would you listen to the views and respect the views of your fellow jurors in arriving at your verdict and discuss the case?

MR. CAMERON: I would listen, yes.

* * *

MR. PEARL: Well, then, I think -- correct me if I'm wrong -- I think what you have said is, although you're opposed to it and although you're [sic] thinking now is that you would not vote for the death penalty, that, on the other hand, there are or may be circumstances under which you would, although you do not know what those circumstances might be at the present time?

MR. CAMERON: It's a possibility I could change my mind. That's true.

Supp. at 339-42. (Emphasis supplied.)

The State then moved to have Mr. Cameron stricken for cause. The Court again questioned Mr. Cameron, and Mr. Cameron again stated that he might be able to vote for a death sentence:

At this time is it your thinking that you could not, under any circumstance, impose the death penalty?

MR. CAMERON: Yes, it is.

THE COURT: There is an outside chance that you could change your mind, is that correct?

MR. CAMERON: That's true, yes, sir.

Supp. at 343. (Emphasis supplied.)

The State then renewed its motion to excuse Mr. Cameron for cause, and the court granted it.

The voir dire colloquy plainly indicated that Mr. Cameron, although personally opposed to the death penalty, was not irrevocably committed to vote against the death penalty under any circumstances. His answers also made it clear that he would not let his attitude towards the death penalty prevent him from making an impartial decision as to the defendant's guilt. Mr. Cameron's personal opposition to the death penalty would neither have prevented nor substantially impaired the performance of his duty as a juror.*

* It is clear that under Witherspoon the trial court erred in excusing Mr. Cameron for cause. Nor can Mr. Cameron's rejection for cause be justified under the subsequently decided case of Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). In Witt the Court held that the proper standard for determining whether a juror could be excluded for cause was whether:

the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath."

469 U.S. at 424, 105 S. Ct. at 852, 83 L. Ed. 2d at 851-52.

(footnote continues on next page)

Appellate counsel inadequately researched and presented this argument to the Court. Of the ten pages counsel devoted to the Witherspoon issue, six consist of nothing more than an extended quote -- the voir dire examination of Mr. Cameron. In the remaining four pages, counsel cites eight cases.* These citations to case law consist of nothing more than extensive quotes from the cases cited, without any comparison between the facts in the cited cases and the facts presented on appeal, or any analysis of the applicability of Witherspoon and its progeny here. Counsel provided the court with statements of law but failed to apply the law to the facts presented. This failure rendered the assistance he gave Herring ineffective. Wilson v. Wainwright, 474 So. 2d at 1164; accord, Anders v. California, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967).

Appellate counsel's lack of zeal and care is typified by his discussion of Witherspoon. It consisted of nothing more than a quote from footnote 21 of the opinion, and the comment that "(t)hese principles have been strictly construed." Initial Brief of Appellant at 14-15.

In addition, counsel's passing reference to Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd, 626 F.2d 396 (5th Cir. 1980) (en banc), was perfunctory and inadequate. Counsel should have set out the facts and the

(footnote continued from previous page)

The above colloquy reflects that Mr. Cameron's personal views would not have "impair[ed] the performance of his duties as a juror in accordance with his instructions and his oath." He explicitly stated, in response to questions asked by the trial judge, that his personal views about the death penalty would not affect his ability to determine guilt or innocence objectively. Supp. at 337-38. In response to questions asked by Mr. Pearl, Mr. Cameron unequivocally indicated that he would follow the law. Supp. at 339-42.

It is therefore clear from Mr. Cameron's testimony that he could perform his duties as a juror in accordance with his instructions and the law, and that his performance as a juror would not have been "substantially impaired." Mr. Cameron was therefore improperly excused under Witherspoon and its progeny.

* Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980); Wilson v. Florida, 403 U.S. 947, 91 S. Ct. 2286, 29 L. Ed. 2d 858 (1971) (Memorandum); Maxwell v. Bishop, 398 U.S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221 (1970); Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, 455 U.S. 1003, 102 S. Ct. 1636, 71 L. Ed. 2d 870 (1982); Burns v. Estelle, 592 F. 2d 1297 (5th Cir. 1979), aff'd, 626 F.2d 396 (5th Cir. 1980) (en banc); Wilson v. State, 225 So. 2d 321 (Fla. 1969), rev'd, 403 U.S. 947, 91 S. Ct. 2286, 29 L. Ed. 2d 858 (1971); People v. Washington, 71 Cal. 2d 1170, 459 P.2d 259 (Cal. 1969).

holding of that case "to persuade the court of the gravity of the alleged deviations from due process." Wilson v. Wainwright 474 So. 2d at 1165. In Burns, the en banc court (whose opinion counsel failed to cite, citing instead the superseded panel opinion) held that the exclusion of a prospective juror who stated three times that she was opposed to the death penalty was improper. 626 F.2d at 397-98. Despite the fact that her opposition to the death penalty was strong, the court found it did not warrant her exclusion because she had not made it "unmistakably clear" that her beliefs would prevent her from making an impartial decision as to guilt. 626 F.2d 398. In the present case, Mr. Cameron's statements make clear that he would not automatically vote against death, that there might be circumstances in which he would vote for the death penalty, and that he could perform his duties as a jury in accordance with law and with the Court's instructions.

Counsel's discussion of Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, 455 U.S. 1003, 102 S. Ct. 1636, 71 L. Ed. 2d 870 (1982) was also inadequate. In Granviel, the Fifth Circuit held that the exclusion of a prospective juror was improper because his responses were equivocal and only indicated a generalized objection to the death penalty. The venireman was asked if he could vote for the imposition of the death penalty and he responded "I don't think I could." 655 F.2d at 677. The Fifth Circuit found his answer insufficient to justify an exclusion for cause because it was not unambiguous. Counsel should have pointed out that Mr. Cameron's response to a question from the court, "Right now I think I could not," was virtually identical to the response found by the Fifth Circuit insufficient to justify exclusion under Witherspoon.

Mr. Cameron's answers compare favorably to those given by potential jurors in Burns and Granviel in that they were, at most, equivocal but nonetheless clearly reflected that his duties as a juror would be unimpaired by his views respecting the death penalty. Had counsel provided this Court with some guidance as to the applicability of those cases to the facts of this case there is a reasonable probability that its decision regarding Herring's Witherspoon claim would have been different.

Counsel could also have supported his Witherspoon claim by including a discussion of Boulden v. Holman, 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed. 2d

433 (1969). In Boulden, eleven veniremen were excluded simply on the basis that they had a "fixed opinion" against capital punishment. 394 U.S. at 482-83, 89 S. Ct. at 1141, 22 L. Ed. 2d at 438. In concluding that the veniremen were improperly excluded for cause the Court held:

[I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing laws - to follow conscientiously the instructions of a trial judge and consider fairly the imposition of the death sentence in a particular case.

Id. at 483-84, 89 S. Ct. at 1141-42, 22 L. Ed. 2d at 438-39. Even if Mr. Cameron had a "fixed opinion" against the death penalty -- which he did not as shown by his answers above -- he indicated more than once during the voir dire that he could perform his duties as a juror and abide by existing law. Counsel's failure to raise this point illustrates the lack of zeal and persuasiveness in his arguments which are pervasive throughout his brief and oral argument.

Another case conspicuous by its omission is Davis v. Georgia, 429 U.S. 122, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976), which held that the exclusion of even one juror in violation of Witherspoon would constitutionally preclude the death sentence from being carried out. Had counsel cited Boulden and Davis along with Witherspoon, and highlighted for the Court Mr. Cameron's willingness to determine Herring's guilt or innocence, and his willingness to follow the law objectively and consider the possibility of voting for a death sentence, then there is a reasonable probability that this Court would have found a Witherspoon violation.

In addition to these deficiencies in appellate counsel's research and presentation of the Witherspoon issue, counsel actually argued to this Court that the violation of the Witherspoon standard entitled Herring to a new trial. Counsel's error in this regard demonstrates his inadequate preparation as it squarely conflicts with the opinion in Witherspoon itself.

In Witherspoon, the Court stated that its holding that veniremen were improperly excluded for cause in violation of the constitution did not "render invalid the conviction, as opposed to the sentence, in this or any other case." 391 U.S. at 522, n.21, 88 S. Ct. at 1777, n.21, 20 L. Ed. 2d at 785, n.21. Further, in all the cases counsel cited as dealing with Witherspoon violations, the courts have reversed or remanded only the death sentence and not the underlying conviction. E.g., Adams v. Texas, 448 U.S. 38, 100 S. Ct.

2521, 65 L. Ed. 2d 581; Wilson v. Florida, 403 U.S. 947, 91 S. Ct. 2286, 29 L. Ed. 2d 858; Maxwell v. Bishop, 398 U.S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221; Granviel v. Estelle, 655 F.2d 673; Burns v. Estelle, 592 F.2d 1297, aff'd, 626 F.2d 396.

Counsel's inability to comprehend this aspect of Witherspoon became clear in his oral presentation to the court. The following colloquy is illustrative:

Court: Let me ask you a question. I'm just trying to think here, do you recall any case where a conviction has been reversed because of a purported error of the trial judge in granting one challenge for cause by a State attorney? I can understand a whole series of things, but on one challenge for cause?

Counsel: Yes. And I cited to Maxwell v. Bishop, in the brief.

Court: Will you excuse me, even Witherspoon doesn't require a reversal of conviction. Witherspoon only goes to a sentence. Isn't that correct? In this case. Because it's two questions, two phases I mean. The best you would get is a remand on the sentence.

Counsel: In this particular case, in this court?

Court: In this particular case.

Counsel: No, your honor.

Court: I thought under Witherspoon itself, the U.S. Supreme Court reversed only on the death sentence.

Counsel: That may be true in Witherspoon, but the principles applied to the guilt phase. . . .

Court: And in the other cases, I can't remember the name of, but out of this Court we have, where there have been clear Witherspoon violations, vacated the death sentence and remanded for a new sentencing hearing before a new jury, but not vacated the conviction.

Counsel: I believe that's what this court has done in such cases, your honor. I believe though that this court has the power, should they decide that Mr. Cameron was improperly excused, that they can order a new trial.

Court: Why should we grant a new conviction[?] if that doesn't go to the conviction?

Counsel: It was the same jury that decided. If we don't know that Mr. Cameron, as one of twelve reasonable persons on a jury, may have been able to put his views forth during the guilt phase and have changed that outcome. We don't know. That's the danger of not ordering a new trial.

Court: Well, to answer Justice Atkins question for you, I'm not aware of any time that we've reversed a conviction based on a Witherspoon violation.

Counsel: Your honor, I'm not aware of any time this court has done it either. I would point to Maxwell v. Bishop as cited there, where it was a case of, again I will point that

they vacated the death sentence in this case - they didn't order a new trial. But they vacated the death sentence because one juror responded, "I think I do" when he was asked whether there was anything that might prevent him from returning a verdict. But again, that was if it prevented returning a verdict. In this, we didn't even have that extreme case.

Counsel's confusion, misunderstanding and lack of preparation are apparent. The position counsel advocated not only lacked support in existing case law, but in fact is contradicted by the very case upon which he relied.

2. Appellate Counsel Failed Adequately to Argue That the Trial Court Erroneously Found That the Murder was Committed in a Cold, Calculated and Premeditated Manner

Appellate counsel's initial brief devoted a scant two pages and cited only two cases (one of which upheld the applicability of this aggravating circumstance) in support of the argument that the heightened premeditation aggravating circumstance was erroneously applied. He failed to cite to available case law which had found the circumstance inapplicable. See, e.g., Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). His handling of the two cases he did cite was perfunctory.

For Section 921.141(5)(i) to apply, the murder must not only be premeditated, but also must be committed in a cold and calculated manner "without any pretense of moral or legal justification." Fla. Stat. Ann. § 921.141(5)(i) (West 1986). The degree of premeditation required before this aggravating circumstance may be applied is greater than that necessary to establish premeditation for conviction in the conviction phase of a capital felony trial. Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S. Ct. 2916, 73 L. Ed. 2d 1322 (1982). See also Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982) (the limitations on the application of this aggravating circumstance "inure to the benefit of a defendant"). The Jent court, in rejecting appellant's contention that every person convicted of premeditated murder would enter the sentencing phase with an aggravating circumstance already established, declared that:

The level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to

prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated . . . and without any pretense of moral or legal justification."

408 So. 2d at 1032.

This "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, . . ." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982). Although the Court in McCray also observed that "this description is not intended to be all-inclusive," id., there is nothing in McCray or in any other case construing Section 921.141(5)(i) to suggest that this aggravating circumstance may be found in any capital case unless there is substantial evidence that the killer first devised a plan to commit the murder and thereafter put that plan into effect.

Although the cases cited above were all decided before counsel served his initial brief, he cited only McCray in it.* His method of argument on this point is similar to that on the Witherspoon issue. Counsel quoted from the case, then failed to apply its holding to the facts of this case. Counsel also failed to make use of important facts and circumstances of this case which would demonstrate a clear lack of the requisite premeditation.

Although counsel stated that the shooting of the victim was unplanned and resulted only after appellant perceived that the victim was attempting to disarm him, he failed to mention that the State had offered no evidence that contradicted Herring's version of the shooting. In Herring's confession, he stated that the clerk's sudden movement caused him to panic and fire his gun. Supp. at 126-28. Counsel failed to point out that there was no evidence of reflection and that the evidence demonstrated that the gun was fired thoughtlessly as a reflex action, rather than as a planned act.

Counsel also failed to argue that the State had put forth no evidence that the homicide was preconceived. The record shows that the contrary was the case. In the course of confessing to the crime for which he was sentenced to death, Herring also confessed to four other armed robberies. In each of those robberies no one was hurt and Herring never fired his gun. His failure to use his gun in these other cases strongly indicates that he had no intention of using it in the present case, and that he did so only as a

* Jent v. State was the sole case cited by appellate counsel on this point in the Reply Brief.

responsive act. Counsel's failure to make use of important supporting facts, such as these, is evidence of his lack of preparation and understanding of the applicable law and of Herring's claims.

Counsel's representation was also deficient because he neglected to discuss a single fact pattern from any other case which held this aggravating circumstance inapplicable. Counsel could have cited Mann v. State, 420 So. 2d 578 (Fla. 1982). In Mann, the Court rejected the trial judge's finding that the murder was cold, calculated and premeditated. 420 So. 2d at 581. Mann had abducted a ten-year-old girl while she was riding her bicycle to school. He killed her by stabbing her several times and fracturing her skull. The Court implied that while there was evidence of premeditation, the State failed to produce evidence to support application of the heightened premeditation aggravating circumstance. The victim had been cut on both sides of her neck. She was conscious for several minutes after being wounded. Mann then induced death through a massive skull fracture. 420 So. 2d at 582 (Alderman, J. dissenting in part). The several minutes that it took Mann to crush the skull of his victim after stabbing her on both sides of the neck clearly contrast with the rather quick second shot that Herring fired. It is also more likely that an abduction-murder was planned from the start than a robbery-murder, particularly this robbery-murder, where Herring stated that his shot was a reflex, fired out of fear. Supp. at 126-28.

In addition, counsel could have argued that heightened premeditation had been held inapplicable in McCray v. State, 416 So. 2d 804, 805 (Fla. 1982), where the facts strongly suggest that the killer had planned the homicide in advance. McCray first stole several boxes of rifles from the victim's van, and later, after taking the guns to the edge of a wooded area, returned to the victim's van where the killer yelled, "this is for you, motherfucker," and shot the victim three times in the abdomen. This Court concluded that heightened premeditation was not present, citing Jent and Combs. Although counsel cited McCray, Initial Brief at 29, he failed to compare the facts of that case to the undisputed facts here.

The consequences of counsel's failure could hardly be less severe: this Court's decision on Herring's direct appeal was and remains an aberration in the jurisprudence of the heightened premeditation aggravating

circumstance. No case decided before or since Herring ever found this circumstance applicable to evidence of premeditation as meager as that present here. Indeed, the vast majority of cases found the circumstance inapplicable to facts much clearer than Herring's. See, e.g. Preston v. State, 444 So. 2d 939, 947 (Fla. 1984), (victim, a convenience store clerk, was kidnapped and forced to walk a mile and a half at knifepoint, after which her throat was cut and she was stabbed numerous times and a cross mark was cut into her forehead; nevertheless heightened premeditation aggravating circumstance was rejected); Peavy v. State, 442 So. 2d 200, 202-03 (Fla. 1983) (elderly victim stabbed several times and apartment ransacked by accused, who, prior to murder, accompanied victim to his apartment by helping him with groceries); Drake v. State, 441 So. 2d 1079, 1082-83 (Fla. 1983), cert. denied, 466 U.S. 978, 104 S. Ct. 2361, 80 L. Ed. 2d 832 (1984) (circumstance rejected where victim kidnapped and finally killed, being stabbed repeatedly in lower chest and abdomen); Harris v. State, 438 So. 2d 787, 797-98 (Fla. 1983), cert. denied, 466 U.S. 963, 104 S. Ct. 2181, 80 L. Ed. 2d 563 (1984) (victim tried to escape while being stabbed and beaten; blood splattered throughout victim's home); King v. State, 436 So. 2d 50, 55 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S. Ct. 1690, 80 L. Ed. 2d 1461 (1984) (victim first struck on head with blunt instrument and thereafter shot in head). The Herring decision stands alone for one obvious reason: counsel failed to support his arguments either with logic or precedent.

3. Appellate Counsel Failed Adequately to Argue That the Trial Court Erred in Finding That the Murder Was Committed for the Purpose of Avoiding or Preventing a Lawful Arrest or Effecting an Escape from Custody

This Court has construed the witness elimination aggravating circumstance, Fla. Stat. Ann § 921.141(5)(e) (West 1985), as being applicable primarily in situations where a defendant kills a law enforcement officer in an effort to avoid arrest or escape, and in situations where a defendant kills witnesses to a crime. This Court has stressed that this aggravating circumstance applies only if it is clearly shown that the dominant or only motive for the murder was the elimination of a witness. Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979). For the witness elimination motive "to support a finding of the avoidance of arrest circumstance when the victim is not a law

enforcement officer, '[p]roof of the requisite intent to avoid arrest and detection must be very strong.'" Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981), quoting Riley v. State, 366 So. 2d 19, 22 (Fla. 1978).

Furthermore, all aggravating circumstances, including the avoidance of arrest aggravating circumstance, must be proved beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

The evidence relied upon by this Court in affirming this aggravating circumstance was that the clerk was shot a second time after he had fallen to the floor, and that one of the interrogating officers, Detective Varner, testified that Herring stated to him that he "shot [the clerk] a second time to prevent [the clerk] from being a witness against him." Herring v. State, 446 So. 2d at 1057. Both of these aspects of the State's case are suspect, and both, even if proved, fail to establish witness elimination or avoidance of detection as being either the sole or dominant motive for the killing.

Appellate counsel made no attempt to make this argument. Moreover, the argument he proffered in his brief was poorly made. In presenting his argument that Detective Varner's testimony was unreliable, appellate counsel failed to present any persuasive argument. Detective Varner had testified:

At this time, the Defendant stated that he shot the clerk once in the head or he shot him once. He stated at this time as the Defendant -- as the clerk was lying on the floor, he could observe that he was still living; and he shot him a second time to prevent him from being a witness against him, at which time he stated that he observed his body twitch; and he then left the store.

Supp. at 550-51.

Appellate counsel failed to emphasize that Herring steadfastly maintained that the victim was shot "by mistake," "out of fear," and because he made a sudden movement. Supp. at 126-28. Instead, he simply supplied the Court with a transcript of the tape-recorded conversation between Detective Varner and Herring and allowed the Court to draw its own conclusions as to Herring's motive.

In addition, counsel neglected to reinforce his position that Detective Varner's statement was implausible with additional factual support available to him. Counsel failed to inform the Court that Detective Varner's statement appears only in Varner's account of an earlier, unrecorded

conversation between himself and Herring. It was the sole admission which the State attributed to Herring that was not tape-recorded. Counsel also neglected to point out that the only reference to the second shot which is on tape contradicts Detective Varner; Herring stated on tape that the second shot was fired "out of fear." Furthermore, counsel failed to provide the Court with the colloquy between Detective Varner and Herring, where the statement bearing on witness elimination as a motive came, not surprisingly, from Detective Varner. The colloquy follows:

WHITE: Detective Varner, you got any questions for him?

VARNER: Yes. One question. Were you in any fear at any time since you hadn't conspired to perpetrate this robbery, that this guy might have shot you in the process of the robbery?

HERRING: Yea', well, I was, I was scared.

VARNER: Eliminate any witnesses.

HERRING: I was scared, you know. I was really scared. You know what I'm saying. In fact, you know --

Supp. at 121. Counsel should have included this colloquy because it makes obvious that Detective Varner's taped statement did not fit in with the conversation and was purposely injected into the confession.

Counsel should also have included references to Varner's trial testimony about his conversation with Herring. Varner's trial testimony indicates that he had a propensity to attribute his own words to Herring, rather than recounting precisely what Herring said to him. Under direct examination at trial, the following exchange occurred:

GRAZIANO: Would you tell the jury what he told you?

VARNER: The defendant stated that he had observed the - He had done a surveillance on the Seven-Eleven store, 205 South Ridgewood.

GRAZIANO: Excuse me, Officer. Did he use the word "surveillance"? [sic]

VARNER: No, ma'am.

GRAZIANO: Do you recall what terminology he used?

VARNER: Checked it out.

Supp. at 549.

Later in the examination the prosecutor, Ms. Graziano, admonished Detective Varner, saying, "It's very important, Officer, you understand, that we wish to hear exactly what the Defendant told you." Supp. at 550. Had

counsel supplied the Court with this exchange, it would have cast serious doubt on the veracity of Detective Varner's statements. Counsel's failure to make use of such important facts, readily available in the record, is inexcusable.

Appellate counsel failed to assert that, even conceding the "accuracy and reliability" of Detective Varner's testimony, that testimony did not establish that witness elimination was the sole or dominant motive for the killing. E.g., Menendez v. State, 368 So. 2d 1278. See discussion supra at 35-36. In the argument he did try to make, counsel failed to use the facts of the case which were available, and persuasive. Counsel's omissions in this regard were serious, and devastating to Herring. They cannot, and should not, be countenanced.

4. Appellate Counsel Failed Adequately to Inform the Court of Persuasive Supplemental Authority that was Issued Between the Time His Brief was Filed and the Decision in the Case was Announced

Not least among the failures of appellate counsel was his failure to supplement the limited authority that he had provided the Court. During the fourteen months between the filing of the briefs and the decision in Herring's case, this Court decided several cases that were of critical importance to the arguments that appellate counsel had tried to make.

It is particularly in the area of heightened premeditation aggravating circumstance, however, that counsel's failure to supply this Court with supplemental authority is most pronounced, and most damaging. This aggravating circumstance was added to § 921.141 by the State Legislature in 1979. 1979 Fla. Laws c.79-353, § 1. Consequently, this aggravating circumstance was the least "fleshed out" by this Court's opinions at the time that the briefs were filed.* As this aggravating circumstance was fleshed out, in the time between the filing of the briefs and the decision in Herring's case, it became apparent that it should have been wholly inapplicable to Herring.

In Cannady v. State, 427 So. 2d 723 (Fla. 1983), Cannady confessed, to a police interrogator, to a kidnapping and murder during the course of a

* The Initial Brief on direct appeal was served on the State on October 15, 1982. The Reply Brief was served on December 17, 1982.

robbery of the victim's place of employment. Cannady stole some money, kidnapped the victim, drove him to a remote wooded area and shot him five times. During his confession Cannady repeatedly stated, "I didn't mean to kill that man, it wasn't supposed to happen that way." 427 So. 2d at 726. Cannady challenged the applicability of the heightened premeditation aggravating circumstance. This Court found the circumstance inapplicable, stating:

We find that the state failed to prove beyond a reasonable doubt that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.

* * *

[T]he unlikelihood that the victim threatened or jumped appellant and the appellant's shooting the victim five times are insufficient facts to prove premeditation beyond that necessary to sustain a conviction for premeditated murder. We therefore find that the court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

427 So. 2d at 730-31 (Emphasis supplied).

In White v. State, 446 So. 2d 1031 (Fla. 1984), decided two weeks before Herring, White shot one victim in the head, killing him, shot a second victim in the head, permanently paralyzing him from the neck down, and attempted to shoot two other people who happened to enter the store he was robbing. This Court, citing, inter alia, Cannady, found the heightened premeditation aggravating circumstance to be inapplicable. Counsel could also have submitted Harris v. State, 438 So. 2d at 797-98 and Peavy v. State, 442 So. 2d at 202-03.

Counsel should have brought these decisions to the Court's attention, since they are factually similar, and each held that the heightened premeditation aggravating circumstance was inapplicable. Any reasonable lawyer in appellate counsel's position, finding these cases, would have realized their applicability to his pending case and submitted them, along

with an analysis of their applicability, to this Court. The failure to do this was a clear dereliction and requires reversal.

Conclusion

This Court cannot search every record on appeal it receives in every capital case for error. That responsibility rests with appellate counsel. Herring's counsel failed to discharge that responsibility. His failings had devastating consequences for his client: instead of the reversal to which he was plainly and unquestionably entitled, Herring's conviction was affirmed and his death sentence upheld. Herring therefore requests this Court to issue a writ of habeas corpus, vacating his sentence and conviction.

Respectfully submitted,

SHEARMAN & STERLING

By: 

Jeremy G. Epstein
A Member of the Firm

53 Wall Street
New York, New York 10005
(212) 837-6000

Attorneys for Petitioner
TED HERRING

Of Counsel:

Jeremy G. Epstein
Dennis P. Orr
Kenneth A. Freeling
James P. Bodovitz
David Sorokoff