IN THE

SUPREME COURT OF FLORIDA

THEODORE BASSETT, Appellant, vs. THE STATE OF FLORIDA, Appellee.	)	CASE No. 71,130

INITIAL BRIEF OF APPELLANT

(On Appeal from the 7th Judicial Circuit
In and For Volusia County, Florida)

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Statement of the Case

The indictment of February 1, 1979, named both John Carter Cox and Theodore Augustus Bassett, Jr., as defendants on two counts each of first degree murder, robbery and kidnapping. R 5-6.[1] A plea agreement was reached before trial, and filed in open Court on October 15, 1979. R 14-15. The terms of the agreement bound the State to dismiss the robbery and kidnapping charges against both defendants and provided for concurrent life terms for both Mr. Cox and Mr. Bassett on the two counts of first degree murder. In exchange, both defendants would plead nolo contendere to the first degree counts reserving the right to appeal a denial of the corpus delicti challenge to the admission of certain statements given by the defendant. R 14-15. The state and defense stipulated the admissibility of the confession was "dispositive of the entire case...." R 15. A notation on the front page of the stipulation states that "Bassett withdrew from stipulation prior to hearing and elected to go to trial" on October 18, 1979. R 14. John Cox pled no contest, and was sentenced to concurrent life terms on the first degree murder charges. T 712-15.

There is no record of any further pre-trial motions or proceedings on behalf of Mr. Bassett. Trial began January 14, 1980. The state nolle prossed the two robbery and kidnapping charges, T 2, electing to proceed only on the two counts of first degree murder. On January 17, 1980, Mr. Bassett was convicted on both first degree murder counts. R 18,19. Penalty phase was conducted the

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1 In this brief, the Record on Appeal before this Court on the direct appeal will be denoted "R". References to the trial and sentencing transcript will be preceded by the letter "T". The postconviction record, presently on appeal, will be referred to as "PCR", and references to the Transcript of the evidentiary hearing held in this post-conviction proceeding will be preceded by "PCT."

following day, and a majority of the jury recommended death. R 20. The court imposed death the same day, filing "findings of fact in conjunction with the aggravating and mitigating factors set forth in F.S. 921.141." R 24.

The conviction and death sentences were affirmed on appeal. Bassett v. State, 449 So.2d 803 (1984). Appellate counsel did not seek certiorari. On January 10, 1985, a death warrant was signed and Mr. Bassett's execution was set for February 5, 1985. The Motion to Vacate Judgment and Sentence was filed January 20, 1985, and a stay was entered that day. PCR 1236. The case proceeded through pre-hearing motions. The court struck certain claims, and ruled against the defendant on other grounds PCR 1250-1251. Mr. Bassett filed a supplemental ground alleging state misconduct and a Confrontation Clause violation, which was denied on both procedural and substantive grounds. PCR 673-675.

An evidentiary hearing limited to the ineffective assistance of counsel claim was ordered. PCR 673-7,1250-51. On August 5, 6, and 7, 1987, the hearing was held. On August 11, 1987, the trial court denied relief, PCR 1213-15, though finding trial counsel failed to reasonably discharge his obligation to investigate and prepare a penalty phase defense. The court subsequently ordered the previously entered stay of execution continued pending appeal, finding the ineffectiveness claim at penalty phase "presented a difficult decision for this Court," and that it "could be decided differently" by another Court. PCR 1222. Notice of Appeal was timely filed. PCR 1216.

Subsequent to the filing of the notice of appeal, Appellant moved this Court to relinquish jurisdiction to permit the trial court to consider the Hitchcock claim in light of this Court's recognition such a claim is now cognizable post-conviction. The motion was denied.

Statement of the Facts

A. At trial

During trial, defense counsel moved to suppress custodial statements made by Mr. Bassett to two law enforcement agents over a two-day period. T 435. No written motion was filed, but counsel orally moved for a determination whether the statements were "knowingly and voluntarily" given, and "what representations ... were made." T 436,438. Only the two law enforcement officers who elicited Mr. Bassett's statements testified on the motion; the sole defense witness was Mr. Bassett, who was identified as "Earl Lee Smith" before the court. T 440-495. This Court described the circumstances surrounding the confession based on the record before it when this case was on direct appeal:

> On December 12 and 13, 1978, appellant's codefendant, John Cox, directed the Volusia County Sheriff's Department to the skeletal remains of two bodies. Cox confessed to the murders and implicated appellant.
>
> At the time the bodies were discovered, the sheriff's department was holding appellant, apparently on an unrelated felony charge. The state advised the trial court that appellant had relevant information concerning the disappearance of the victims and that appellant was willing to talk to authorities if the court would provide counsel. Because the public defender represented codefendant Cox, the court appointed private counsel to represent appellant during any questioning and negotiations arising from the state's investigation into the victims' deaths. After the investigation was complete, the appointed attorney moved to be discharged, advising the court that he had fulfilled his appointed duties, and stated that the appellant was incarcerated for "a felony charge for which counsel has not been appointed and he will require [further] services of appointed counsel." The appointed attorney further advised the court that he would be out of state and suggested the public defender be appointed. The trial court granted the motion to discharge but did not immediately appoint new counsel.
>
> The investigating officers approached appellant after counsel had withdrawn. They testified that they advised appellant of his Miranda rights and that he then asked to speak with his attorney. The officers informed him that his attorney had withdrawn but that they could contact another one for him. When the officers stood up to leave, appellant responded "Well, what do you want anyway?" The officers told appellant that Cox had implicated him that they had recovered the

> bodies. This led to appellant's two-day confession. The officers continually gave appellant Miranda warnings and obtained a signed waiver of rights form each day.

Bassett v. State, 449 So.2d at 804-5. The trial court denied the motion to suppress, finding it untimely, and further finding the statements were made knowingly and intelligently. T 500. On appeal, this Court affirmed, holding the interrogation did not violate the right to counsel and that Mr. Bassett had knowingly and intelligently waived his rights. Bassett, 449 So.2d at 806-7. Additional circumstances surrounding the confession were one subject of the evidentiary hearing on the 3.850 motion, and will be addressed in more detail in the post-conviction facts section below.

Mr. Bassett's oral confession was recounted at trial by two law enforcement agents, T 528-74, and summarized by this Court on appeal:

> Appellant's confession revealed the following. Appellant met the victims, James Boucher and Daryl Barber, both age eighteen, while walking on Daytona Beach. They had a bag of marijuana with them and were smoking a marijuana cigarette at the time. Appellant told the two boys that he knew of the party they were looking for and offered to them there. The three drove in the boys' car first to the boys' motel room so one could change clothes, and then to a nearby fastfood restaurant to pick up codefendant Cox. Appellant and Cox schemed to steal the boys' marijuana and any money that they might have. After smoking a few marijuana cigarettes and stopping for gas, either appellant or Cox displayed a gun and directed the boys to drive down an isolated dirt road. After they took the remaining marijuana and the money, Cox determined that the boys would have to be killed to cover up the robbery. Appellant and Cox then marched their victims approximately a mile through an adjacent swamp. At some point, the victims were instructed to discard their shoes, and their hands were tied behind their backs with their belts. Later, Cox told the boys to lie down and both captors beat the victims with a rotten tree limb. Frustrated because the limb kept breaking, Cox knocked one boy in the face with the pistol butt, apparently fracturing his jaw. After the captors decided that the murders could not be accomplished there, Cox returned for the car. The victims were forced into the vehicle's trunk so that no one would see them or hear screams for help. Appellant and Cox then returned to the victims' motel room and removed all belongings to make it appear as if the occupants had checked out. With the boys still in the trunk for what must have been hours, the captors went to Cox's trailer to decide how they would commit the murder. Subsequently, they drove the vehicle down another isolated dirt

> road. One boy was removed from the trunk and forced to make the second endorsement on his travelers checks. With both victims again secure in the trunk and appellant keeping watch, Cox placed a piece of hose in the vehicle's exhaust pipe and stuffed a sponge around it to ensure against leakage. He forced the opposite end into the trunk. One boy apparently guessed what was happening and attempted to push the hose away. At that, Cox retrieved a knife from the car's interior and poked it into the trunk until the hose was freed. The trunk was then sealed with air conditioning tape and the engine started. Two hours later, the bodies were extricated and dumped into nearby bushes where they remained undiscovered for four months.

Bassett, 449 So.2d at 805-6.

Additional evidence relevant to this appeal was introduced by the state but not mentioned by this Court in its opinion. The prosecutor elicited testimony from Robert Darnell of the Florida Department of Law Enforcement in front of the jury during the guilt phase of the trial which indicated the co-defendant Cox had given a statement in which he said Gus Bassett was the main actor and dominant force in the killings. T 512-14,551-52 ("Cox indicated Smith was [the strong man]"). During closing, the prosecutor clearly told the jury the nontestifying codefendant had said Mr. Bassett committed the crime, T 593-94, and on rebuttal, in discussing the relative culpability of the defendant Bassett with the co-defendant Cox, the prosecutor again made that argument. T 645-46. There was no objection to any of this testimony or argument. The prosecutor also argued the truth of the nontestifying codefendant's statement at the penalty phase of trial, to which there was again no objection. T 742.

After Mr. Bassett was convicted on both counts of first degree murder, the trial proceeded to penalty phase, which began the next day. T 678.

At the penalty phase, the state produced two additional witnesses: Connie Christy, who was Mr. Bassett's girlfriend, and James Wilkinson, a police officer with the City of Daytona Beach. The state elicited, without objection, the following testimony from Ms. Christy: she had seen Mr. Bassett in the possession of a sawed off shotgun (which the State said was illegal) T 692-93, and the

suggestion that he had stolen a motorcycle and luggage. T 694-695. When she was asked if she had heard Mr. Bassett "conspiring to murder," she testified she had not but that Mr. Bassett had made a statement that he was going to blow two men away. The state also asked her about a later incident which she described as "some kind of brawl at the Wreck Bar, and this guy ended up in a trunk." T 695. She was also asked her age (sixteen) T 691, which was used later in aggravation by the state attorney during closing argument. On cross, defense counsel asked whether Ms. Christy had taken a "tape measure" and "measure[d] the shotgun," T 697, and had her repeat the statement about the man being in the trunk. T 698. Officer Wilkinson testified he had seen the defendant when he arrested him for eluding a police officer and driving a motorcycle without a helmet after an 85-100 m.p.h. chase. At that time, Mr. Bassett told him he was 22 years old. T 699-700.

The defense case proceeded as follows. Defense counsel said he would call "Earl Smith," then asked Mr. Bassett his name, which he said was "Earl Lee Smith." T 701. Defense counsel continuously referred to Mr. Bassett as Mr. Smith throughout the examination (and trial). Counsel had his client testify that he had in fact lied about his age to a police officer, that he lied to others about his age, T 701-2, and had used a driver's license someone "gave to him" to obtain liquor. T 702. He also had Mr. Bassett testify to his birthdate, T. 702, and explained the incident about the guy in the trunk at the Wreck Bar. T 703. Finally, he allowed Mr. Bassett to testify to his age at the time of the offense, and led him to say falsely that he "would have been 18" a month or so after the crime occurred. T 704.

The prosecutor's cross examination, on every subject except that relevant to death sentencing, is reproduced below:

MR. WHITE:

Q. Whatever happened to this fellow that was in the trunk?

A. There was a perimity (sic) officer that walked around at the Wreck Bar to see that traffic got in and out safely.

And he heard the guy banging on the trunk and he let the man out.

Q. You didn't go tell that officer about it, though.

A. No. I went into the bar and left.

Q. You had a beer?

A. Yes.

Q. What is your real name?

A. Theodore Agustus Bassett.

Q. Not Earl Lee Smith?

A. No.

Q. You told this office that testified before you that you were 22 back in November of 1978.

That was a lie?

A. Yes, it was.

Q. Do you remember talking to a Bob Darnell when you were involved with this murder case?

A. Yes.

Q. And do you recall telling him how old you were at that date?

A. I believe I told him, too, I was 22.

Q. Do you recall another incident when you came in contact with a Frank Dean Genevese, another police officer from Daytona Beach, in 1978?

Do you recall teling him that you were 22 on that occasion?

A. I don't remember the occasion.

Q. It was an incident where there was--someone had allegedly and apparently falsely implicated in a car theft.

Do you recall that incident now?

A. Yes, I do.

Q. Do you recall telling that officer that you were 22?

A. Yes, I do.

Q. That was a lie also?

A. Yes, it was.

Q. It was a lie when you told Officer Darnell that you were 22?

A. Yes.

Q. Okay. So that's three lies. Have you ever been convicted of a crime?

A. Yes.

Q. How many times?

A. Three.

MR. WHITE: No further questions.

T 704-706 (emphasis supplied).

Defense counsel redirected by asking Mr. Bassett whether he also told the officers his name was Earl Lee Smith. T 706. He then put two correctional officers on the stand to attest to Mr. Bassett's "or Smith['s]" good behavior (most of the time) for two months while awaiting trial. T 706-711.

Finally, defense counsel called the prosecutor, Gene White, to the stand. He asked Mr. White to attest to the plea agreement and the co-defendant Cox's life sentence. T 712-15. Mr. White cross examined himself as follows:

> If it's all right, I'll just give my reasons for the plea.
>
> I felt -- early in the prosecution I felt that it was a death penalty case, but I was going to give them the benefit of the doubt at that point if they wanted to admit their guilt, plead guilty -- plead guilty -- it would be some type of indication of a rehabilitation on their part.
>
> I wanted to spare the family the burden of coming here to this courtroom and going through the ordeal of sitting through a murder trial in which their sons' bones would be exposed; they would have to hear the gruesome testimony, relive their entire life until this point.
>
> And I wanted to try to put it behind the family, wanted to try to save the State expense.

But the Defendant, Spider, said he wanted to challenge the Court; he wanted to challenge the evidence.

So he has that.

He knew that when he withdrew that he would face this Jury, face the parents, and put them through the ordeal the entire time.

Their bodies could not be released. Their bodies would be held pending all this.

He chose that option. No chance.

That showed his inability to rehabilitate himself.

MR. BEVIS: Objection to what he feels it showed on that part of the defendant.

THE COURT: Sustained.

MR. BEVIS: Are you through, Mr. White?

MR. WHITE: Yes.

REDIRECT EXAMINATION

MR. BEVIS:

Q. In point of fact, Earl Smith demanded that the state prove this case beyond a reasonable doubt and stood on his constitutional right to a jury trial of his peers, didn't he?

A. That's correct.

MR. BEVIS: No further questions.

MR. WHITE: And if I may recross myself. He certainly has that right. And I think the Jury can take that into consideration also.

T 716-17 (emphasis supplied).

Prior to closing arguments, the court listed the statutory aggravating factors for the jury, beginning with the standard phrase, then read the statutory mitigating factors, prefacing the list with the standard phrase. T 720-22. The only instruction given which was not contained in the standard text was one combining robbery with pecuniary gain. T 726.

The State closed with a number of arguments which were made to the jury without objection at trial, but which are challenged in this post-conviction proceeding. See T 726-43. The defense closing focused on the co-defendant's plea and life sentence, low age (17) of "Earl Smith," his smoking pot and drinking at time of offense, the analogy of an execution to a crucifixion, and a plea for life for "Earl Smith" or "Earl Cox." T 744-62. A number of damaging inaccuracies in defense counsel's closing are also challenged in this proceeding, and will be discussed in more detail below.

B. Post-Conviction

1. Introduction

The evidentiary hearing was limited to the issue of counsel's effectiveness at the guilt and penalty phases of this capital trial.[2] The case for demonstrating ineffective assistance consists of the following: the record and transcript on direct appeal; trial counsel's testimony relating to his investigation and preparation for trial; his proffered reasons for failing to object to inadmissible testimony and prosecutorial argument; his failure to produce evidence and legal challenges supporting the challenge to the confession, and in support of a case for life at penalty phase. Expert testimony on counsel's penalty phase representation was also presented by both parties. On the guilt phase prejudice prong, Mr. Bassett introduced the testimony of two witnesses who had been involved in eliciting information from Mr. Bassett prior to his confession: Mr. Brown, a private investigator hired by the victim's family; and Murray Ziegler, a Volusia County deputy sheriff. Also introduced relative to the confession challenge was the testimony of Richard Kane, initially appointed

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2 Prior to the evidentiary hearing, trial counsel's deposition was taken for use as substantive evidence, and was admitted at the hearing as Defense Exhibit 34. Exhibits marked during trial counsel's deposition (from trial counsel's file) were admitted as 1-33 at the evidentiary hearing.

to represent Mr. Bassett, Ms. Gardner, secretary to Judge Cobb, who permitted Mr. Kane to withdraw, and Mr. Darnell, who was one of the officers who obtained the confession. Related exhibits were also admitted.

To demonstrate prejudice at penalty phase, in addition to the record of the trial, Mr. Bassett introduced a number of records relating to his childhood, treatment at juvenile rehabilitation facilities, a psychologist, priest and social workers and family members who recounted his early life. Documents relating to co-defendant Cox's background were proffered but excluded.

The state's case consisted of the testimony of Howard Pearl, who was the defense attorney representing the co-defendant Cox, as its expert on penalty phase, and reliance on its cross-examination of witnesses and excerpts from exhibits relating to Mr. Bassett's childhood toward attempting to demonstrate a presentation of his background would not have affected the outcome of the trial.

2. The pretrial and trial conduct of counsel

Shortly after Mr. Bassett was indicted, Thomas E. Bevis was appointed to represent him on the charges. R 7. Though trial counsel never formally requested discovery, the state provided a number of reports related to the investigation which were generated both by the Volusia County Sheriff's Office and the Florida Department of Law Enforcement. Ex. 3-37, PCR 692-873. Counsel testified that early in the proceedings his "assessment of the case -- and I believe -- I'm sure it was concurred in, by Mr. Pearl, whom I discussed the case with at length -- was that if the defendants' statements went into evidence, they would almost surely be convicted" of first degree murder. PCR 914. Counsel's analysis of the likelihood of prevailing at penalty phase was the same: "I thought, all along, ... that if he were convicted and the statement went in -- the jury had knowledge of that -- they would recommend the death penalty; and I felt very strongly that the Court would go along with that recommendation." PCR 989; T 112,915-16. Counsel thought this was a death

penalty case "from ab initio." PCR 988. Under questioning by the trial judge at the post-conviction hearing, trial counsel said he felt a case for life would be "hopeless." PCT 203.

Counsel testified his fee application probably underestimates the total number of hours spent on the case, but was "as accurate a reflection" as he could now recall. PCR 913. Counsel also agreed a "fair statement" of his division of hours is that the "vast majority" were devoted to preparing for guilt phase, as opposed to the penalty phase of trial. PCR 913. The total number of hours reflected for pretrial work is 78.5. Ex.2, PCR 686.

Consistent with his pretrial assessment of the case, counsel focused his energies on suppressing the confessions based on the argument counsel thought was the "best chance": that there was insufficient proof of the corpus delicti to admit the confession. PCR 914.[3] To this end, he took depositions of six witnesses. PCR 906-907. All of those witnesses are related to the establishment of corpus delicti. Those are the only depositions taken in the case as far as counsel can recall, PCR 905, and the record reflects no other depositions.

After a hearing on the corpus delicti challenge to the admissibility of the confessions, the motion was denied. PCR 916. The transcript of that hearing was not included in the record on appeal of this case. While counsel received numerous FDLE and Volusia County Sheriff's Office reports relating to the investigation, he never deposed any law enforcement officers or anyone else, because, he says: "The way I assessed the case, was simply that if a corpus delicti was made and the confessions went in, then that was pretty much the state's case; without the confessions, they had a little case; with it, they had a very strong case." PCR 909. Counsel also challenged the statement at trial as involuntary, calling no witnesses except the defendant. T 440-500.

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3 Although counsel thought the confession would make or break the case, he held out little hope for its suppression at the trial level. PCR 922-23.

For the defense case against imposing a death sentence, counsel testified it was also "a fair statement" to say that "the bulk of this preparation came just prior to penalty phase beginning." PCR 913,991. Counsel conducted no independent investigation of Cox and obtained no records of either Cox's or his own client's background. PCR 986-1000. Investigation and preparation of the case for life consisted of: counsel speaking with jailers (at his client's request) PCR 990, talking with his mother, and having an "understanding" of the case. He also "evaluated the law as it existed, at the time, concerning aggravating and mitigating circumstances to see which, if any, applied. I did research on whether or not one might merge -- all of those things." PCR 991. Investigation into Mr. Bassett's background and childhood was described by counsel: "I think I discussed it, some with Gus, but my memory of it was that it was that it wasn't in tremendous detail," PCR 992. Counsel's "investigation" did not go so far as to uncover Mr. Bassett's true name: "He had an alias. I never was extremely clear what his real name was; either Theodore Augustus Bassett or Earl Lee Smith." PCR 886; PCT 84-85.

Counsel also testified he did have a strategy for penalty phase: "my strategy, primarily, was to make an emotional appeal." PCR 993. His focus in presenting evidence was his client's age, the fact the co-defendant was the dominant person in the crime and the co-defendant's life sentence. "I wanted to put it off as much on Cox, as I could." PCR 993-94.

3. **Evidence of Prejudice Produced in Post-Conviction**

(a) Guilt Phase: Factual and legal challenges to the confession not brought out at trial.

Counsel was tipped off to the participation of several people in obtaining Mr. Bassett's confession. In discovery provided him by the state, agents of FDLE and Sheriff's Office reports related the participation of a private investigator, Charles Brown, in the investigation. Ex. 3-15, PCR 692-722; PCR

50-60,76 (Bevis testimony). He took no action to further investigate Brown's involvement, even though he knew from information provided him, that: (1) Brown was working closely with the sheriff's department; and (2) Brown had several conversations with Mr. Bassett while he was incarcerated. There were other relevant facts bearing directly on the voluntariness issue actually raised at trial by counsel, and on the "initiation" question upon which the confession issue was ultimately resolved on appeal, which counsel did not investigate.

Both Ziegler and Brown testified at the post-conviction hearing to their participation in the investigation of the case. Brown was hired by one of the victim's families to investigate the disappearance of the two young men. PCT 41-43. Brown met with the sheriff's office on several occasions about the case and "frequently" exchanged information with that office. PCT 55. He also met with the State Attorney Jack Watson, and reported information to him. PCT 51-52, PCR 1174-1185, (Watson deposition exhibits). Brown authorized the sheriff's office to call him collect, and on one reported occasion, gave money to one of the deputies.[4]

Brown admits that on numerous occasions he spoke with Gus Bassett in meetings in his cell which continued up until days preceding the confession. He testified he "had clearance to talk to him." PCT 53. Brown prayed with him, gave him what amounts to a "Christian burial for the victims" speech, told him the victim's family might hire an attorney for him, and that he would try to get

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4 The payment was to Ziegler, and characterized by both as a "loan" which was paid back. PCT 56,39. Roy Mathews, an investigator for post-conviction counsel, testified Brown told him he had a deputy on his payroll, PCT 704-11. The receipt for the payment to Ziegler was contained in Brown's expense file for this case but was removed by Brown just prior to the hearing, even though the file was under subpoena, because he thought post-conviction counsel "might make it an issue." PCT 58,65-66.

him immunity if he talked. PCT 44-50. Ziegler (the deputy sheriff) and Watson (the state attorney) confirm Brown told them of these basic topics of conversation. PCT 28-29,32-34.

Two other witnesses, Robert Darnell of the FDLE and Elizabeth Gardner, the original trial judge's secretary, also testified on matters relevant to the confession. Ms. Gardner produced the calendar of Judge Warren Cobb, who permitted the withdrawal of the attorney initially appointed to represent Gus Bassett. For the day the withdrawal was permitted there is no record of a hearing held on the motion to withdraw. Ex. 35, PCR 1019-20; PCT 72-75. Mr. Darnell, who was in court when the withdrawal order was brought to the judge's attention, testified Mr. Bassett was not there, and that he did not wait to find out if another attorney would be appointed, proceeding directly to question Mr. Bassett. PCT 76-78. The first time Bassett knew of the withdrawal was when Darnell informed him.

(b) Post-conviction evidence relating to the penalty phase

i. Expert testimony on counsel's ineffectiveness

To defend the effectiveness of counsel, the state called as its expert witness a long-time local public defender, Howard Pearl. PCT 440-500. Mr. Pearl represented the co-defendant, John Cox, and was familiar with the general facts of the case, PCT 446-53. He was established (as stipulated) as an expert criminal defense attorney. PCT 446-50. Mr. Pearl offered his view that the many on the spot decisions required of trial lawyers, and the vagaries of interaction with jurors, make it impossible to determine from a cold record whether a trial lawyer is ineffective. PCT 457, 459. He would give great deference to the judgment of the lawyer who actually appeared before the jury. PCT 459. Mr. Pearl's opinion on this case was clear. He testified this was "inevitably a case in which death would be imposed," PCT 45, and that "absolutely nothing" could have been done that would have resulted in a life recom-

mendation or verdict. PCT 453.[5] Knowing that, Mr. Pearl took the life plea offered by the state. PCT 453. His professional opinion of Tom Bevis, through working against him as a state attorney and with him as a defense attorney, is that Mr. Bevis is a good lawyer, with an excellent reputation. PCT 453. Prior to testifying at the post-conviction hearing, Mr. Pearl had not read the record of Mr. Bassett's trial -- guilt or penalty phase --and had no knowledge of how trial counsel actually performed. PCT 457, 465. Specific excerpts of the penalty phase trial were brought to Mr. Pearl's attention for the first time when he was on the stand.

Mr. Pearl agreed that even if defense counsel considered the penalty phase case a "dead loser," the obligation to investigate and prepare remained. PCT 466, 468, 473. ("It is the defense attorney's duty to investigate all available sources of evidence in order to determine whether or not any of them may be useful to his client in the presentation of a defense. I don't think any lawyer would argue with you about that." PCT 473.) Mr. Pearl related that even during the time this case pended pretrial, his practice was to obtain client histories, and almost invariably have a psychological evaluation conducted. PCT 468-69.

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5 Of course, Mr. Pearl represented the older co-defendant, who Mr. Bassett said actually committed the killings. Mr. Pearl had backed off his extreme position somewhat by the end of his testimony:

> BY MR. MALONE:
>
> Q. Mr. Pearl, you don't know all the facts that this jury heard, do you?
>
> A. No, sir. I don't know any in fact. I was offered the record to read and I declined to read it.
>
> Q. So, you can't say --
>
> A. No, sir. I don't really know why I'm here.

PCT 500-501.

Consistent with the state's contention that introduction of evidence of Mr. Bassett's childhood and background would open the door to unfavorable testimony, the state sought Mr. Pearl's opinion on certain types of mitigation testimony. Asked whether he had "any theory of putting mothers on the stand," PCT 457, Mr. Pearl said his experience "has been negative" mostly because "every one of them that [he had] ever met had her own agenda," that is, "justifying their own life and their own actions in essence saying, where did I go wrong..." PCT 458. However, Mr. Pearl later agreed he could not make a blanket statement that the testimony of a defendant's mother would always be unfavorable. PCT 458, 471. The state then summarized what it thought was the unfavorable information that would have been revealed had Mr. Bassett's family and childhood background been presented in mitigation:

> Q. Let me ask you another hypothetical. Assuming you had the facts where the individual, since the age of nine or ten years old, shows aggressive behavior, problems in school, disobedience toward teachers.
>
> The mother thought -- the mother's testimony through the records showed that he participated in thefts in neighborhood houses, he picked on his brothers and sisters, that -- let me just take a second.
>
> That they had shown that he was the worst kid on the upper level in school for discipline for boys of thirty-five children; that he stole two cars that the mother knew of; that fighting in school, unacceptable behavior at home, staying out late.
>
> A psychologist whose opinion was that Mr. Bassett was -- was not surprised that Mr. Bassett had worked as an accomplice to kill someone; that he was very violent -- had violent behavior; that he thought about murders; that he though about death.
>
> That there were many episodes when he gave him a fact situation that he turned into a violent situation.
>
> A. You're talking about the psychologist?
>
> Q. He gave his opinion as to the personality make-up that he was anti-social, things of that nature, would you think that would be something you would want to present in a penalty phase of a murder case?

PCT 459-60.

To that question, Mr. Pearl's responded (over objection as a misleading and inaccurate hypothetical):

> THE WITNESS: Allow me to answer it in as general a way as I can since -- Of course, I have not heard or examined any of that evidence or testimony ...
>
> A. The lawyer's job in defending a person in the second phase of a capital case is to establish, as best he can, mitigating circumstances which he hopes will outweigh the aggravating circumstances, and, of course, he can establish not only statutory mitigating circumstances but non-statutory mitigating circumstances.
>
> And, once again, the dynamics of every case is different from any other case and the lawyer's judgment about what to use and what to refrain from using is a highly personal profession kind of decision which is very difficult to second-guess or criticize.
>
> But, my reaction to the facts set forth in your question and accepting them for the purpose of this answer, if accurate and true, it would sound to me as if I was establishing aggravating circumstances in a sense.
>
> Now, they would not be statutory aggravating circumstances but I would rather that a sentencing jury didn't hear about my client's bad background if he had one.
>
> I don't think I can say more about that without not knowing what case and what evidence you're talking about.

PCT 460-61.

On cross, Mr. Pearl reiterated his basic approach: "I would certainly, in any case, prefer a sentencing jury to think that my client may have been a choir boy than to remove all doubt by telling them that he was not." PCT 468. He agreed, though, that an attorney cannot make a sound decision whether to present background mitigation unless he had first conducted an investigation and knew what was there. PCT 473-474.

More importantly, while on the stand Mr. Pearl for the first time was made aware that much "bad" information had actually been presented to the jury by the state and admitted he really didn't know <u>what</u> effective counsel should do in

that instance. PCT 486. He did know, however, that he would have objected to much of the evidence the record shows was admitted without proper objection. For instance, Mr. Pearl was asked his opinion of the state seeking to admit evidence of the defendant possessing illegal firearms, PCT 483, that he had conspired to murder another, PCT 487, had stolen a motorcycle, and had fled and eluded a police officer. PCT 486. Mr. Pearl said "during a phase two, any time I heard a question which to me sounded as if counsel was trying to elicit evidence of non-statutory aggravating circumstance, I would object and move for a mistrial." PCT 489. "You've kind of stumped me with the business about things coming in like if he was convicted of stealing motorcycles. I can't understand how that kind of thing would come in to be heard by the jury during sentencing phase." PCT 486-87. The state suggested on re-direct that the evidence was admissible to rebut the statutory mitigating factor of a lack of criminal history, and Mr. Pearl agreed such had been admitted in the past over his objection. PCT 489-90. However, on recross, his position on this issue was clear:

> I would raise objections. It may very well be that counsel on the spot felt an objection would be -- would irritate the jury and it would be for him to decide, but ordinarily, certainly during the life/death phase of a trial, if I see anything that's even remotely found, like it could be error, I would object, make the objection and preserve it and make a motion for mistrial automatically if any error, if I saw it, took place during that phase of the trial.
>
> It's pretty delicate stuff.

PCT 498. Even if the court advised the objection would be overruled (in a pre-trial conference), the state's expert would object to test the court's ruling on appeal. PCT 499-500.

Finally, on cross examination Mr. Pearl was also asked his opinion of the effect of an attorney presenting misleading information to the jury. The specific misleading information brought to his attention was putting a client on

the stand and leading him to testify to a false name and age. His expert opinion is that jurors' knowledge that they are being fed false information is devastating: "If the jury got the idea is any manner at all that they thought they were being misled by the attorney during closing argument, certainly it would weigh heavily. False in one, false in all, you know the rule." PCT 480.

Joan Bickerstaff was called by the defendant to testify as an expert witness.[6] She had read the record of the penalty phase, this Court's opinion on Mr. Bassett's direct appeal, and the amended motion to vacate judgment and sentence. PCT 333-34. Her unique perspective is that she was preparing and trying capital cases on a specific appointment in an adjoining circuit during the same time this case was prepared and tried. Her opinion was that Mr. Bevis was ineffective at penalty phase and she provided the reasons for that opinion. PCT 346. "I believe that Mr. Bevis, at the beginning of the trial, number one, should have known his client's real name, since Mr. Bevis continued to refer to the defendant is this case as Earl Lee Smith, which was one the of aliases." PCT 348. Ms. Bickerstaff summarized the bases for her opinion that defense counsel was ineffective:

> A. I feel that Mr. Bevis' overall presentation of the penalty phase was deficient. I believe that he failed to present an adequate rebuttal to the state's case. He failed repeatedly to make objections to what I believe were objectionable statements made by the prosecutor during his argument; objectionable questions which were asked of the state's witnesses; and particularly the soliloquies that Mr. White involved himself in when he was on the stand cross examining himself, after having been called as a defense witness.
>
> I think that there was a lack of evidence with regard to any extensive efforts to prove any mitigating factors, including the statutorial defined mitigating factors, but also any type of mitigation which would help to explain or serve to convince a jury that a sentence of life imprisonment was more appropriate in the case.

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6 Her qualifications are set forth at PCT 324-333.

> I feel also that Mr. Bevis -- even in those cases where his objections were sustained, fell short of doing what was appropriate under the circumstances, which was to request corrective or curative instructions of the court to the jury. I think most lay people have no idea what it means when an objection is either overruled or sustained. They have no idea what effect that should have on their consideration of the testimony, and unless they are cautioned by the court they will consider it in its totality.
>
> I think that -- It appears to me as if the gentleman gave up after he lost the guilt phase and did not make any adequate effort to prepare himself or to present any type of convincing case at the penalty phase. It gives the appearance of someone who spent all of his effort attempting to keep the case from coming to this point in time, and then when it was time for the advisory penalty phase of the case to go forward, he was unprepared. He found himself strictly in a defensive posture. The use of some of his witnesses, to the extent that he even presented the case for this defendant, was I think extremely ineffective.

PCT 346-47.

Ms. Bickerstaff gave her opinion in response to specific issues of ineffectiveness, which will be referred to where relevant in the argument below.

ii. Mitigation which could have been presented

(1) Childhood and social history

How grisly the killings were and how bad Mr. Bassett's character was at the time of the offense makes up the entire picture known to the jury, judge and this Court in finding death to be the proper sentence. How Mr. Bassett got to be who he was at that time, and why, no sentencer ever heard. The story of Gus Bassett's childhood and adolescent years, and the splintered, chaotic, abusive, and impoverished circumstances under which he grew up, could have been told through family members, a priest, nuns, social workers, a psychologist, and through school and treatment records. The evidence presented below established that there is a tragic story the sentencers never knew when they recommended and imposed death.

Theodore Augustus Bassett, Jr., was conceived, literally, in violence. His mother, Mary Freeman, was raped by an acquaintance (Donald Leece) and Gus was born September 21, 1959 when she was nineteen. PCT 410-11, 428.[7] Gus was told about the circumstances of his mother's rape; he was exposed to this knowledge when he was only five. PCT 411, PCR 1147. When Ms. Freeman was eight months pregnant with Gus she married Theodore Augustus Bassett, Sr. He was nice at first, Ms. Freeman testified, but changed dramatically after Gus was born. PCT 412. While the baby was still in the hospital, Bassett, Sr. told the family Gus had died, then said he was "just fooling." PCT 414. Bassett, Sr. later threatened to kill Gus by putting plastic bags over his head while he was still in the crib. PCT 412. Ms. Freeman's brother testified through affidavit that Theodore Bassett, Sr. threatened to do this "many times." PCR 1147.

The senior Bassett was also cruel to Gus's mother. She testified she still has scars from his beatings. He tried to strangle her at least once. PCT 416. Gus saw these beatings when he was young and would scream for "mommy." PCT 413; PCR 1148. Mrs. Freeman was working in a binding factory at this time making $45 a week, and Bassett, Sr. would take all but ten dollars when she got home. PCT 415. For several years, the family had to live on AFDC and welfare, and had little to provide food and shelter. PCT 420. Bassett, Sr. left, then the two had a short reconciliation around Christmas of 1964, which later resulted in Tammy Bassett's birth. PCT 418. Shortly afterward he abandoned the family again, and so ended Mrs. Freeman's relationship with Theodore Bassett, Sr.

The next major male role model to enter Gus's life was Leon Charest. PCT 419. Mr. Charest was living in prison just before Ms. Freeman married him. PCT 419. Charest was, for a short time a good father and provider, according to

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7 The State cross-examined Mr. Bassett's mother about the rape, revealing further details. PCT 428. Dan Berger, Ms. Freeman's brother, testified through affidavit that Leese "spent most of his life in jail and was murdered one week after his release from jail in 1978." PCR 1147.

Ms. Freeman's testimony. But his alcoholism and philandering soon dominated the relationship, and it ended. PCT 420. Ms. Freeman's brother related he "had to go to Mary's house and make Charest stop beating her just like I did with Bassett. Gus saw Charest beat Mary which upset Gus terribly." PCR 1148. Contemporaneous records discussed below provide more detail about the men in Gus's life.

In the meantime Gus had developed something of a relationship with his grandfather who lived in the area. His grandfather, the most consistent male figure in young Gus's life, was an alcoholic binge drinker who constantly fought with his mother over how Gus was to be raised. He was so extremely lax at imposing any discipline. PCT 421-22; PCR 1148. Treatment records reflect how the tension between him and Ms. Freeman created more turbulence for Gus in his childhood.[8]

Gus's unstable family life spilled over to his behavior and performance at school. From kindergarten, he had an extremely high absence rate, missing for instance, 27 days in 7 months at Huntington School.[9] Ex. 39, PCR 1026-1037. His grades were low from the start. PCR 1027-1040. Board of Education records reveal Gus as a child consistently scored nearly three grades below his actual level in reading scores. Id. By the age of seven, a school psychological report revealed Gus's "psychological adjustment" was "poor," as well as his academic progress, and that he was "going on to second grade for social

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8 Tammy Bassett, Gus' sister also testified at the evidentiary hearing about the difficult family circumstances. PCT 313-321. The State's cross-examination revealed how the same upbringing affected her. She, too, had been in trouble with the law, having been convicted of a felony. PCT 321.

9 His mother explained Gus was being beaten and picked on by the kids in school during these years. PCT 423-4.

reasons." PCR 1030. The same pattern remained through third grade, spent in his third elementary school. While in third grade, a psychological study revealed an "average" IQ[10], and that:

> There is . . . a great deal of anxiety operating with Teddy which is manifested in his self-doubt, his distractability and his low tolerance for failure. Ted's self-image is quite poor and he tends to unconsciously identify with social isolates whom he considers rather foolish and ridiculous.
>
> The level of cognitive functioning on his Rorschach, is not comparable to his WISC IQ, and suggests that he becomes so stimulated by emotional factors, that he distorts reality and is unable to use his intelligence very effectively. . . .
>
> The Rorschach further suggests that a good deal of anxiety is operating with this boy and that he is tending toward an orientation which will be marked by a general unresponsiveness to others and poor interpersonal relationships. This no doubt stems in part from his relationship with his parents which for him is such a conflicted area that he can handle it only via complete avoidance.
>
> Teddy's primary defenses are denial and avoidance which are not sufficient to prevent the break through of impulses, many of which are aggressive. There is some suggestion that Teddy's social consciousness causes him to experience guilt because of these impulses and he tends to turn aggression inward on occasion. These factors plus indications that Teddy is experiencing a good deal of anxiety and many dysphoric feelings, suggests that Teddy is in need of professional help.

PCR 1048-49.

The high number of absences and academic problems continued to the Fifth grade.

A May 7, 1971 "pre-admission summary" was completed to determine whether Gus should be admitted to Mt. St. John's School for Boys. The summary noted the following immediate family situation: Bassett, Senior had a "history of unstable employment and was a heavy drinker," and "his address is unknown"; Gus's mother and Leon Charest, her husband at the time, "have experienced recurrent marital problems," and that Leon Charest and the grandfather were alcoholics. The summary also noted Gus's mother "believes the absence of an

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10 In his youth, Theodore Bassett, Jr. was referred to as "Ted" or "Teddy".

adequate father figure and the marital discord have adversely affected Teddy," and that she "accepts the possibility her emotional problems and those of her two spouses were related to Teddy's problems." It concludes: "She does not seem, however, to have the capacity, at this time, to deal with her son's problems while he's at home, when she is trying to cope with her personal and marital problems," and recommends Gus, ("Teddy"), be placed at Mt. St. Johns. MSJ, PCR 1050-51. On June 21, 1971, at age eleven, Gus was voluntarily admitted to Mt. St. John's. Since his family was on AFDC, the records show, his stay was paid for by "state welfare." PCR 1052. He actually entered the school in August of 1971.

Father Kenneth McDonald, the Director of Mt. St. John's, testified about the school and about Gus at the evidentiary hearing. Father McDonald is a priest in the Catholic Church, a Chaplain at two prisons, and since 1943 has directed Mt. St. John's. He describes it as a private, non-profit center providing "residential treatment for boys," located in St. John, Connecticut. PCT 223. His memories of "Ted" were mostly "bland," indicating to him he had not been in serious trouble at the school. PCT 225. Most of the boys who came there had troubles at home. PCT 235. His recollection was that "Ted" "didn't relate easily with the other boys ... I have a distinct picture that he very much wanted friendship, and I think at times he could go too far to seek it." PCT 225-26. He recalled "Ted" "could be easily led" and that some of the problems he had there related to his desire for friendship. Ted would provoke others to get adult attention. PCT 225-26. He recalls Ted had "a great longing to be accepted." PCT 227. The prosecutor crossed the father about incidents in which Gus behaved poorly, items of which Father McDonald had little or no knowledge. PCT 229-31. Father McDonald testified he would have come to testify at trial, but was never contacted. PCT 228.

David Merry, a social worker at the school, also testified at the evidentiary hearing. He worked with "Ted" while there, and also characterized him as a "follower." PCT 307. He described Ted's background of having "weak role models," "no father figure", and that the men in his life were alcoholics. PCT 304-306. He felt Ted was getting better and responding to the school's treatment, but then was pulled out against his and other's advice. PCT 308.

Two nuns who taught at Mt. St. John's, Sister M. Rosemarie, and Sister M. Anthony, also testified on Gus' behalf, through affidavits. PCR 1150-57. Sister Rosemarie taught at the school from 1970 to 1974, and was one of Gus' teachers. She remembers "Ted" as "a sloppy, fat boy, with a baby face and dirty blond hair." She also testified he "was a very poor student who needed constant guidance, support, and encouragement." PCR 1150. "Ted liked the sisters very much and responded well to encouragement and attention. He simply enjoyed having someone mother him." PCR 1151.

Sister Rosemarie explained some of the details of "Ted's" attempts to get attention "in a negative way," and said "he was always the butt of jokes and verbal abuse," and that the kids used to call him "Bassett hound." He would cry and scream when the other boys harassed him. She says "Ted" "never took the initiative in anything" and that he "needed someone -- like a mother or sister -- to take care of him." She concludes:

> I remember Ted with great affection. He is often in my prayers and I often have my students say special prayers for him.

PCR 1152. No one contacted Sister Rosemarie, but if they had, she would have testified.

Sister Anthony was also one of "Ted's" teachers. She recalls him as "chunky child, with a bad complexion and dirty blond hair." PCR 1154. She says Ted should have been in seventh grade at the time he was there, but managed to do "only average work between a third and fifth grade level." Sister Anthony

also describes "Ted" as in need of attention "and so tried very hard to please the sisters." She also related Ted was ridiculed by his peers, and because of his need for attention, "Ted was a follower who could be easily led by the peers whose approval he sought." PCR 1156. Finally, she says "Ted was a good boy, who was very nice, and I remember him fondly." She would have also come to testify, but was never contacted.

Mt. St. John's records contain several notes which give contemporaneous accounts of the family's problems, and Gus's resulting behavior.

His first psychological evaluation, by Dr. Stephen Bank, was conducted on December 1, 1971.[11] Dr. Bank at that time suggested "his dynamics are of the sort which will respond to continuous every day support and encouragement and expression of interest

> In contrast to those MSJ boys who benefit from limit-setting and confrontation, Gus will probably close up and become excessively anxious when placed in high pressure situations. He fears violence or any implication of aggression. With support I would expect him to grow in self confidence and to be able to handle his fears of being destroyed.
>
> The focus in this case should be not with the disciplinary aspect, but with actively teaching him how to make and keep friendships. Much of his destructive nit-picking social behavior appears to be a desperate attempt to get recognition from other boys.

PCR 1053.

The day after that evaluation, Gus's mother, then identified as Mrs. Charest, attended a treatment conference. The notes of her conference provide a dramatic summary of the home life to which Gus had been subjected:

> Mother has reported that her present husband is an alcoholic and due to recurrent marital problems several separations and reconciliations have taken place. Mother has reported Mr. C to be unpredictable at times and that he has physically abused her and threatened her life.

* * *

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11 Dr. Bank also testified at the evidentiary hearing. His testimony will be discussed in detail, below.

At present it appears mother is overwhelmed with problems of trying to resolve her marital conflicts while maintaining her four children at home. Maternal grandparents, who reside in the above apartment within the same building, have at times added to her problems by undermining her parental authority.

PCR 1055-56.

The notes also summarized Gus's difficulties at the school to that date:

Since placement, T has had difficulty adjusting to group living. His verbally provocative manner of relating to peers has resulted in peer abuse, both physical and verbal. Friendship, when it occurs, tends to be with social isolates who can easily lead T into trouble. Initial discipline and/or reprimand caused T to cry which made him more vulnerable to peer abuse...

* * *

I view T as a rejected isolate in group living, as he is actively involved with his peers, however, finds himself rebuffed when he reaches out to peers in a provocative way. Finding himself rejected tends to evoke hostile impulses which keeps the cycle going. T also employs avoidance through fantasy and tries to compensate for his poor self image by telling exaggerated stories. It appears that T's anxiety, to a large extent, has interfered with his comprehending the marking system and other aspects of the program.

As noted previously, T has been responsive to individual support which at this time needs to be continued. T is involved in a newly initiated group whose stated purpose is bettering peer relationships. Effort should be directed at supporting and encouraging T's involvement in small group activities that will provide areas of acceptance and success.

* * *

A social worker reported on the same day that:

His peer problems are more serious and numerous than those of any boy in the Upper Dorm. He has been moved to three different rooms in three months because of fights and dissension he inspired, and he has gradually assumed the role of "punching bag" for the entire dorm. Characteristically soft, weak, sneaky, whining, he is nonetheless impulsively loudmouthed and provocative. To his peers he is simply a bag of wind begging to be smacked, and they accomodate him with a frightenly cruel and merciless consistency T.'s continued failure to fit in to the living group milieu has been a source of concern and unending frustration to the entire Upper Dorm staff.

PCR 1057 (emphasis supplied).

The next three "Sunday Counseling" sessions with Mrs. Charest reveal the gradual deterioration of what family Gus had. On January 23, 1972, Gus's mother said she had found him more "open," and her authority "less susceptible to being undermined by the grandparents." PCR 1059. (Gus was allowed to go home on weekends). By March, much of the time of this "Sunday session" was spent in a discussion of Mrs. Charest's own father's drinking problem, and how it interfered with her raising of her children. PCR 1060. The April session was "somber and depressed" with Gus's mother pointing out a number of behavioral problems that Gus had exhibited. She was separated from Mr. Charest, and divorce was impending. The social worker pointed out how the family problems may have been contributing to the behavior, with Gus seeing "his mother was unhappy," and that "Gus might have felt his stay was tenuous." By May:

> [Mrs. Charest] reported that the divorce had been finalized and that this had removed a great weight from her mind. She reported that occasional threats are still leveled at her by her exhusband and pointed out that during her recent hospitalization, he arrived at the hospital and b[r]andished a knife while threatening her, on one occasion. In spite of this, she seemed content with her situation and has received assurances from her attorney that exhusband will not be allowed to come into contact with the children.
>
> She reported that this last vacation weekend had gone very well with Gus. There had ben no difficulties whatsoever to report; he had done very well, followed her directions very well, and in short had performed without difficulty at anytime. She reported that the other children had responded much better to this weekend of Gus than had previously been the case.
>
> * * *
>
> Mrs. Charest did sign a request that Mr. Charest not be allowed to visit Gus at Mount Saint John.

PCR 1062.

While Gus's behavior was improving, and the weekend visits were going well, the behavioral and academic troubles continued:

> It was reiterated that in school T is in the 7th grade, however, working on a third to fifth grade level. Although T is receiving A's and B's, it was considered essential that T, as well as mother, realize what level he is working on so that they will not misinterpret the report cards. Academically T would not be able to function in a 7th grade at a public school, and it appeared that there are no existing facilities in T's community that could provide the remedial program he needs. T's behavior in school has improved, as he is less provocative in relating to peers and has modified his reaction to peer abuse. T continues to daydream in class and lacks motivation.
>
> In discussing T's personality traits, it was indicated a major problem has been his inability to make friends. He was viewed as a sad, chronically, depressed boy who has a poor self image.

PCR 1063 (11-2-72) (emphasis supplied)

Gus was discharged from MSJ on January 22, 1973, against the advice of the school. PCR 1069. Board of Education records at that time show Gus performing well below his grade level.

Dr. Stephen Bank, a clinical psychologist, evaluated Gus during his stay at MSJ, and his evaluations provide an insight into Gus's emotional problems already deeply-imbedded at age twelve.[12] Dr. Bank's expert testimony at the evidentiary hearing, both parties here agree (for different reasons), was startling. Dr. Bank testified to a series of tests he conducted on Gus at the age of twelve. Dr. Bank summarized his clinical impression of Gus's personality as "a needy lost soul who was drifting into any situation that would get him organized, and that would give him some structure, and that would give him some attention."

> It didn't matter to him what kind of situation that would be. It could be provocative. It could be getting into a fight.
>
> He wasn't a ring leader. You have ring leaders at school, and he didn't have the kind of social poise to become a leader of boys.

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[12] Dr. Bank was qualified as an expert witness by the Court without objection. His background and qualifications are extensive. PCT 236-238.

> He was always a follower, a kind of kid that would jump on to the pile and then get caught after the pile up occurred.
>
> He was a depressed youngster and a very nervous one, and one who where ever he went was wondering what harm might befall him.
>
> He had gotten into so much trouble by the time he had gotten to Mount St. John -- This child had been into trouble since the beginning of his school days. It was almost a part of his identity. He almost believed that things were not going to work out.

PCT 252-53 (emphasis supplied).

Dr. Bank repeatedly characterized young Gus as a person who was "pliable and unguarded and easily influenced by others ... where there are no clear right or wrong ways of doing things" he became "nervous" and "unable to think ... I characterized him really as, in a certain sense a dependent person ..." PCT 298 (emphasis supplied). He was in Dr. Bank's words, "very jumpy and erratic." PCT 271. Considering Gus's family situation, Dr. Bank testified, Gus's personality and the behavior he exhibited were "very typical... There is, of course, a wide range of reactions to social and emotional deprivations and abuse. This is certainly a major theme that you will see. It is one of several major things that you will see with children of these types of background -- especially children who have had an alcoholic parent." PCT 253.

Dr. Bank had retained his raw data from the testing he conducted with Gus, and it was these notes and materials that provided the most revealing and shocking insight into the workings of Gus Bassett's mind at age twelve. He was clearly a very troubled child. On the Thematic Apperception Test, Gus was asked to tell stories about different pictures or drawings. The stories the twelve year old boy Gus told were "depressed and morbid," including a preoccupation with death and violence (generally related to his family) and with being

mortally harmed PCT 272-79. This twelve year old child had been deeply affected by the violence he had been exposed to in his childhood. Dr. Bank read Gus's responses, given in 1971. This is Gus's response when he was shown

> [a] picture of a woman in a dress, sitting as though she is having her portrait painted. "The husband went to war and she is sitting and worrying because he is supposed to come home today. He's late. She's worried. The kids ask where is Dad. The kids start playing records, and she goes up to yell at them. Her husband's really dead, but before he died he hired a man to kill the wife because he figured, 'If I can't have her, nobody will have her.' Then the man killed the wife and all the kids. There were eight kids."

PCT 275.

The sad stories Dr. Bank recounted, being told by Gus as a child, are consistent in their tragic themes. "Every card, in a remarkable way, has a feeling of doom in it." PCT 249. Dr. Bank discussed several other of Gus's responses to the tests, and his impressions from those responses:

> He was very easily -- in every single one of the cards, something very unhappy happens to the child in the drawing. There was always an unhappy outcome in every single card.
>
> And I was impressed also with how easily influenced he was.
>
> For example, in the first drawing there is a picture of a boy standing in front of a table on which there's a violin. And here's what Ted said -- Would you like to --
>
> Q. Yes.
>
> A. He said, He takes lessons. His teacher got mad at him and his teacher said, 'You're dumb.' so the kid concludes. 'Well, I guess I'm really dumb because they say I am.' And then the kids gets fed up with the lesson."
>
> So, again, he's sort of told something and he believes it rather than fighting back against it or challenging it.

PCT 248-9.

Dr. Bank also related stories reflecting Gus's dependent personality:

> In two cards there's an individual who is pressed into service by somebody else. And they both get in trouble. A lot of his cards have people getting in trouble.

> Here's one: There's an older man and a younger man standing in a drawing room. And here's the way the card reads at age twelve: "This guy -. There are two guys. One of them said, 'There's a bank we can rob.' Then he waited a minute. They were worried about cops. Cops came over to them and put the older one under arrest. He busted out. They electrocuted the younger one because he had killed a girl before. The older one was shot in the back."
>
> Again, the theme of doing something wrong and being doomed, and pressed into service by somebody. There's another one of an acrobat climbing up a rope and he says -- There's only one person in the picture, but he says, "This guy's in the gym and one guy says to him, 'I'll beat you climbing.' So they both get drunk."
>
> See again, throughout the testing he has people getting drunk because they're afraid of what they are going to do. They know what they are going to do is wrong.
>
> "They both get drunk and now the guy who was afraid to climb now has the courage and starts to climb. The race begins.
>
> "The guy's rope breaks and he falls. The other guy's rope breaks and he falls. The moral is: I should never have tried to come here."
>
> There are repeated scenes of robberies which fail and which the perpetrators of the robberies are punished and caught. They are punished for the crimes.

PCT 249-50.

Other responses from this twelve year old child are also remarkable for their relentless tragic outcome:

> ... Here the individual, a boy -- a lady's son, is killed.
>
> It begins this way -- There's a picture of a woman and a younger fellow. I call it the mother-son card, but you can put a lot of things into it. He says: "This reminds him of Perry Mason." This is age twelve. "The lady's son got killed, and she called up Perry Mason and asked him to investigate and see how the boy died. He found an overdose [of] LSD, and then Perry found the person who had given him it, and had also taken an overdose." The person who gave LSD also overdosed himself.
>
> And then he says: "The mother is pretty sad, and that's the end. Things stay lousy for her because that's all she had to live for." My interpretation of this story is that the identification for Ted is with the dead boy.

PCT 272-73.

* * *

> "Now, here's a kid who gets in trouble by being hit by a car. He's playing outside and he gets hit by a car.
>
> "The boy's on the critical list and the father comes to see him. The father leans over to him and says, 'Don't strain yourself.' The kid dies. The father commits suicide." These themes of, "Does my father really care about me?"

PCT 251.

Dr. Bank concluded Gus was not sociopathic: "it is a kid who is worried and preoccupied, but not one who sees himself as even enjoying beating the law. Because he gets caught every time. His conscience and society always catches him...." PCT 251. More perspectives from this twelve year old:

> This is a vague picture of a cave. You might see a bat flying by; you might not. "Here are people who are wishing at a waterfall and throw money in as they were making their wishes. But this skinny animal snuck up on them and killed one of them, and the other person fall into the falls. Then the animal dies because like when a bee stings you, the bee dies -- the animal died." That's the raw story.
>
> * * *
>
> These two stories are just a violent death happening to a person. These innocent people with whom -- and this innocent boy with whom, I think, the twelve year old Ted identified are just sort of -- they're gone.

PCT 273.

Dr. Bank concludes Gus had "a real preoccupation with being harmed, and an inner belief that life just could not work out. It's a very devastating belief to have when you are twelve-years old, when life for most twelve-year old boys is looking pretty good." PCT 274.

Gus was withdrawn from MSJ at age 13, and Board of Education records of January, 1973 show his mother had by then married Mr. Freeman, and Gus was entering the seventh grade. Id. He failed seventh grade as the high absentee rate continued. A psychological evaluation conducted by Dr. William V. Moore on December 22, 1973, noted Gus's IQ of 85, a mental age of 12 years for the 14

year old Gus, and testing "significantly below his grade norm." Dr. Moore concluded the dynamics of the chaotic family situation were interfering with Gus's emotional well-being, and noted "dysphoria" and "breaks in his reality testing."[13]

> The reported confused parental authority in Gus life posed by no father in the home, mother the boss, but not really in that his grandparent(s) seem to dilute her authority without providing clear and reliable control themselves, sets Gus up to be confused per se; the resultant of a complicated Oedipal drama and adolescent sexual panic reaction.
>
> . . .
>
> Gus needs a long period of personal psychotherapy to help him begin to integrate his emotional development. To make this effective, however, it must be within the framework of Family Treatment, because it will finally be through clarifying and stabilizing the home-environment impact on Gus that he will solidify his personality development into a stable reality-oriented and integrated whole (currently, there are breaks in his reality testing.) Socially acceptable male peer group activities might also be highly useful to Gus. ...

PCR 1071-74

By February, 1974, when Gus was fourteen, Dr. Moore recommended against commitment to a juvenile detention facility (Long Lane), though Gus had been getting into trouble, but noted: "Should further acting out occur his commitment to a mental health facility should probably be considered." PCR 1075. (emphasis supplied) The downhill slide from MSJ was at full bore by the middle of the school year. Gus missed 61 out of the 123 school days. During a social worker interview of Gus's mother in April, 1974, she notes:

> Toward the end of the social interview mother related that Gus' father is in actuality a Don Leece. She stated that she was raped by him and that he was mentally disturbed. She wonders if Gus may not have inherited some psychological disorders. . . .

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[13] Dr. Moore testified through affidavit that "Gus could be influenced by an older person he became attached to and dependent upon," and that considering his background and testing, the facts of this case "could cause Gus severe mental or emotional disturbance and he might thus be unable to conform his conduct to that required by law and society." PCR 1159-1165.

> Mother is rather verbal and seems to be interested in the boy although she appears to be somewhat overwhelmed at times.
>
> Maternal grandparents' interference, particularly the grandfather, in this case has been significant.
>
> P.O. feels that mother is rather a poor judge and sometimes responds inadequately to certain situations that Gus presents to her. Although she does try and has been entirely cooperative P.O. feels that the situation has reached proportions that are beyond mother's control even with the help of psychotherapy.

PCR 1078-80.

Gus was retained again in seventh grade at the age of 14, having flunked nearly all of his courses, and absent 100 days of the school year. PCR 1043-45. He was sent to Long Lane, a juvenile detention facility (PCR 1043). Long Lane records show Gus ran away several times. (Long Lane). The progress reports and monthly interviews are sketchy. The July 1974 monthly progress report said Gus "is no longer the acting out boy he was when he came here. His frustration level has increased as well as his ability to tolerate other people's faults." Notes of a counseling interview say Gus was "making good adjustment ... with peers and adults," and that "he has a long history of school maladjustment. He recalls that even from an early age he had difficulty with teachers and peers. He has definite plans to terminate his education at age 16." "At present much of Gus's behavior is directed for peer acceptance. In delinquent acts he admits that he tries to impress others by showing how brave and capable he can be." PCR 1109.

An August 1974 report by Andrew Whitehead, Counseling Team Chairman notes: "Mother and Stepfather seem interested in the boy, but constant intervention and interference on the part of maternal grandparents have been problematic. Both mother and stepfather have been attending counseling sessions held by Dr. William Moore, clinical psychologist in Meriden. These sessions have helped them understand Gus and be able to more consistently control his behavior. This worker feels that home placement is indicated with continued counseling, but

only at a later date which I strongly urge that placement be deferred until the family is settled in new residence with more counseling and with Gus having more of a stable placement environment, perhaps a year, meaning a group home, before his return to home." "It is noted that Gus has established many negative relationships in his home, community, especially school, and also his behavior at Long Lane being characterized as poor. He will need either a very specialized school program, or if possible consideration for an extended long-term group home. At this point we have considered the AREBA program in Manhattan, N.Y." PCR 1119-20.

On September 9, 1974, Gus was placed in AREBA. The Placement Report says: "We visited AREBA in New York City. The staff there reported to us that the boy is making satisfactory progress in the time he has spent there. He is now in Phase I of their program which includes assignment to emotion sessions, group therapy, and confrontation sessions. After some initial difficulties, the boy is settling into the program." But Gus was encouraged to run away by his relatives, and did:

> The boy was progressing satisfactorily through the AREBA program where he had been placed in August, 1974. However, on 10-31-74 the boy ran from AREBA. Nothing was heard of the boy until the end of November. At this time, this worker was notified that the family had moved from Meriden to Wallingford and that Gus was living with his parents. This worker talked to Gus and his mother about the boy's run from AREBA. Apparently, Gus was dissatisfied with certain procedures of AREBA. Utmost was the fact that AREBA would not let the boy call home or have any visits or outside calls. The boy's parents drove down to AREBA, but they were not allowed to see or talk to their son. All letters to and from the boy were held up. This upset Gus and that is why he ran.
>
> Since his run from AREBA, Gus has apparently been keeping out of trouble. The parents have told this worker that Gus is no problem at all. They have noticed quite an improvement in the boy's overall behavior. Gus has shown an interest in attending school.

PCR 1122.

On December 12, 1974, Gus was given Conditional School Entrance. During the next few months, through early 1975, records show Gus was staying with his grandparents "without the parents' or this worker's consent" (2-5-75), he was withdrawn from school at age 15, arrested for stealing a car, and sent to California to live with his uncle. A social worker reported Gus's mother didn't want him anymore:

> Gus has indicated a strong desire to remain with his grandparents ... with whom he has lived for extended periods of time. They have indicated that they want Gus to relocate with them and are now awaiting his release before they leave.
>
> Mrs. Freeman has told [a worker] She does not wish to have Gus live in her home due to the many difficulties between Gus and her husband. She does not feel that Gus fits into the family picture any longer.

PCR 1136 (Sept. 1975.)

In September, 1975, records show Gus was given permission to go to California with his grandfather (Gus was fifteen); the social workers thought the place "would be a good one for Gus for two reasons: (1) it would help Gus in an impossible family situation and (2) it would allow Gus to leave the Meriden-Wellingford area which has proven negative for Gus." PCR 1138-42.

There are no more records of further treatment. Gus went to California with his grandfather when Gus was sixteen. His grandfather died in 1976. The crime with which he is charged was committed when he was eighteen, in August, 1978.

(2) **Mitigating circumstances of the offense**

Other evidence was available but not used by counsel, for no stated strategic reason. Counsel knew the co-defendant, John Cox, was substantially older than Gus Bassett. Counsel testified one of his penalty phase theories was to put the crime "off on Cox" as much as he could. Yet he did not let the jury or the court know that Cox was born on 9-12-48, and was thus nearly thirty years old at the time of the offense, PCT 442-49, while Gus was only eighteen.

Also available to support counsel's theory at penalty phase, was evidence that Gus was afraid of Cox. Counsel testified he now knows of no strategic reason why he didn't use the testimony of Connie Christy to show his client was afraid of Cox. Exhibit 30 is an FDLE report contained in trial counsel's file, and provided to him in discovery. It shows Agent Darnell interviewed Ms. Christy on January 4, 1979, and quotes her:

> According to CONNIE, SNAKE had the "respect" of the street people. By "respect" CONNIE said she meant people felt SNAKE was no one to "mess around" with.
>
> Connie stated that Spider was afraid of Snake and would do what Snake told him to do.

PCR 863; 1006-07.

Though Connie Christy was on the stand at penalty phase, having been called by the state as a witness, defense counsel never asked her about the statement. He agrees the statement would have been relevant, PCR 1007, along with one that Gus wished he had a chance to start over and straighten up. In fact, the referenced statements were starred and underlined by counsel, as reflected on the exhibit. He had no reason for not using them except to say "it may be that it came out, and I felt, sufficiently, in her testimony...." PCR 1007; T 130.

(4) Mitigating evidence relating to the co-defendant's background excluded from consideration at the 3.850 hearing

During the 3.850 evidentiary hearing, counsel offered three records related to the co-defendant's background, all of which were excluded by the trial court. PCT 442-47.[14] The records are identified as Ex. 43, John Cox School Records; #44, John Cox Military records; and #45, John Cox Records from Florida Department of Corrections. PCR 1372-1412. The school records show Cox's high grades

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[14] These records were omitted from the initial record on appeal, but were later included upon appellant's motion, and are contained in Volume 9, Supplemental Record.

and general success in school, and aggressiveness as a "defect needing correction". Military records reflect his birthdate, combat training, participation in combat in Vietnam, his status as a squad leader in Vietnam, and, ultimately his discharge under conditions less than honorable. Florida Department of Corrections records reflect a 1971 IQ test showing his IQ at 116 -- "Bright Normal." Except for the age difference, any comparison of the personality and domineering characteristics of the co-defendant Cox was precluded by the 3.850 court's exclusion of this evidence.

SUMMARY OF THE ARGUMENT

I.

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE GUILT AND PENALTY PHASES OF TRIAL IN DEROGATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At guilt phase, counsel focused on a single avenue for suppressing the confession, to the exclusion of other facts easily discoverable and other apparent legal theories. Readily available facts showed improper influences and promises were being brought to bear on Mr. Bassett in the weeks preceding his confession by a private investigator hired by the victim's family whose relationship with law enforcement on this case made him a state agent. The investigator's representations to and dealings with Mr. Bassett were sufficient to render the confession involuntary. Additional facts were unknown to this Court because counsel failed to investigate: Mr. Bassett was given no notice or opportunity to be heard on his counsel's withdrawal, which occurred just prior to his interrogation, and the evidence shows the state engineered a custodial interrogation setting designed to deprive him of counsel. There were, and are, state and federal constitutional challenges to the confession presented by the facts proven post-conviction which would have required suppression, but were never presented to the court because of counsel's derelictions.

On the penalty phase challenge to counsel's effectiveness, the trial court found counsel failed to conduct a reasonable investigation. That finding is amply and absolutely supported by the record. The trial court erred in finding insufficient prejudice; there is much the jury and this Court did not know about Gus Bassett's tortured childhood, his relationship with the codefendant and the codefendant's domination, that is reasonably likely to change the outcome at penalty phase. Also challenged here is counsel's patently unreasonably deficient performance appearing from the face of the trial record: his obvious ignorance of basic facts about his client, about capital sentencing law, his failure to object to improper, inflammatory, and damaging evidence and argument put before the jury by the state, and his inept presentation of what defense case he had prepared. A new penalty phase is required.

II.

THE DEATH SENTENCES VIOLATE THE EIGHTH AMENDMENT BECAUSE THE JURY AND JUDGE WERE PRECLUDED FROM CONSIDERING NONSTATUTORY MITIGATION.

The record shows the jury, judge and parties were limited to statutory mitigation in this post-Lockett trial as evidenced by conduct nearly identical to that in cases recently decided by this Court. There was some mitigation, and the relative sentence of the codefendant could not be considered because of the limitation, so the limitation was not harmless.

III.

THE STATE KNOWINGLY USED FALSE OR MISLEADING TESTIMONY AND ARGUMENT RELYING ON THE STATEMENT OF THE CO-DEFENDANT COX CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state falsely told the jury through a law enforcement agent, during closing argument and before this Court, that the codefendant said Mr. Bassett was the dominant person in the crimes. The codefendant never made such a statement. Mr. Bassett proffered exhibits demonstrating the falsity of the state's

contention. He also challenges its use as a violation of the Confrontation Clause violation. Mr. Bassett was denied an evidentiary hearing on this ground, when either that, or relief now, is required.

ARGUMENT

I.

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT THE GUILT AND PENALTY PHASES OF TRIAL IN DEROGATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Guilt Phase

Two sources of evidence resulted in Mr. Bassett's first degree murder convictions: the custodial statements he made to law enforcement officers, and the incriminating statements of his co-defendant, John Cox, which the police were permitted to relate to the jury at trial even though Cox did not testify. The steps which should have been undertaken to suppress Mr. Bassett's statement, and to exclude the co-defendant's hearsay statements (which implicated Mr. Bassett even more), were apparent but neglected by trial counsel for no good reason. Those failings and the resulting prejudice, together with counsel's failure to object to patently unlawful error, make up the challenge here to the constitutionality of these guilt phase proceedings.

Counsel's guilt phase performance should be judged against the familiar double-pronged Strickland[15] analysis: unreasonably deficient performance and deficiencies reasonably likely to have affected the outcome at trial. It is true that the defendant has the burden of proof on these issues, that the courts defer to most decisions of counsel as "sound trial strategy," and that the presumption is that counsel's performance was reasonable. Strickland. It is also true, however, that in judging counsel's conduct in this capital case, "the seriousness of the charges against the defendant is a factor that must be

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15 Strickland v. Washington, 466 U.S. 668 (1984).

considered." Magill v. Dugger, 827 F.2d 879, 886 (11th Cir. 1987). Even a single error by counsel, if serious enough, can deprive a defendant of effective assistance, United States v. Cronic, 466 U.S. 657 at n.20. That some of counsel's failings at the guilt stage challenged here are unrelated to actual innocence is of no moment. Because the "constitutional rights of criminal defendants are granted to the innocent and guilty alike" the right to effective counsel is not one that "attaches only to matters affecting the determination of actual guilt." Kimmelman v. Morrisson, 106 S.Ct. 2579, 2586 (1986) (Finding counsel ineffective for failing to adequately investigate suppression issue). With these principles in mind, we will discuss each of the challenged areas of representation separately.

1. **The Confession**

No one doubted the central importance of Mr. Bassett's confession. The case, according to counsel for all parties, was thought to rise and fall depending on whether the confession was admitted. Counsel put substantial effort into the challenge to the confession based on a failure of proof of the corpus delicti. The trial court found counsel's corpus delicti effort reasonable and that it conclusively established his effectiveness on this issue. But that cannot be the end of the question. There were other substantial, and evident, factual and legal bases for suppressing the confession which counsel failed to adequately investigate and develop. These include additional facts bearing on Mr. Bassett's alleged "initiation" of communication with law enforcement, the voluntariness of the "waiver" of his right to counsel, and Sixth and Fourteenth amendment and state constitutional challenges which will be discussed more fully below.

Faulting counsel for failing to conduct a more thorough investigation into bases for suppressing the confession is fair enough in this case. It does not require invocation of the "distorting effects of hindsight," Strickland, 466

U.S. at 689, because from counsel's perspective, the confession was the critical evidence in the case. Under these circumstances, counsel's exclusive focus on the corpus delicti issue as his sole avenue of pretrial investigation is unreasonable. See Smith v. Wainwright, 777 F.2d 609, 617 (11th Cir. 1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982). See also Kimmelman v. Morrison, 106 S.Ct. 2579 (1986) (counsel ineffective for failing to conduct any pretrial investigation into basis for suppressing evidence).

The "tactical" reason counsel suggests for limiting his inquiry is twofold: he does not file "frivolous" motions and his client didn't tell him he felt coerced. Clearly, these reasons are not strategy at all. Counsel in fact challenged the confession as "involuntary" in his untimely motion at trial, a strong indicator that he did not feel such a motion to be "frivolous" at the time. In addition, his heavy reliance on his client's analysis of potential confession challenges gave blind deference to his client's uninformed perspective of the law and reflect an abandonment of his professional obligation to independently investigate.

Major areas of inquiry into the circumstances surrounding the taking of the confession were suggested by the facts known to trial counsel. In discovery provided him by the State, a number of FDLE and Volusia County Sheriff's Office reports set out a scenario suggesting improper influence and participation in the questioning process by Charles Brown, a private investigator. Reasonable counsel who saw the confession as the heart of the case against his client would have thoroughly investigated Brown's participation. If he had, the evidence at the post-conviction hearing demonstrated what he would have found about Brown's involvement extremely relevant, and the facts he would have uncovered would have provided sound support for a confession challenge.

Brown is a licensed private detective who was hired by the family of Darryl Barber to try to locate him when he turned up missing. Brown's agency conducted an investigation into the disappearance, while communicating with law enforcement on the case "frequently." His relationship with the investigation --and investigators -- of the Volusia County Sheriff's Office was an extraordinarily close one. He "exchanged" "information" with VCSO, attended law enforcement meetings, permitted deputies to bill him for phone calls, and "loaned" money to one of the deputies.

It was in his numerous questioning sessions with Gus Bassett that Brown worked most closely with law enforcement on this case. Brown had a number of "conversations" with Mr. Bassett in the month preceeding his confession. During that time, he provided oral and written reports of the substance of those conversations to law enforcement, and even met with Jack Watson, who was the state attorney assigned to the case. He continued to report back what Mr. Bassett said both to the Sheriff's deputies and to the State Attorney.

The purpose of the conversations, Brown testified was to obtain information from Mr. Bassett about the missing young men. He thought Gus "had something to do with it." In the course of his search for information from Mr. Bassett, Brown told him of the family's concerns, discussed religion with him repeatedly, discussed the possibility of immunity, and that the victim's family could pay for counsel for him if he provided them information about the young men's whereabouts. The last time Brown met with Mr. Bassett, he and Ziegler set up a joint questioning session with Mr. Bassett to be questioned by Brown, and Cox by Ziegler. That session ended when Cox gave a statement to law enforcement first.

These facts, easily developed through the most cursory investigation, would have provided additional evidentiary support for the voluntariness challenge, and to the validity of the waiver of the right to counsel. It is true that it is and has been law that even "[t]he most outrageous behavior by a private party

seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." Colorado v. Connelly, 107 S.Ct. 515, 521 (1986) (citations omitted). But the information available to counsel had he investigated (and suggested by what he knew through discovery) was sufficient to show Brown acting as a State agent in his (double) dealings with Mr. Bassett. See generally United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964). While, to this day, no "'bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment 'has emerged'" Lightbourne v. Dugger, 829 F.2d 1012, 1019 (11th Cir. 1987), Brown's involvement bears all the hallmarks used by this and other courts for making the determination that he was acting for the state here. When this Court decided Lightbourne v. State, 438 So.2d 380 (Fla. 1983), it found "that in order for an informant to be acting as a state agent he must, acting in concert with the state, actively stimulate or instigate conversations specifically designed to elicit incriminating information." Id. at 386. Brown's involvement unquestionably meets that test of agency.[16]

What the state did through Brown in his surreptitious role of government inquisitor illustrates textbook examples of questioning techniques previously and repeatedly held by the courts to be coercive, and had counsel brought those facts to the Court's attention, would have resulted in suppression. See Brewer v. Williams, 430 U.S. 387 (1977); Bram v. United States, 168 U.S. 532, 542-3 (1897) (no threats, promises, or improper influence), Brewer v. State, 386 So.2d 232 (Fla. 1980).

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16 The test for agency may be different in fourth amendment cases in which apparently private individuals conduct searches or seizures. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). The Fifth and Eleventh Circuit require only foreknowledge and acquiescience or cooperation by the government to implicate the range of Fourth Amendment protections. United States v. Ford, 765 F.2d 1088, 1090 (11th Cir. 1985); United States v. Clegg, 509 F.2d 605, 609 (5th Cir. 1975).

When this Court reviewed the circumstances surrounding the confession, it found Mr. Bassett had invoked his right to counsel under Edwards v. Arizona, but had "initiated" a conversation with the officers at that same meeting. Bassett, supra, 449 So.2d at 806. What Mr. Bassett had been promised before then (by Brown acting as a state agent), was unknown to this Court. The suggestions of immunity, promise of counsel, religious and other emotional persuasion all are indications of an invalid waiver, which, if known by this Court, would have resulted in the suppression of the subsequent confession.

Neither was this Court aware of the extent of the state's deliberate misconduct immediately preceding the confession. The evidence not known to this Court on direct appeal now shows the state purposely engineered the custodial questioning to deprive Mr. Bassett of the right to counsel, that he was given no notice of his counsel's withdrawal, and was not present at the withdrawal "hearing." The deprivation of notice, and the opportunity to be heard under these circumstances lends critical support to the right to counsel and voluntariness issue, and are sufficient standing alone to require suppression. See DR 2-110, CPR; United States v. Morrison, 449 U.S. 361 (1981); Haliburton v. State, 514 So.2d 1088 (Fla. 1987).

When this Court reviewed the case on direct appeal, it knew counsel had withdrawn, and that Mr. Bassett asked to see him before questioning. It didn't know what an investigation by counsel would have shown: In an unscheduled appearance by some attorney, without notice to Mr. Bassett, and without his presence, a judge permitted his court-appointed counsel to withdraw. Robert Darnell, the FDLE case agent, was in the courtroom, heard the withdrawal granted, and without giving the court an opportunity to appoint new counsel, or Mr. Bassett the opportunity to object or obtain counsel, picked up a sheriff's deputy, went to the jail and questioned him. Withdrawal is not permitted under

the State and federal constitutions law without notice and opportunity to be heard, Cash v. Culver, 122 So.2d 179 (Fla. 1960), DR 2-110, and the statements were therefore unconstitutionally obtained.

The custodial questioning here incorporated the worst of Edwards and of the conduct condemned by the Massiah/Brewer line of cases, while not falling neatly into either analysis. Mr. Bassett had not been formally charged, so he probably had no independent right to counsel during questioning, but Edwards applied because he explicitly invoked the right to counsel prior to this custodial questioning. The analysis used by Edwards does not go far enough in this case, though, because the timing of the questioning here was far from accidental. This was an intentional interference with Mr. Bassett's Sixth Amendment right to counsel occurring during a critical stage, plea negotiations, so there could be no waiver of counsel. See Michigan v. Jackson, 106 S.Ct. 1404 (1986); Anderson v. State, 470 So.2d 574 (Fla. 1982)

The questioning was designed to take place during a window period in which Mr. Basset's previously appointed counsel was (improperly) released from the case without providing Mr. Bassett with judicial notification of the fact, and a chance to object, or with any opportunity to do anything about his lack of counsel. While the questioning by Darnell was clearly that of a government agent and was not surreptitious, it nevertheless violated the principles espoused by Massiah/Brewer, that "the lawyer is the medium through which the demands and commitments of the sovereign are communicated to the citizen" Brewer v. Williams, 430 U.S. at 415 (Stevens, J., concurring), and the Sixth Amendment because "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to the assistance of counsel as the intentional creation of such an opportunity." Maine v. Moulton, 106 S.Ct. 477, 487 (1985).

Had counsel investigated and presented the factual and legal bases for suppressing the confession described above, it would have been suppressed as an involuntary waiver of counsel or because waiver principles could not apply.

2. **The Co-defendant's statements**

Because trial counsel said nothing, the state was able to place before the jury as substantive evidence what it said was John Cox's version of the crime -- which was that Gus Bassett was the dominant force in the killings -- even though Cox did not testify at trial. There was no objection to this inadmissible evidence, and no limiting instruction, though the courts have "consistently recognized a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." Lee v. Illinois, 106 S.Ct. 2056, 2064 (1986). Cox's statements when introduced against Mr. Bassett were blatant hearsay and Confrontation Clause-violative, and upon objection would have had to have been excluded, Douglas v. Alabama, 380 U.S. 415 (1965), or at least its use limited by a strong cautionary charge to the jury upon request. Cf. Bruton v. United States, 391 U.S. 123 (1968).

Instead, under the guise of establishing the "voluntariness" of Mr. Bassett's confession, the prosecutor was able to admit the otherwise inadmissible story of Cox that Mr. Bassett was the "strong man" or "heavy." T 551-52. When he saw defense counsel was going to remain silent, the prosecutor was able to abandon the "voluntariness"subterfuge at closing, and argue Cox's statement to the jury as substantive evidence of Mr. Bassett's guilt. ("In other words, his statement is not like this one. Cox made Smith the heavy." T 545-46). The use of these unconfronted, untested, "presumptively unreliable" hearsay statements of Cox "calls into question the ultimate integrity of the fact-finding process.'" Chambers v. Mississippi, 410 U.S. 286, 285 (1973) (quoting Berger v.

California, 393 U.S. 314, 315 (1969)). Without it, the jury may have returned a lesser verdict or acquittal believing Mr. Bassett's statement that he was coerced, and did not participate in the actual killing.[17]

The admission of Cox's statement also unquestionably affected the penalty phase. While the defense strategy was to put the blame on Cox, the absent Cox's hearsay statement, argued by the state at penalty phase, directly and effectively contradicted Mr. Bassett's version of the events. See Proffitt v. Wainwright, 685 F.2d 1227, (11th Cir. 1982).

3. Counsel failed to assert fundamental rights at closing

Florida's right to concluding argument, "perhaps one of the most cherished provisions by defense counsel ..." Rule 3.250, Author's Comment, inexplicably was not asserted by Mr. Bassett's trial attorney at the guilt phase of trial. Though he put on no evidence at that phase, and thus had an absolute "substantial procedural right," Preston v. State, 260 So.2d 501 (Fla. 1972), to make the final argument to the jury, trial counsel let the state get in the first and last word. T 586-648. Rule 3.250 provides the defendant who puts on no defense except his own testimony, "shall be entitled to the concluding argument before the jury." Mr. Bassett put on no evidence before the jury at guilt phase. The Author's Comment declares "concluding closing argument [] is of great tactical force at trial and a defendant is at a disadvantage in losing it and there is no good reason for counsel's failure to assert that right. See Herring v. New York, 422 U.S. 853 (1975).

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17 Counsel testified he wanted Cox's statement before the jury to be able to argue some reason why Mr. Bassett confessed. This suggested "strategy" is disingenuous -- he did not move for a limiting instruction directing the jury to consider it solely for that purpose, and did not even object to the state's remarks to the jurors at closing that they could not question the reliability of the statement because the Court had already determined it to be voluntary, so it was "true." See Section 3, PCT 88-9. PCT 88-89.

Had counsel objected and been convicted, the conviction would have been reversed, Gaines v. State, 364 So.2d 766 (Fla. 2d DCA 1978), for the denial of the right to conclude can never be harmless error in Florida. Raysor v. State, 272 So.2d 867 (Fla. 4th DCA 1973); Birge v. State, 92 So.2d 819, 822 (Fla. 1957) ("It is not our privilege to disregard [the right to concluding argument] even though we as individuals might feel this appellant is guilty as sin itself"). Counsel made other errors which cannot be ignored.

The major thrust of trial counsel's guilt phase defense was that the inculpatory statement given by Mr. Bassett was involuntary. T 626-29, Yet counsel failed to object to the prosecutor's unlawful argument that the jury could not consider whether the statement was involuntary. This is what the prosecutor told the jury without objection:

> Before a confession can be introduced into evidence the Court must scrutinize it.
>
> The Court must weigh it against legal standards.
>
> The Court must first determine whether or not that confession is freely and voluntarily made.
>
> The Court heard that confession and the Court determined themselves that that was a free and voluntary confession.
>
> Mr. Bevis used that argument earlier and it didn't work. Now he is going to try it with you.
>
> This Court determined that that was a free and voluntary statement.
>
> So don't get confused on that rabbit. Don't chase that red herring, because it's been tested already.
>
> And what is interesting is, it's true. There is no doubt now that that confession is true. It's amazing that we would have a trial when the defendant confessed to these elements.

T 640-641. (emphasis supplied).

The non-record assertions improperly told the jury the Court's ruling was tantamount to a directed verdict of guilt, had relieved it of the obligation to prove the elements of the offense, and that the jurors could not question the reliability of the confession. There can be no legitimate reason for failing to object to such argument, which took from the jury the heart of the defense case.

It has long been the law that the defense is constitutionally permitted to question the reliability of the confession even after the court rules it legally admissible. Palmes v. State, 397 So.2d 648 (Fla. 1981). See, Crane v. Kentucky, 106 S.Ct. 2145 (1986); Lego v. Twomey, 404 U.S. 477, 485 (1972) ("Nothing in Jackson [v. Denno] questioned the province or capacity of juries to assess the truthfulness of confessions..."). "Confessions, even though voluntary, are not conclusive of guilt," Crane, 106 S.Ct. at 2146, and state deprivation of the jury's obligation to assess the truthfulness of a confession, the Supreme Court has found, "deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." Id. at 2147. This crucial error, also, calls for a new trial.

B. Penalty Phase

1. Introduction

The claim that Mr. Bassett was ineffectively represented at penalty phase "though ultimately resolved against the defendant, presented a difficult decision for [the trial] court." Order Granting Stay of Execution, PCR 1222. Judge Foxman ruled that while counsel ineffectively investigated penalty phase, it was unlikely the evidence overlooked would have affected the outcome at sentencing. Notwithstanding this finding, in continuing the stay of execution pending appeal, Judge Foxman also recognized Mr. Bassett's claim "could be resolved differently by another Court, ..." T 1222 (emphasis supplied). This is the Court, and now is the time, to grant relief.

"[C]onfronted with both the intricacies of the law and the advocacy of the prosecutor," United States v. Ash, 413 U.S. 300, 309 (1973), Mr. Bassett was left to fight for his life with an appointed counsel who in the nearly one year he had to prepare for trial didn't even bother to learn his client's real name.[18] "Assistance begins with the appointment of counsel, it does not end there." United States v. Cronic, 106 S.Ct. at 2066, n.11 (quoting United States v. DeCoster, 627 F.2d 196, 219 (D.C. Cir. 1979)). Yet for Mr. Bassett, preparation of the case for life ended with the virtually pro forma appointment of trial counsel. The resulting death recommendation was predictable; but the lack of adversarial testing underlying that recommendation erases any reliability that recommendation otherwise might have had. At no time relevant to sentencing was the prosecution's case required to survive the "crucible of meaningful adversarial testing," Cronic, 104 S.Ct. at 3245, and "in a case involving the death penalty," that requirement of partisan and zealous advocacy "is the very foundation of justice." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985).

2. **The failure to investigate and prepare**

Trial counsel's testimony about his investigation for penalty phase is recounted in the Statement of Facts, supra, and it is fair to say, charitably, preparation for penalty phase was negligible. The only evidence sought was that explicitly suggested by Mr. Bassett. The record amply supports the trial court's finding that "counsel had a duty to investigate and his investigation

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18 Though the importance of discovering your client's true name seems self-evident, counsel testified to him it was "legally insignificant." PCT 173, Not so. The United States Supreme Court passed on the question in the context of the defense right to know the true name of a state witness, finding it to be a "rudimentary inquiry." In terms equally applicable here, "When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth [] must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. Smith v. Illinois, 390 U.S. 129, 131 (1968). (emphasis supplied).

was unreasonably deficient." Even minimally effective representation imposes on counsel "a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary." Strickland, 466 U.S. at 691. In a capital case, that means, at a minimum, investigating the defendant's background and history. See O'Callaghan v. State, 461 So.2d 1354 (Fla. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). Certainly in a case such as this, where counsel knew a death sentence was likely "ab initio", he was required to put substantial effort into building a case for life. Cf. Stewart v. State, 481 So.2d 1210, 1212 (Fla. 1986). This is the sum total of counsel's penalty phase investigation:

> a) one phone call to Mr. Bassett's mother at his client's request, the conversation limited to whether she could afford to travel to Florida for trial;
>
> b) talked with two or three jail guards at Mr. Bassett's request, while at the jail investigating another case;
>
> c) did some legal research.

He did not seek out family members, or records of any kind for either Mr. Bassett or Cox. There is no legitimate reason for counsel to abdicate his obligation to investigate a case for life, and counsel offered none. The trial court's ruling that counsel unreasonably failed to investigate is fully supported by the record and should be upheld.

The trial court had trouble finding the lack of investigation would have changed the outcome of penalty phase though in light of the "bad facts" of the crime and the "negative factors" which the jury would have probably also heard had the defense introduced evidence relating to Mr. Bassett's life as a child and youth. PCR 1214-15. It was this prong of the effective assistance claim that presented a "difficult decision," and should be "resolved differently" by this Court. We believe a complete review of the mitigation which could have been presented, but was not, will persuade this Court of the prejudice resulting

from counsel's failure to investigate. In addition, the trial court's "no prejudice" conclusion is skewed by its erroneous failure to admit evidence relating to the co-defendant Cox's background at the post-conviction hearing, which we will discuss below. To put the uninvestigated and unpresented evidence in perspective, it is helpful to look at just how badly counsel actually performed at penalty phase. On the independent basis of counsel's errors appearing from the record produced at trial, this Court should order a new penalty proceeding. See Vaught v. State, 442 So.2d 717, 719 (Fla. 1983).

3. Counsel's ineffective performance at penalty phase

> "He had an alias. I never was extremely clear what his real name was; either Theodore Augustus Bassett or Earl Lee Smith."
>
> Tom Bevis, trial counsel, PCR 886; PCT 84-5.

Apparent from the face of the record are a number of unsettling errors committed by trial counsel which are sufficient standing alone to conclude the assistance of counsel relevant to penalty was inadequate. These errors are not minor ones, nor are they recognizable only through hindsight. The record shows counsel's representation was disabled by a vast ignorance of the relevant facts and capital sentencing law, and that the defense case was doomed by a failure of advocacy. Counsel testified he felt "hopeless" about his chance of success at penalty phase and the way he performed, for Mr. Bassett, it was.

Where there were obvious objections to the state's use of unlawful evidence, counsel failed to move to exclude that evidence or otherwise preserve the error. Where there was an opportunity to present evidence in mitigation (consistent with counsel's theory), counsel presented obviously false evidence to the jury instead, and made both him and his client out to be "liars." Where there was grossly inappropriate argument by the state, and improper or inade-

quate instructions on the law by the court, counsel sat mute. Under no circumstances can this Court conclude the death sentences imposed in this case are the result of a constitutional sentencing process.

(a) Nonstatutory aggravating evidence and argument

The duet of witnesses called by the state were on the stand for one purpose: to talk about prior crimes Gus Bassett allegedly committed, for which he was uncharged and unconvicted, and which fall nowhere within the list of relevant aggravating circumstances. Through Christy, the jury heard of illegal firearms in Gus Bassett's possession, a purported "murder conspiracy" unrelated to this offense, about a fight in a bar in which someone ended up in a trunk, the implication of stolen items in his possession, and through the prosecutor's creative use of Christy's age (sixteen), that Bassett had "contributed to the delinquency of a minor." Through Officer Wilkinson, the state introduced evidence of Mr. Bassett's alleged high speed chase on a motorcycle, and that he had falsely given his age as 22. The prosecutor emphasized these alleged crimes during closing argument. There was no effective objection by trial counsel.

Since the earliest cases interpreting the Florida death penalty statute, this Court has plainly forbidden introduction or argument on unconvicted crimes and nonstatutory aggravating circumtances. Provence v. State, 337 So.2d 783 (Fla. 1976). The state and defense counsel contend the evidence was admissible as anticipatory rebuttal of the mitigating circumstance of no significant prior criminal history, and that is the reason why counsel did not object. PCT 107-110. ("It's my recollection, Mr. Malone, that there was case law at the time that allowed unconvicted criminal acts to be testified to, not to prove an aggregate [sic] circumstance, but to disprove the mitigating circumstance of no significant criminal history, or something").

But that was not and never has been the law, and it certainly was not the practice of reasonably competent attorneys to permit such evidence to go unchallenged. Ms. Bickerstaff testified that during the time this case was tried, the mitigating circumstance was being waived to avoid just what happened here, and both she and Howard Pearl testified the evidence should have been the subject of an objection and mistrial motion. In Maggard v. State, 399 So.2d 973 (Fla. 1981), this Court reversed a death sentence where such evidence had been admitted, when the trial attorney waived the mitigating circumstance and objected. The Standard Jury Instruction in existence at the time contained a comment that the state could use the "no criminal history" mitigating factor only in "rebuttal"

In Fitzpatrick v. Wainwright, 399 So.2d 938 (Fla. 1986), this Court found appellate counsel ineffective for failing to challenge on appeal similar conduct by the state when there was an objection, even though Maggard was yet to be decided. Clearly, this Court recognizes reasonable counsel should have known the law and objected to the nonstatutory aggravation during the time this case was tried.

If there is any doubt about the use actually made of the evidence of unconvicted crimes placed before the jury by the state, it is dispelled by the state's argument at closing. This is how the state "simply rebutted" mitigation:

> Let's look at this Defendant now. Convicted three times. Possession of a sawed-off shotgun, contributing to the -- Connie was about 15 or 14 --
>
> MR. BEVIS: Object to that comment. It was not proved. No evidence in the record to suggest he had been convicted of possession of a sawed-off shotgun.
>
> MR. WHITE: Let me rephrase that.
>
> THE COURT: That objection is well taken.

MR. WHITE: You heard Connie Christy say -- and what reason would she have to lie? -- that he had a sawed-off shotgun of approximately 18 inches in length.

You heard her say that she lived with him.

She was 16 today. You figure out how old she was there.

Contributing to the delinquency of a minor.

He conspired to commit murder. Somebody stole their motorcycle parts, and there were going to blow them away.

Carries a false identification.

Alluding (sic) police officers.

That's just the things that were shown to you here today.

What does he bring you for his good character? A jailer that works from eleven o'clock at night until seven in the morning three or four nights a week that is there while they sleep.

And he tells you that he's a pretty good prisoner.

Is his life worth what has been done?

You examine all these facts. Make a decision on the facts and the law.

T 740-41.

Under law extant at the time of this trial, the state was clearly prohibited from arguing this lack of mitigation in aggravation, as it did here. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). The state's argument here does not even pay "lip service to its inability to rely on these other crimes to prove [an] aggravating factor ..." as it did in Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986), and was reversed anyway. As in Robinson, the "very fine distinction" sought to be drawn by the state was "meaningless because it improperly lets the state do by one method something which it cannot do by another." Also, as in Robinson, the error here likely affected the outcome: "Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial." Id.

Counsel's failure to properly object or take reasonable steps to exclude the inflammatory other crimes evidence, or properly preserve the issue for appellate review in an of itself requires a new penalty phase proceeding.

(b) **Unconstitutional aggravating evidence and argument**

Without objection or other attempts to pretermit jury consideration, defense counsel let the prosecutor testify and argue to the jury the legitimacy of recommending death because Mr. Bassett went to trial instead of pleading guilty and receiving life imprisonment. The defense put Gene White, the prosecutor, on the stand to attest to the terms of the plea bargain in which both defendants were offered life sentences. T 711-15. The prosecutor then cross-examined himself on the reason why Mr. Bassett should get death saying

> I wanted to spare the family the burden of coming here to this courtroom and going through the ordeal of sitting through a murder trial in which their sons' bones would be exposed; they would have to hear the gruesome testimony, relive their entire life until this point.

The prosecution also told the jury Mr. Bassett should have pled to save the State the "expense" of trial, and finally, he paid bare "lip service" to the constitutional right:

> He certainly has that right. And I think the Jury can take that into consideration also.

T 716-17.

During closing, the prosecutor again urged the jury to use the demand for trial as a reason for recommending death. In the course of an emotional argument about the suffering of the victims' families related to the need for a trial, the prosecutor said: "From the time the parents learned of the deaths through today they had to relive it every day. And why? The defendant wanted to exercise his constitutional right. And he has a right to do that." T 734. See also T 729.

Two justices reached this issue on direct appeal, and would have reversed solely because "[w]ithout question, the state placed the appellant's exercise of his right to a jury trial before the jury as a critical aggravating factor." Bassett v. State, 449 So.2d at 809-11 (Overton, J., and McDonald, J., dissenting) (emphasis in original). Trial counsel now concedes he should have objected to the testimony and comments, though he doesn't know if he thought about it at the time. PCT 123,137-38. (Compare PCT 128 -- counsel opines that the argument "doesn't jump out" as objectionable).

There can be no reasonable attorney decision to permit a jury to consider the exercise of a fundamental constitutional right as a basis for imposing death, and there is no constitutional authority for this Court to permit a death sentence so infected to stand. Here, Mr. Bassett's "inestimable privilege of trial by jury ... [] a vital principle, underlying the whole administration of criminal justice," McCleskey v. Kemp, 107 S.Ct. 1756, 1776 (1987) (quoting Ex parte Milligan, 4 Wall. 2, 123, 18 L.Ed. 281 (1866)), was grotesquely contorted instead into a reason why he should be executed. It was used effectively by the state in emotional testimony and argument describing the sorrow of the victims' families, and expense of a trial. This ground also, standing alone, requires vacation of the death sentence. Zant v. Stephens, 103 S.Ct. 2733, 2747 (1983) (if aggravating circumstance had been request for trial by jury, "due process of law would require that the jury's decision to impose death be set aside"); United States v. Jackson, 390 U.S. 570 (1968).

(c) Other improper comments which were unchallenged

In addition to evidence and argument already identified as unlawful and to which counsel offered no objection is a litany of improper arguments made by the state at penalty phase, to which defense counsel also unreasonably failed to object. We invite this Court to read the penalty phase in its entirety, because there is little the prosecutor said to the jury at penalty phase which was not

improper and which did not merit reversal. Pait v. State, 112 So.2d 380 (Fla. 1959). For the sake of organization, additional improper arguments made by the state have been categorized below. Effective counsel should have objected to the following arguments which have no relevance to Florida's statutory death sentencing scheme, and are unlawful under state law and the Eighth and Fourteenth Amendments to the United States Constitution.[19] If he had properly objected, the arguments would have been precluded, or this case reversed on direct appeal. Trawick v. State, 473 So.2d 1235, 1240-41 (Fla. 1985) ("because the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance the jury recommendation is tainted" and new sentencing required).

(i.) Inflammatory nonstatutory argument relating to parole and general deterrence

The prosecutor acted as if he had listened to the argument from another case tried in the same circuit before the same judge, Teffeteller v. State, 439 So.2d 840 (Fla. 1983), and patterned his own after it here. Teffeteller, which involved almost identical misconduct, was reversed. The only difference between Teffeteller and this case, both tried about the same time, is that in Teffeteller, defense counsel objected to the arguments. The state apparently could

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19 Counsel offered various "strategies" for failing to object, at one point saying he didn't because he wanted to use similar (apparently unlawful) arguments during his closing. PCT 124, 126, 141-2. If he objected, trial counsel said, the prosecutor would also object to his argument. See also PCT 161 ("continual" objections make jurors impatient), and PCT 184 (objecting would not have made a difference). Professional courtesy, the trading off of a constitutionally conducted penalty phase for the possibility the prosecutor would refrain from objecting cannot be a valid strategy. There are cases in which the courts can, and should, forgive counsel's failings as strategy, but this is not one of them. The arguments made here were outrageous. No counsel functioning "reasonably" under the sixth and eighth amendments could fail to object to these arguments. See Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984) ("when it becomes apparent that the prosecutor may be prejudicing the jury, it is paramount for the defense counsel to preserve the error for appeal by making timely objections.").

not "warn" the jury enough in Mr. Bassett's case that a life sentence might let him kill again, tell them that deterring others was a valid reason for recommending death, and that a death sentence would be a continuing source of such deterrence because it would be publicized when reviewed in years to come.

Arguing the victims "didn't die for no reason," the prosecutor told the jury if they recommended life, "the deaths will be forgotten," and that there would be no point in the trial or "the deaths of these two individuals." If they recommended death, though, "this case will never be forgotten." It would "serve as an example to an individual on Main Street or anywhere that may read of the incident...." T 738-39. A death recommendation, the jury was told, would be publicized when "it is brought up before the advisory boards on the number of times that it's reviewed."[20] "Don't let them die for nothing." T 739.

After arguing other improper bases for death, which will be or have been addressed, the prosecutor concluded with the same theme:

> When he gets out in 25 years, maybe, if the parole board lets him out, or 50 years, could it ever happen again?
>
> I wouldn't want to take the chance.
>
> Is it worth it? It is worth putting another family through?
>
> Is it worth letting them know this man has the potential to get out?

T 743.

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20 Telling the jury that its verdict will be "reviewed" "a number of times" directly contravenes the principles of Caldwell v. Mississippi, supra, for it lifts responsibility form the jury for the ultimate decision. However, though Caldwell adds the Eighth Amendment to the reasons that this argument is wrong and puts an exclamation point on its prejudicial character, it is the type of argument that has been long condemned in Florida law. E.g., Pait v. State, 112 So.2d 380, 383-85 (Fla. 1959); Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-36 (1918). This argument standing alone is an independent ground for vacating the death sentence.

With objection, this case would have been reversed. Without it, it wasn't. The prejudice is evident. Teffeteller made this point: such argument is "inexcusable prosecutorial overkill" and "[t]here is no place in our system of jurisprudence for this argument." 439 So.2d at 845. As the Court noted, it was not "a matter of first impression" in Florida law, so there is no excuse for not knowing its impropriety. Id. Just as the Teffeteller prosecutor had no excuse, so too defense counsel here had no possible excuse for permitting such argument that has been soundly condemned for its highly inflammatory effects.[21]

(ii.) Reference to matters outside the record

The prosecutor referred to a newspaper article quoting a minister who supported the death penalty, and who relied on scripture as a basis for imposing death. T 727. He also made several references to evidence "we don't know" existed, such as whether the victims pleaded for their lives, T 731, were injured on other parts of their bodies, and "how long they were in the trunk waiting...." T 737. Implying the facts of the crime were much worse than the evidence showed, the state told the jury: "And I suggest to you what you heard is a bare minimum of what happened." T 732. The prosecutor's theme that there were facts the jury had not heard also included speculation on Mr. Bassett's criminal record discussed and quoted in full in Point I, B, 3, (a), supra. The prosecutor ran through what he said were prior crimes by Mr. Bassett and concluded this unauthorized litany by telling the jury there was more: "That's just the things that were shown to you here today." T.741.

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21 The Teffeteller Court cites decisions starting as early as 1951. Id. To those cases can be added the post-Furman case of Miller v. State, 373 So.2d 882, 885, 886 (Fla. 1979) where this Court condemned the judge's consideration of possible parole as being a nonstatutory aggravating factor constituting "reversible error."

Reference to matters outside the record has long been forbidden. E.g., Johnson v. State, 88 Fla. 461, 102 So. 549-550 (1929); Blanco v. State, 150 Fla. 88, 7 So. 333, 339 (1942). A prosecutor cannot comment on facts not of record, but even more importantly a prosecutor cannot imply that there are more facts that the jury did not hear, but that the prosecutor knows. E.g., Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976).

Specifically to the comments here, speculating on criminal record and telling the jury there was more for obvious reasons are improper. "Unsubstantiated statements which concern references to other crimes committed by a defendant are particularly condemned by the Florida courts." Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984). The prosecutor invoked the scriptures, from "an article on the death penalty in the religion section of the local newspaper" and of particular interest were the views of a television preacher "Jim Henry" who particularly interested the prosecutor "myself, being a Baptist." T 727. This Baptist preacher "believed early in the death penalty" quoting "Romans XIII, 1 through 5" and "remembering the teachings of Jesus," in particular "'Render unto Caesar,' as Jesus put it." T 727. He used the religious teaching to tell the jury to do its "sacred duty ... we must fulfill." T 728 (emphasis supplied). Appeals to religious prejudice have long been condemned. E.g., Cooper v. State, 136 Fla. 23, 186 So. 230 (1939). The outside limit for invoking religion was established in Paramore v. State, 229 So.2d 855 (Fla. 1969) as using Biblical stories to illustrate arguments. Beyond that, such religious arguments are improper, for as in this case the jurors' duty became "sacred" because Jesus told them to "Render unto Caesar." To appeal to divine law is to ask the jury to apply a higher law -- the law of the Baptist preacher Henry who believes in the death penalty.

(iii.) Victims' family

The state sprinkled references to the victims' family throughout its closing argument, invoking sympathy in direct terms not even remotely relevant to the aggravating factors provided by law. There was no objection by counsel though Florida law was clearly established by 1979 that evidence concerning surviving victims could not be used in determining the heinous, atrocious and cruel aggravating circumstance. Riley v. State, 366 So.2d 19, 21 (Fla. 1979); see also, Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) (error to consider nature of other offense as heinous, atrocious, or cruel). As Justice Ehrlich opined, such argument is not only "irrelevant and improper," but is contrary to the efforts to "insulate ... application [of the death penalty] from emotionalism and caprice" and thus has been "long condemned" by this Court. Bush v. State, 461 So.2d 936, 942 (Fla. 1985) (Ehrlich, J., concurring):

> I can think of few arguments which are more calculated to arouse an intense emotional response in a jury than the graphic portrayal of the survivor's bereavement. I can imagine no set of facts on which this would be proper argument.

Id (emphasis supplied). If indeed there is no imaginable set of facts to permit such argument, there is no good reason why counsel would permit such argument, as will follow, to go unchallenged.

It was the heinous, atrocious, or cruel aggravator into which the prosecutor tried to shoehorn the victim's impact argument. At the beginning of closing, he drew attention to the victim's family, "the parents," and told the jurors that while they couldn't consider such information during guilt phase, they could in determining penalty: "But *this is the only time you will see a* consideration of the victim. Isn't that a shame? The only time you can consider what happened to the victim." T 28. The prosecutor continued to interlace his heinous, atrocious, and cruel argument with references to the victim's family. "Darrell Barber was a human being. He had feelings. He had a

family." T 725. He described the circumstances of the offense saying the "two 18 or 19" year old victims "left their good home -- they each had families." T 730. Then in the context of an argument that the jury should show the defendant "the same mercy he showed the victims," he again invoked sympathy for the family in the midst of an extremely inflammatory reference to how the state could not kill Mr. Bassett and leave his body out to be eaten by "rodents and buzzards" while "Your family at home will never know. You'll just be gone." T 736. Finally, he referred to the hurt which could fall on "future families." T 739.

Interlarded within another unconstitutional argument urging the jury to recommend death because Mr. Bassett sought a jury trial, the prosecutor said, "From the time the parents learned of the deaths through today they had to relive it every day. And why? The Defendant wanted to exercise his constitutional rights." T 731. Still no objection by counsel. Pounding on the theme, he asked the jury to "think of the parents' remorse. Think of their lives every day since they heard of this. If this Defendant's death does no purpose but give one minute's satisfaction to that family, he deserves to die." T 739.

Winking at the rule against arguing sympathy, the prosecutor said: "If you ever become sympathetic for this Defendant, think of his family." T 741. Then returning to his other them of punishing Mr. Bassett for seeking a jury trial, the prosecutor concluded by combining several unconstitutional arguments in one. The co-defendant Cox, he said, should get life because he didn't go to trial. "He tried to save the families from going through this." T 743. But if Mr. Bassett got life he might get out and "Is it worth putting another family through this?" T 747.

These arguments were clearly objectionable and recognized as highly inflammatory under Florida law in 1980. What is clear now that perhaps was not previously so clear, is that such argument violates the Eighth Amendment as well as state ethical and substantive law. In Booth v. Maryland, 107 S.Ct. 2529

(1987), the United States Supreme Court rejected Maryland's practice of permitting victim impact statements to be considered in capital sentencing as transgressing constitutional grounds. The statements' descriptions of "the personal characteristics of the victims and the emotional impact of the crimes on the family" and "family member opinions and characterizations of the crimes and the defendant" were, the Court found, "irrelevant to a capital sentencing decision, and [] its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id. at 2533. Accord, Patterson v. State, 513 So.2d 1263 (Fla. 1987)

(iv.) Send a message

Building on his theme to the jurors that "you as the jury do not sit as individuals [but] ... as a representative of the community," T 728, he told the jury that it could and must send a message by a death verdict:

> If you sentence Spider Smith to 25 years in the penitentiary, [the victims'] deaths will be forgotten. There will be no point in this whole trial. There will be no point in the deaths of these two individuals.

T 728. A life sentence thus could send no message, but death could:

> But if you ... vote that he is to die, this case will never be forgotten. If may serve as an example to an individual on Main Street or anywhere that may read of the incident that if you kill somebody in the perpetration of a murder, you die.

T 738 (emphasis supplied). That message, hammered the prosecutor, means that the jury will prevent crime:

> And if that [death sentence] just brought an inkling feeling in a person that's committing a robbery, it could save a whole lot of hurt on future families and that Defendant also.

T 738 (emphasis supplied). He continued to drive home the need to send a message to the community: "an example for others"; "these facts will be brought forth to the public. And it will be brought forth to the individuals that live here. They will see that you don't do this." T 738. A life verdict of course would send no message: "it will never be brought up." T 739.

As with the other improper arguments by the prosecutor, defense counsel interposed no objection. He allowed through inaction, argument that is well-recognized as inflammatory to be used against his client. "The 'send 'em a message' argument may have some cachet in the political arena, but it is grossly improper in a court of law." Boatwright v. State, 452 So.2d 666, 667 (Fla. 4th DCA 1984) (emphasis supplied). "It diverts the jury's attention ... and worse, prompts the jury to consider matters extraneous to the evidence." Id. It is "calculated to inflame the passions and prejudices of the jury." Id. See also, Hines v. State, 425 So.2d 589, 591 (Fla. 3d DCA 1982) ("so egregious that reversal is required).

While these arguments were going on, defense counsel stayed mute, paralyzed by inattention or miscomprehension of the damage being done. He failed to do what an advocate should do: protect his client (and the proceedings) from the interjection of inflammatory and irrelevant considerations.

(d) Counsel's failure to adequately present the defense case at penalty phase.

> "False in one, false in all, you know the rule."
>
> -- Howard Pearl, State's penalty phase expert.
> PCT 480.

When the time came for counsel to present the case for life he had investigated, the result was a confused, obviously misleading, weak and almost entirely defensive presentation of evidence and argument. Counsel's ignorance of relevant facts and capital sentencing law was painfully apparent, and his performance probably resulted in more harm than good.

Counsel has testified his strategy was to make an "emotional appeal" and argue the age of his client, the co-defendant's life sentence, and to "put it off on Cox" as much as he could. Apparently to those ends, as his first witness he called his client to the stand. Counsel said his client was called to attest

to his age, and respond to some of Connie Christy's testimony. His client did answer some of the testimony. He testified the shotgun barrel was "about 19 inches," T 706, and told the jury he was not involved in putting anyone in a trunk in the "Wreck Bar." T 707. This testimony only helped to make the uncharged offenses a feature of the trial, and was unpersuasive -- not to mention unnecessary had counsel effectively moved to exclude Connie Christy's testimony.

Most disturbing, though, was counsel's ignorance of his client's own name and age, which had to be apparent to anyone listening. As he had throughout the trial, counsel referred to his client as "Earl Smith" when he called him to the stand and questioned him. T 701. The jury (and court) had to have serious questions about the reliability of any of the defense case when, on cross, the prosecutor not so cleverly asked for, and got, Mr. Bassett's real name. T. 704. The prosecutor continued to cross Mr. Bassett on other times he had given a false name and age, concluding with the closing, "Okay. That's three lies." T 706.

Defense counsel sought to end the debate about Mr. Bassett's age[22] by having him testify (accurately, though as "Earl Smith"), that his birthdate was September 21, 1959. T 701. But he decimated any credibility he had with the jury by leading Mr. Bassett to testify falsely, then arguing that falsity during closing, that Bassett's age should be mitigating because he was seventeen at the time of this August, 1978, offense. T 704. For one of his major bases of his plea for life, counsel said, "Earl Smith" is "seventeen years of age, ladies and gentlemen. Not even a legal adult. Not even a legal adult." T 754-757. Counsel's representation at penalty phase was a joke, and the jury knew it.

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22 Had counsel simply obtained Mr. Bassett's birth certificate, Ex. 38, PCR 1025, the damaging information brought out as a result of this debate would never have been admissible.

The other major mitigation counsel sought to argue, "Putting [the crime] off on Cox" was a legitimate and substantial basis for arguing a case for life. But to support this mitigation, counsel did not even use evidence available and known to him. Counsel's argument on this issue relied solely on Mr. Bassett's confession to show Cox dominated and was the actual killer. What counsel was aware of, but did not tell the jury, were two critical facts which have substantially underscored Cox's domination: Cox was twenty-nine at the time of the offense, eleven years older than the eighteen year old Gus. (Counsel's "impression" was that Cox was older than his client, but he didn't "recall" if he knew for sure he was older, or by how much. PCT 143-44. Numerous law enforcement reports in his file, however, clearly refer to Cox's birthdate in 1948.)

Substantial age difference of a codefendant is clearly relevant and supports an argument and finding of domination. Such evidence would have been entirely consistent with counsel's theory; there is no strategic reason for failing to use the difference in age, and counsel suggested none.

Also supporting the domination theory was the statement of Connie Christy to an FDLE agent. When she was interviewed, Christy told Agent Darnell that Gus was afraid of Cox. In a statement underlined and starred by counsel, Christy says "Spider was afraid of Snake and would do what Snake told him to." Counsel admits that testimony would have been helpful, and has no reason for failing to use it when he cross examined Christy except that he may have "thought it came out sufficiently." It didn't.

Also on the "domination" issue, counsel failed to take care that the jury was told accurately that it was permitted to parse out the relative culpability of the codefendants. Both he and the prosecutor told the jury aiding and abetting theories made one defendant "as guilty" as the other as a matter of law, without limiting that theory to the guilt determination. T 71, 122, 144, 145, 146, 202, 203, 238, 239, 243. Though the prosecutor inundated the jury

with vicarious liability theory, without limitation, in opening, T 260, guilt phase closing, T 586, 612-15, 639, 644, 646, and the Court instructed them on that theory at guilt phase, T 654, 658, 659, 665, defense counsel made no attempt to have the jury instructed to its inapplicability at penalty phase. Neither did he object to the prosecutor's use of the same theory at penalty phase, though it was then and remains, unlawful under Florida law and Eighth Amendment law. Enmund v. Florida, 458 U.S. 782 (1982).

Defense counsel has no good reason for failing to take corrective measures (he "didn't think of it"), and admits the prosecutor's vicarious liability argument was at odds with his theory at penalty phase. PCT 100-06. While counsel brought the mitigating instruction on substantial domination to the jury's attention, that argument was eroded when the prosecutor argued aiding and abetting theories of vicarious liability for purposes of penalty phase. Cf. Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) (no vicarious application of aggravating factors).

Finally, counsel also permitted the state to argue at penalty phase the confrontation clause-violative statement of Cox that Gus Bassett was actually the killer. That statement is false, as discussed infra, and inadmissible. Whatever "strategic reason" counsel may have had for permitting Cox's hearsay to be admitted at guilt phase, did not apply to penalty phase. The statement undermined one of the central theories at penalty phase ("put it off on Cox"), and, as counsel admits, hurt the defense case.

Counsel did put two jailers on the stand to testify Mr. Bassett was not much trouble while being held in the local jail awaiting trial, but the state jumped on it as being the only "good" character evidence, and effectively erased any persuasive voice it may have had in another context.

The next line of mitigation was the co-defendant's life sentence. Counsel did argue the codefendant's life sentence. He failed, however, to request the jury be instructed they could consider that evidence as mitigating, instead allowing only the statutory list to be read, and himself arguing to the jury that it should consider itself limited to the list. His obvious ignorance of the law post-Lockett was unreasonably deficient, and also harmed his client in precluding the jury from considering another of his major bases of mitigation. See Young v. Zant, 677 F.2d 792 (11th Cir. 1982). If counsel's ignorance was not unreasonable, then as discussed in Point II, infra, the penalty trial failed to meet Eighth Amendment standards.

4. The mitigation evidence describing Gus Bassett's childhood and adolescence would have changed the outcome of the penalty phase

> "There is, of course, a wide range of reactions to social and emotional deprivations and abuse. This is certainly a major theme that you will see."

Dr. Stephen Bank, child psychologist, PCT 252.

Ineffective counsel's failure to investigate deprived the jury of any explanation for the crimes and Gus's participation, and of all sympathetic information about how Gus Bassett came to be there. The jury knew how "bad" he was at the time of the crime, but didn't know what those who saw him struggle through childhood knew about the conditions into which he was born and raised. That evidence, presented only in post-conviction, is summarized in the statement of post-conviction facts.

This Court has frequently recognized the importance of mitigating evidence relating to a defendant's difficult and trouble childhood in persuading a jury and court of the propriety of life, Duboise v. State, 12 FLW 107 (Fla. 1988); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), as has the United States Supreme Court, Eddings v. Oklahoma, 455 U.S. 104 (1982). This is so particularly where such evidence shows mental or emotional problems, as it does here.

Certainly, presentation of such evidence is consistent with the practice of reasonably competent defense attorneys in capital cases by 1980. It is not only persuasive to a jury, but is essential to develop a record to support a life recommendation on appeal (should it be overridden) and to argue the propriety of life or the harmfulness of errors on direct appeal even without a life recommendation. See, e.g, Livingston v. State, 13 FLW 187, 188 (Fla. Mar. 10, 1988) (reducing death sentence to life where jury recommended death, one aggravating factor struck on appeal, and evidence of childhood abuse and neglect).

The evidence here is compelling. It shows, both through live testimony and records, the sad and sometimes lurid story of Gus's exposure to violence, poverty, alcoholism and an extraordinarily chaotic family arrangement. The psychological snapshot of how the twelve year old Gus was affected by the events swirling around him is heartbreaking, and demonstrates the depth of Gus Bassett's emotional troubles. Any decision whether Mr. Bassett should live or die is entirely unreliable without the social history and background information only now known. Had counsel investigated, he would have discovered, for instance, much to support his theory that Gus was dominated by Cox. The historical, anecdotal and psychological testimony and records all point to Gus as a dependent person, in need of a male role model. His characteristic "follower" instinct was imbedded early in his youth, and offered solid evidentiary support for the argument that Gus was simply following the older Cox. See Duboise, 12 FLW at 82. ("The jury could have been influenced by one of Duboise's companions being his older brother, a person who might well have had an influence on this eighteen year defendant's behavior and conduct"). Without this evidence, the sentencers had only Gus Bassett's own statement to determine whether he was dominated.

The state points to "harmful" information that might be revealed if Gus Bassett's childhood and adolescence was used in mitigation. During the 3.850 hearing, the state referred to the fact that as a child, Gus was involved in thefts, in trouble consistently, difficult to control, and that the psychological testimony reflecting the twelve year old's thoughts about death and violence were more aggravating than mitigating. The State does not say how this information about Gus's childhood could possibly be any more damaging than the nonstatutory aggravation trial counsel (whose performance they defend) let the State introduce.

In any event, it is first important to distinguish those instances in which trial counsel can ultimately decide not to present "background" mitigation. There are cases where trial counsel has a valid tactical reason to conclude his or her client's background is a "mixed bag," and that presentation of some sympathetic evidence should not be undertaken because it would open the door to unsympathetic evidence. Decisions with complete knowledge of what the defendant's background shows are strategic ones, and virtually unchallengeable. See, e.g., Burger v. Kemp, 107 S.Ct. 3114 (1987). But when there is no investigation, and there was no serious investigation here, there can be no strategic decision. Counsel did not decide not to use the mitigation we have proven here; he just didn't know about it.

The state's "door opening" contention is implausible here for other reasons. First, assuming a state attorney could get the bad information before the jury (See Provence, Robinson), the state certainly could not argue it in aggravation. See Mikenas, Provence. The state would also appear to a jury as nit-picking if it tried at trial to bring out the relatively mild "bad acts" of childhood when the defense has put those acts in the perspective of the impossible situation to which Gus as a child was subjected.

Clearly, the evidence we have proffered is precisely the sort of "compassionate or mitigating factors stemming from the diverse frailties of humankind" which the United States Supreme Court has recognized as critical to the capital sentencing process. Woodson v. North Carolina, 428 U.S. at 307. It clearly should have been known to the sentencers. A new penalty phase is required.

5. **Evidence relating to the co-defendant's background was erroneously excluded from consideration post-conviction, and would have substantially supported the case for life at penalty phase.**

No one can seriously dispute the importance of testimony relating to the co-defendant Cox's history and background, and the ineffectiveness of counsel for failing to investigate it here.

The Eleventh Circuit, following this Court's lead, has noted in strong terms the probative value of evidence relating to a co-defendant's background and reputation in a first degree murder case, in Thompson (William Lee) v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986):

> In a capital case, where a defendant's life may well depend on the extent and nature of his participation, the background of a co-defendant could be crucial. Here one of [defense counsel's] goals was to affix blame for the crime on [the co-defendant], and his failure to investigate [the co-defendant's] background is, therefore, not understandable.

The proffered documents were extremely relevant to the mitigation sought to be proven here (and at trial) and that is Cox's domination of Mr. Bassett.[23] They show Cox, for instance, was old enough to be enlisting in the army at a time when Gus was still a child; they demonstrate Cox was a squad leader, in combat, with weapons training. The educational records show Cox as a high achiever, compared to Gus Bassett, and the State's own I.Q. test (DOC records) show Cox as "bright normal" in 1971 (compared to Gus's "average" IQ). The

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23 The documents certainly are admissible to demonstrate what counsel could have discovered upon adequate investigation.

comparisons to be made to each in their relative stages of life is persuasive evidence that Cox's many life experiences placed him clearly in the role of leader of the two.

The evidence was admissible post-conviction, and would have been at penalty phase. The state did not question the accuracy of the documents, PCT 433-45, and those documents had been provided to the state prior to the hearing. Hearsay is admissible in mitigation, See 921.141 (1), F.S. (1980), and constitutionally must be so. See Green v. Georgia, 442 U.S. 95 (1979); Chaney v. Brown, 730 F.2d 1334 (8th Cir. 1984). This Court should consider them here. They are cumulatively or independently sufficient to have affected the outcome of the penalty phase and to require reversal of the trial court's order denying relief.

II.

THE DEATH SENTENCES VIOLATE THE EIGHTH AMENDMENT BECAUSE THE JURY AND JUDGE WERE PRECLUDED FROM CONSIDERING NONSTATUTORY MITIGATION

This January 1980 trial was conducted as if Lockett had never been decided[24] and resentencing is therefore required under the intervening decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). All participants in this trial, including defense counsel, told the jurors clearly and often that their mission at sentencing was to weigh the statutory aggravating factors against "the" statutory mitigating factors. During voir dire, the state told prospective jurors they would be instructed on "the" aggravating and mitigating factors they could consider. T 126. The prosecutor told them aggravation was on one side, mitigating factors on the other, and they would "fit that into a formula." T 237

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24 The trial was held only six months after the statute was amended to remove some of the Lockett-violative language, Ch. 79-353, Laws of Florida, and more than a year before the standard instructions were modified in an attempt to meet the Lockett mandate, In the Matter of Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

(emphasis supplied). The defense attorney said nothing to correct the prosecutor's limiting comments, and made additional statements that invited the jury to consider itself constrained to the list of mitigating factors in the statute. Defense counsel told jurors that what could be considered in mitigation was "pretty well quantified," T 109, referred to "the" aggravating and mitigating factors, T 200, and the sentence "guidelines." T 178.

At the beginning of the penalty trial, the judge read the standard jury instruction that "you will be instructed on the factors in aggravation and mitigation so that you may consider them." T 690. See Hitchcock v. Dugger, 107 S.Ct. at 1824 (the jurors were told the judge "would instruct them 'on the factors in aggravation and mitigation that you may consider under our law'"). Just prior to closing argument, the list of statutory aggravating and mitigating factors was read with the now familiar limiting language that: "The mitigating circumstances which you may consider as established by the evidence are these: [statutory listing]." T 720-22.[25] The closing argument of counsel (both State and defense) continued to make the limiting point. The State's argument concluded by telling the jury there was "not one" mitigating factor. T 743. Counsel argued mitigating features of the case that could not be characterized as falling within the statute, though he attempted to shoehorn them into those narrowly enumerated categories.[26] However, the court's instructions just prior to sentencing deliberations, T 762-69[27] were virtually identical to those in

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25 The precise language used in this case has been repeatedly found violative of Hitchcock. See, e.g., Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1988); Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987); Mikenas v. Dugger, ___ So.2d ___, 13 FLW 52 (Fla., January 21, 1988).

26 Although mentioning nonstatutory mitigation, counsel's primary view that mitigation was restricted to the statutory list did come through clearly. For example, he started by telling the jury that: "The aggravating and mitigating circumstances are what you should consider in arriving at this grave decision." T 744.

27 The written instructions were given to the jury, T 769, which "further reinforced the impression already laid in juror's minds," Downs v. Dugger,

Hitchcock where the unanimous Court found that "it could not be clearer that the advisory jury was instructed not to consider, ... evidence of nonstatutory mitigating circumstances." 107 S.Ct. at 1824.

The judge too limited his consideration to the narrow statutory list of mitigation. In Hitchcock the judge said he had considered "mitigating circumstances as enumerated in Florida statute 921.141(6)," 107 S.Ct. at 1824 (original emphasis), and the Court found that "the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." Id. Here, the sentencing judge filed his written sentence about twenty minutes after the jury's verdict, T 776, and stated expressly that he considered "the aggravating and mitigating factors set forth in F.S. 921.141." R 24.[28] This restricted scope was in accord with the judge's instructions to the jury and "[w]e must presume that the judge followed his own instructions to the jury on the consideration of nonstatutory mitigating evidence." Johnson v. Dugger, ___ So.2d ___, 13 FLW 167 (Fla., February 24, 1988).[29]

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514 So.2d at 1072.

28 See, e.g., Morgan v. State, 515 So.2d 975, 976 (Fla. 1987) ("the court ... examined the list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there any reference to any nonstatutory mitigating evidence"); Riley v. Wainwright, 517 So.2d at 659 (judge considered mitigation "under Florida statute"); Combs v. State, 13 FLW 142 (Fla. February 18, 1988) (in sentencing order judge stated he considered "statutorily enumerated ... mitigating circumstances"); Foster v. State, 518 So.2d 901, 902 (Fla. 1988) (sentencing order refers to "mitigating circmstances, as enumerated in subsection (6) of said Section 921 141").

29 What the objective record plainly shows -- that the judge limited consideration to statutory factors in the same manner as has been repeatedly found Hitchcock-violative by this Court -- cannot be shunted aside, nor its presumption overcome, by an ex parte summary comment seven years later by the judge that, despite what the record shows, "it did specifically evaluate non-statutory mitigating factors." PCR 1215. This comment in the order denying post-conviction relief filed August 11, 1987, has no support in the objective contemporaneous record of sentencing. It was a claim that had previously been stricken and was not argued in the proceedings to which the August 11th order was addressed. The comment was either an attempt to avoid Hitchcock error being found, or it represents a miscomprehension of the scope of Hitchcock error. The comment came before this Court had first

The nonstatutory mitigating features of this case proffered by defense counsel were Cox's dominant role and the disparate treatment he received. T 750-53. "This Court previously has recognized as mitigating the fact that an accomplice in the crime in question, who was of equal or greater culpability, received a lesser sentence than the accused." Downs v. Dugger, 514 So.2d at 1072. He also argued that the intoxication by alcohol and marijuana should be considered in mitigation. T 753-54, 756-57. It could not be considered, however, because as a matter of law only statutory mitigation could be considered -- and that list permitted only "extreme" mental or emotional problems to be considered. That statutory threshold excludes entirely any consideration of mental condition not meeting its high standard, but intoxication is independently mitigating without regard to the statutory list. See, e.g., Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Norris v. State, 429 So.2d 688, 690 (Fla. 1983).

Where the record shows that consideration of mitigating features of a case was limited that "settles the issue because there was some nonstatutory mitigating evidence." Foster v. State, 518 So.2d 901, 902 (Fla. 1988). There was Hitchcock error in this case, violating the Eighth Amendment, and thus resentencing must be ordered.

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addressed the meaning of Hitchcock and its effect on prior Florida precedent. What Hitchcock reaffirmed is that the Eighth Amendment requires that independent mitigating weight must be given to proffered mitigation, mere "consideration" is not sufficient since in Lockett itself nonstatutory evidence could be "considered" and Hitchcock's effect on Florida precedent was to "clearly reject[]" the "'mere presentation'" standard followed in Florida. Riley v. Wainwright, 517 So.2d at 660. The judge's post hoc comment reflects neither of these Hitchcock principles and hence cannot overcome the presumption shown by the objective record.

III.

THE STATE KNOWINGLY USED FALSE OR MISLEADING TESTIMONY AND ARGUMENT IN RELYING ON THE STATEMENT OF THE CO-DEFENDANT COX CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state intentionally used the Confrontation Clause-violative statements of the co-defendant Cox in a manner which falsely implied Cox had stated Bassett committed the killings. In fact, Cox's various statements to the Florida Department of Law Enforcement and Volusia County Sheriff's Office clearly show it was Cox's contention that the victims died accidentally. The prosecutor elicited testimony from Robert Darnell of the FDLE in front of the jury during the guilt phase of the trial that "Cox's statement [] had implicated Mr. Smith quite heavily and that Mr. Cox had tried to lay most of the blame onto Mr. Smith and we wanted to afford Mr. Smith the opportunity to tell his side of the story." T 512-14.

The prosecutor also brought out testimony that "Cox indicated that Smith was. [the strong man]," (T 551-52), and the prosecutor drew further attention to Cox's allegedly incriminatory statement: "I was just going to ask: 'was there any way to verify which one was doing which?' The witness answered: 'no, sir,' because by -- each of them said that they were the only two there." T 554.

In discussing the relative culpability of the defendant Bassett with co-defendant Cox, the prosecutor made the argument to the jury during his rebuttal closing at guilt phase. "And what is also interesting which bears out this point is that the officer testified that when they -- Cox first made Smith the heavy. In other words, his statement is not like this one. But Cox made Smith the heavy." T 545-46.

During his closing argument at the penalty phase of trial, the prosecutor further misled the jury as to Cox's statement by stating: "And I suggest to you that what you heard is a bare minimum, a bare minimum of what happened," T 732, and referred to the co-defendant's statement, "And again we're having to work from his confession. And the other guy -- he puts the heavy on the other guy. You heard what the other guy did to him." T 742.

Mr. Bassett's 3.850 motion below relates that Cox gave several statements to the authorities regarding the killings, PCT 747-845, between November 23, 1978, and January 29, 1979, which in no way say what the state told the jury they did. Those statements were proffered below and are in the record before this Court at PCR 747-845. The claim was denied without an evidentiary hearing.

It is clear the state's representation of Cox's hearsay statements was false. In his November 29 statement, Ex. 20, 21, PCR 747-785, Cox relates the victims came to him to engage in a marijuana purchase. Cox states he took traveler's checks and cash for the marijuana, and also took their car for collateral against other money owed. After the victims left, Cox said, he never saw them again. In his December 12, 1978, statement, Ex. 22, PCR 786-818, Cox states the defendant Bassett, referred to as Earl Lee Smith, brought the two younger men to meet him at a McDonald's restaurant with the intent of having Cox assist in robbing them. He says Bassett had a gun at that time. After robbing the victims, Cox says, they were put into a car trunk and taken onto a dirt road hear the Civil Defense Center. When they opened the trunk, the two victims were already dead, having suffocated, according to Cox. On December 13, 1978, Cox gave essentially the same statement as related above, PCR 819-828. On January 29, 1979, Cox gave another statement after the state gave him a summary of what Bassett had already stated. PCR 829-845, Ex. 24. This time, Cox professed not to remember many of the details of the killings but stated it could have

happened the way Mr. Bassett described it. PCR 837. Significantly, the cover sheet for the statement, prepared by Special Agent Robert Darnell on Florida Department of Criminal Law Enforcement stationary states:

> Investigator Deemer advised Cox of his rights and then gave Cox a summary of a statement given by EARL LEE SMITH, M/W, DOB 8/23/56, aka THEODORE AUGUSTUS BASSETT, M/W, DOB 9/21/59. Cox acknowledged that the events "could have happened that way." Cox also acknowledged that he had no bullets for the .38 caliber revolver.

PCR 829 (emphasis supplied).

During oral argument on the appeal of the above-styled case, the state told this Court the evidence in the record that Cox said Smith was the "heavy" was a factor justifying the disparate sentences of Cox and Bassett. Recording of Oral Argument. It thus relied on the false or misleading testimony to ensure the sentence of death would be affirmed by this Court.

The state knew of the contents of the above statements and reports, yet presented false or misleading hearsay testimony and argument about their contents to the jury. Since the rationale for a finding of first degree murder and sentence of death was based on the relative culpability of Bassett and Cox, use of this testimony prejudiced Mr. Bassett and violated his right to confrontation, fair trial, due process, and to a reliable determination of whether death was an appropriate sentence, under the Sixth, Eighth, and Fourteenth Amendments.

The use of hearsay incriminating statements of the co-defendant Cox violates Mr. Bassett's right to confrontation and fair trial under Douglas v. Alabama, supra, and Bruton v. United States, 391 U.S. 123 (1968), and the Sixth and Fourteenth Amendments to the United States Constitution. The knowing use of false or misleading evidence by the state is prohibited by the Sixth and Fourteenth Amendments, Alcorta v. Texas, 355 U.S. 28 (1957), as is "manipulation of the evidence by the prosecution [which is] likely to have an important effect on the jury's determination." Donnelly v. DeChristoforo. The fair trial command

of the Sixth Amendment requires the state not "strike foul blows", but use legitimate means in bringing about a just conviction. Berger v. United States, 295 U.S. 78 (1935).

The Eighth Amendment standard for ensuring the reliability of evidence used to support a sentence of death has also been infringed in this case, as the sentencers had before them evidence which was clearly misleading on an issue going to one of the core defenses at penalty phase that Cox was the main actor in the crime. A death sentence cannot stand under such circumstances. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

From statements made by the prosecutor at an ad hoc hearing during the argument of October 1, 1986, on this issue, it is clear the prosecutor intentionally used testimony in violation of the confrontation clause only because he did not want to not call Cox. This is what the State says about using Darnell's hearsay testimony:

> MR. WHITE: I don't -- first of all, I don't know -- I'd have to go though my whole file to see if I even had that. I don't know if I did. If I did, from what I've heard, it's not inconceivable, still, with the philosophy that Cox put the heavy on Smith, because he never came back from the fact that the things I said -- he had the gun; he pointed the gun and he decided to rob them. That's putting the heavy on him.
>
> He never receded from that statement, because I even went back to the jail, during the course of that trial, after all the testimony was in, and he still stayed to that statement.
>
> MR. MALONE: Why didn't you put him on?
>
> MR. WHITE: Because I didn't want that testimony on.
>
> I would have had to have made a deal to put him on, and I wasn't going to make a deal with him.
>
> MR. MALONE: So it came in through hearsay, instead.
>
> MR. WHITE: Your Honor, I have a difficult position, as he indicated. I'm having to defend myself and still handle the appeal, and that's a very unenviable position.

PCT 586-87 (emphasis supplied).

Mr. Bassett is entitled to an evidentiary hearing in this claim, Smith v. State, 400 So.2d 956, 962-63 (Fla. 1981), and to relief.

CONCLUSION

Mr. Bassett is entitled to a new trial or penalty phase based on the foregoing argument.

Respectfully submitted,

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BY _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by Federal Express to BRIAN BAYLY, Assistant Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 this 30th day of March, 1988.

_____
Of Counsel