IN THE

SUPREME COURT OF FLORIDA

CARL PUIATTI, Petitioner, v. RICHARD L. DUGGER, et. al., Respondent.	Case No. 74,865

REPLY BRIEF OF THE PETITIONER

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I. MR. PUIATTI RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT

A. INTRODUCTION

The Due Process clause of the Fourteenth Amendment guarantees a criminal defendant effective assistance of counsel on his first appeal, as a matter of right. Evitts v. Lucey, 469 U.S. 387 (1985).

The criteria for proving a defendant was denied ineffective assistance of appellate counsel parallel those set out in Strickland v. Washington, 466 U.S. 668 (1984), for ineffective assistance of trial counsel. Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985). A petitioner must first demonstrate "specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance." Second, it must be shown that the deficient performance "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Johnson v. Wainwright, 463 So. 2d 207 (Fla 1985).

Thus, a showing of prejudice to the appellate process must be made, based on specific acts or omissions of counsel. "Where, however, a petitioner demonstrates that circumstances surrounding his representation give rise to a presumption of prejudice, he will prevail." Smith v. Wainwright, 777 F.2d 609, 616 (11th Cir. 1985). Consequently, even if no one specific act or omission of appellate counsel rises to the level of ineffective

assistance, if the totality of the circumstances indicates that the appellate process was prejudiced, the petitioner must prevail on a claim of ineffective assistance of appellate counsel.

The performance of Mr. Puiatti's appellate counsel must be assessed against the backdrop of counsel's appointment. Mr. Puiatti was represented by counsel who were admittedly too over-burdened with other matters to represent him zealously. The Public Defender's office for the Tenth Judicial Circuit was appointed by the court as his appellate counsel.

The record shows that the Public Defender twice petitioned the court to be removed from Mr. Puiatti's case because of an excessive caseload, including an unusually large number of new death penalty appeals. These motions were denied by the Circuit Court and this Court.

It is clear that appellate counsel was unable to, and in fact did not, represent Mr. Puiatti effectively and zealously. This serious miscarriage of justice resulted in prejudice to Mr. Puiatti. This Court has placed considerable importance on adequate representation of indigents by appellate counsel:

> Appointment of appellate counsel for indigent defendants is the responsibility of the trial court. We strongly urge trial judges not to take this responsibility lightly or to appoint appellate counsel without due recognition of the skills and attitudes necessary for effective appellate representation. A perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated. The gravity of the charge, the attorney's skill and experience and counsel's positive appreciation of his role and its

> significance are all factors which must be in the court's mind when an appointment is made.

Wilson, 474 So. 2d at 1165 (Fla. 1985) (emphasis added).

Mr. Puiatti's appellate counsel knew they would not be able to properly represent their client and, in fact, the record shows they were right. The prejudice resulting from this lack of proper representation deprived Mr. Puiatti of an effective appeal, thereby denying him his Sixth Amendment rights. As this Court has stated, "the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164.

B. APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUE THAT MR. PUIATTI WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY CONSTITUTED INEFFECTIVE ASSISTANCE ON DIRECT APPEAL

The State's response to Mr. Puiatti's allegations that he was denied his right to a trial by a fair and impartial jury is completely inadequate and unpersuasive. As set forth in detail in Mr. Puiatti's Amended Petition for a Writ of Habeas Corpus ("Amended Petition"), Mr. Puiatti was tried, convicted and sentenced by a manifestly biased jury -- predisposed both to convict and sentence to death. That appellate counsel failed to raise this issue on direct appeal, when the record clearly demonstrated the existence and merit of these issues and when trial counsel specifically preserved these errors for direct appeal, must be considered nothing less than ineffective assistance.

It is a fundamental tenet of state and federal law that a trial court commits reversible error if a party is compelled to use a peremptory challenge on a member of the venire who should have been excused for cause. United States v. Butera, 677 F.2d 1376, 1384 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976); Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).[1] Indeed, the denial of even one meritorious challenge for cause constitutes reversal error, provided the aggrieved party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied. Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990) (reversible error to refuse to dismiss for cause a juror

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1. In United States v. Nell, 526 F.2d 1223, 1226 (5th Cir. 1976), the United States Court of Appeals for the Fifth Circuit explained the constitutional infirmity that results when a trial court improperly denies a challenge for cause:

> The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial. Therefore, as a general rule it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges. . . . At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors. . . . Although a trial court has broad discretion in its conduct of voir dire, . . . its exercise of that discretion is "subject to the essential demands of fairness."

(citing Aldridge v. United States, 283 U.S. 308, 310 (1931)) (other citations omitted). See also Holland v. Illinois, 110 S.Ct. 803, 809 (1990); Stroud v. United States, 251 U.S. 15, 20-21 (1919).

who, through publicity, knew of the existence of defendant's confession which had been suppressed); Smith v. State, 516 So. 2d 43, 44 (Fla. 3d DCA 1987).

During voir dire, the trial judge in at least four instances, improperly denied defense counsel's challenges based upon manifest bias of prospective jurors through, inter alia, knowledge about the case through publicity (Prospective Jurors Harris and Tucker),[2] knowledge of potential witnesses (Prospective Juror Roller), or one or both of the prosecutors (Prospective Jurors Roller and Harris),[3] and antipathy toward mental health professionals (Prospective Juror Withers)[4]. Contrary to the State's assertions, the constitutional infirmity caused by the trial court's failure to dismiss these prospective jurors for cause was not remedied by the fact that trial counsel ultimately exercised peremptory challenges against these jurors. It is precisely because defense counsel was compelled to use its peremptory challenges in these instances that error occured.

Faced with the gravity of the errors committed by the trial court in this regard -- which if raised on direct appeal

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2. See, e.g., Hill v. State 477 So. 2d 553, 554-55 (Fla. 1985); Reilly v. State, 557 So. 2d 1365, 1366-67 (Fla. 1990).

3. See, e.g., Ortiz v. State, 543 So. 2d 377, 378-79 (Fla. 3d DCA 1989) (error to deny for cause challenge to prospective juror who worked with prosecutors and who could not unequivocally state she would base her verdict solely on the evidence presented).

4. See, e.g., Moore v. State, 525 So. 2d 870, 872-73 (Fla. 1988) (prospective juror who could not state unequivocally that he would be impartial regarding insanity defense should have been dismissed for cause).

should have led to a reversal of the judgment below -- the State argues that appellate counsel was not ineffective for failing to raise this issue and implies -- contrary to the record -- that trial counsel did not properly preserve the issue. The issue was clearly preserved. Defense counsel exhausted its allotted peremptory challenges;[5] and defense counsel, in light of the court's denial of earlier challenges for cause, requested and was refused additional peremptory challenges. (R. 1641-42.)

The State's contention that appellate counsel cannot be deemed ineffective because trial counsel failed to flag errors relating to jury selection in their motion for a new trial is wholly unpersuasive. Appellate counsel has the responsibility to read the record below and determine what issues are cognizable on appeal. While trial counsel's new trial motion may be an adequate starting point, such a motion can necessarily be only as comprehensive as trial counsel is effective. Appellate counsel's obligation to render effective assistance does not stop with a review of trial counsel's new trial motion.

Moreover, a review of defense counsel's motion for a new trial should have alerted Mr. Puiatti's appellate counsel to the fact that numerous errors were committed during the voir dire. Included as grounds for this motion was the trial court's refusal to grant for cause challenges to four specific members of the voir dire, including three of the four listed above. (R. 315.) Thus,

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5. Before trial, defense counsel had requested additional peremptory challenges, and this motion was denied. (R. 207-08.)

appellate counsel's failure to raise this fundamental issue can only be explained as ineffective assistance.

C. WHERE A DEFENDANT MAY HAVE BEEN CONVICTED OF A CRIME -- FELONY MURDER -- THAT HE WAS NOT CHARGED WITH, THE CONVICTION MUST BE REVERSED

Mr. Puiatti was not charged with felony murder. The only murder charge was premeditated murder. The prosecution requested a felony murder instruction only after opening statements had been delivered, all the evidence had been presented, and defense counsel had prepared and presented to the jury his sole theory of defense -- that Mr. Puiatti lacked the requisite mental state to be convicted of premeditated murder under Section 782.04(i)(a) of the Florida Statutes. Nevertheless, the Court instructed the jury on felony murder as well as on premeditated murder. (R. 2153, 2155.) Both the Court's instruction and the verdict form permitted the jury to return a "general" first degree murder verdict based on proof of a felony murder. It cannot be determined whether the verdict was premised on a finding of premeditation or the commission of felonies.[6]

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6. The United States Supreme Court has granted certiorari in Schad v. Arizona, 59 U.S.L.W. 3275 (Oct. 9, 1990), 59 U.S.L.W. 3302 (Oct. 16, 1990) to review the constitutionality of a general first degree murder verdict. The verdict was challenged as violating a defendant's right to a unanimous verdict because it was impossible to determine whether juror unanimity was reached on either premeditated murder of felony murder. The Arizona Supreme Court, sitting en banc, held that it was not error to have one form of verdict for first degree murder even though both premeditated and felony murder were submitted to the jury. However, the court strongly urged that alternate forms of verdict be submitted to a jury when a case is submitted on alternative theories of premeditated and felony murders. State v. Schad, 788 F.2d 1162, 1168 (9th Cir. 1989).

Only three months ago, after Mr. Puiatti filed his Amended Petition, the United States Court of Appeals for the Ninth Circuit reversed a first degree murder conviction because a felony murder instruction was submitted to the jury where the defendant was only charged with one count of murder and the case was tried on the theory that the killing was premeditated and deliberate and it was not possible to tell whether the jury's general murder verdict was based on proof of felony murder or premeditated murder. Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1989, (amended 1990). This is the precise Sixth Amendment violation which occurred at Mr. Puiatti's trial.

> [A] violation of the Sixth Amendment right to be informed of the nature and cause of the accusation . . . arises from the constitutionally improper use of one of multiple legal theories of culpability culminating in a general verdict of guilty.

Sheppard, 909 F.2d at 1235.

At Sheppard's trial, "at no time during [the] pretrial proceedings, opening statements, or the taking of testimony, was the concept of felony-murder raised, directly or indirectly." Id. These facts are mirrored in Mr. Puiatti's trial. (Amended Petition at 45-57). As in Sheppard, the prosecution in Mr. Puiatti's case did not request a felony murder instruction until after both sides had rested and requested jury instructions. As in Sheppard, Mr. Puiatti's trial counsel strenuously objected to a felony murder instruction. As in Sheppard, the jury in Mr.

Puiatti's case rendered a general verdict without indicating the legal theory on which it relied. Id. at 1236.

Without even attempting to address the federal constitutional violation raised by this claim, the State merely responds that even though the indictment charged only premeditated murder, the State was entitled to proceed on either a theory of premeditated murder or felony murder because, under Florida law, a premeditated murder indictment provides sufficient notice of both crimes. (Response to Amended Petition at 21.) This precise argument was rejected in Sheppard. The prosecution initially argued that the general allegation of murder in the primary charging document was constitutionally sufficient in itself to put the defendant on notice that he may have to defend against a charge of felony-murder. On rehearing, the prosecution conceded that Sheppard had been "ambushed." The Ninth Circuit agreed and held that this violation was not harmless and ordered that a writ of habeas corpus be granted.

The Ninth Circuit rejected a harmless error analysis in spite of (1) overwhelming evidence pointing to petitioner's guilt of premeditated murder and (2) the lower court's finding that "there was an abundance of evidence" to support a finding of felony-murder.

> Where two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a general verdict.

Sheppard, 909 F.2d at 1238 citing Mills v. United States, 166 U.S. 644, 646 (1897). A bedrock principle of federal constitutional law is violated where the defendant is not apprised in a timely manner of the charges against him. Id. at 1237. Just as in Sheppard, Mr. Puiatti was "ambushed with a new theory of culpability after the evidence was already in." Id.

> This new theory then appeared in the form of unexpected jury instruction permitting the jury to convict on a theory that was neither subject to adversarial testing, nor defined in advance of the proceeding.
>
> Moreover, the right to counsel is directly implicated. That right is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the charges against which he or she must defend. Sheppard's counsel had no occasion to defend against the felony-murder theory during the evidentiary phase of the trial.

Id. at 1237.

The inability of Mr. Puiatti's trial counsel to defend against a felony murder theory is described in detail in the Amended Petition, pages 45-57. The State's unconstitutional expansion of the indictment prejudiced Mr. Puiatti in two fundamental ways. First, it placed defense counsel in the predicament of having to respond in his closing argument to a charge which he had already conceded and for which no preparation was made. Second, it had the effect of broadening the possible bases for conviction. Unless Mr. Puiatti is afforded a new trial, the explicit guarantees of the Sixth Amendment -- that a defendant must be informed of the charges on which he is to be tried -- will, in this case, have been thoroughly abrogated.

D. CALDWELL V. MISSISSIPPI APPLIES TO THE FLORIDA SENTENCING SCHEME AND APPELLATE COUNSEL'S FAILURE TO RAISE THE ISSUE ON DIRECT APPEAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

The State fails adequately to address Mr. Puiatti's contention that, in clear violation of the priniciples enunciated in Caldwell v. Mississippi, 472 U.S. 320 (1985), the trial court and prosecution repeatedly and consistently misled the jury that it was not ultimately responsible for sentencing Mr. Puiatti to death.

As stated in his Amended Petition, Mr. Puiatti does not dispute that this Court has held that Caldwell is inapplicable to the Florida sentencing scheme in capital cases. The United States Court of Appeal for the Eleventh Circuit, however, has held otherwise. Mann v. Dugger, 844 F.2d 1446, 1454 (11th Cir. 1988) (en banc) ("[T]he concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant."), cert. denied, 109 S.Ct. 1353 (1989). Because Caldwell presents a federal constitutional issue, the Florida Supreme Court should defer to the decision of the Eleventh Circuit.[7] The State does not take issue with this precept of federal constitutional law.

Contrary to the State's assertions, the numerous Caldwell violations were properly preserved for appellate review. The State contends that trial counsel's request for a jury

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7. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Speedco, Inc. v. Estes, 853 F.2d 909, 914 (Fed. Cir. 1988).

instruction under Tedder v. State, 322 So. 2d 908 (Fla. 1975), and her subsequent objection to the court's denial of that request does not constitute a sufficient objection that Caldwell error occurred. Without providing any support, the State instead "submits" that Mr. Puiatti's Caldwell claims are procedurally barred in light of Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211 (1989).

In Adams, a case also tried prior to the United States Supreme Court's decision in Caldwell, the Court held that Caldwell error is preserved if it is objected to at trial under either state or existing federal law. The Court stated:

> Neither do we hold that whenever a defendant has any basis for challenging particular conduct as improper, a failure to preserve that claim under state procedural law bars any subsequently available claim arising out of the same conduct. Indeed, respondent here could have challenged the improper remarks by the trial judge at the time of his trial as a violation of due process. . . . Rather, what is determinative in this case is that the ground for challenging the trial judge's instructions -- that they were objectionable under state law -- was a necessary element of the subsequently available Caldwell claim.

109 S.Ct. at 1217 (citations omitted). Thus, the objection made by trial counsel was sufficient to preserve the issue for appellate review.

Because trial counsel appropriately preserved the Caldwell errors on state law grounds, appellate counsel had no strategic basis for not raising the issue on direct appeal.

Appellate counsel's failure thereby constituted ineffective assistance.

II. MR. PUIATTI'S RIGHTS WERE DENIED BY THE IMPROPER PRESENTATION OF VICTIM CHARACTER EVIDENCE UNDER BOOTH V. MARYLAND; MR. PUIATTI'S BOOTH CLAIM WAS PROPERLY PRESERVED AT TRIAL AND ON DIRECT APPEAL

At trial, counsel for Mr. Puiatti vigorously objected and moved for a mistrial when evidence of both the victim's character and the impact of the crime on the victim was improperly introduced. The Court overruled counsel's objections and denied Mr. Puiatti's motion for mistrial.

Florida law clearly provides that claims for relief under Booth v. Maryland, 482 U.S. 496 (1987), may be raised if the offending evidence is objected to in a timely fashion. In fact, as this Court stated in Porter v. Dugger, 559 So. 2d 201, 202 (Fla. 1990): "An objection at trial is necessary to preserve the Booth issue." Clark v. Dugger, 559 So. 2d 192 (Fla. 1990); Parker v. Dugger, 550 So. 2d 459 (Fla. 1989); Adams v. State, 543 So. 2d 1244 (Fla. 1989); Eutzy v. State, 541 So. 2d 1143, 1145 (Fla. 1989); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988). Mr. Puiatti properly preserved his Booth claims at both the trial stage and on direct appeal. On direct appeal, appellate counsel raised the improper and inflammatory statements made to the jury by the prosecutor, thus preserving the issue.[8] The State seeks to

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8. The State attempts to create a distinction between victim impact statements made in the guilt phase of the trial and those made in the sentencing phase. This is an artificial distinction. Booth v. Maryland, 482 U.S. 496, 501-02 (1987), prohibits a capital sentencing jury from considering any victim impact (continued...)

bar Mr. Puiatti's Booth claim on the ground that it should have been raised in a Rule 3.850 motion, and not in a habeas corpus petition. However, this Court, in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), allowed the petitioner to make a Booth claim in her habeas corpus petition. The Court stated that Booth claims should ordinarily be brought in a Rule 3.850 motion, but held that they may be brought in a habeas petition when the pertinent facts underlying the claim were raised on direct appeal. The Booth issues in this case were preserved at trial and raised in appellant's brief on direct appeal. Thus, they may properly be brought in a habeas corpus petition, under Jackson v. Dugger.

CONCLUSION

For the foregoing reasons, Mr. Puiatti respectfully requests that this Court grant him habeas corpus relief, or alternatively, a new appeal, and the Court grant all other and further relief which the Court may deem just and proper.

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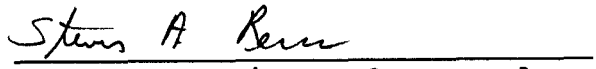
8. (...continued)
evidence. Thus, if such evidence is introduced to a sentencing jury at any time during the trial, it is improper. Certainly, any improper statements made to the jury during the guilt phase of the trial would be considered by them, thereby constituting a Booth.

Further, there is no precedent under Florida law to support the State's attempt to create a distinction between victim impact evidence introduced during the guilt and sentencing stages of the trial. The only case cited by the State in support of its thesis is Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990). However, the quote from that case upon which the State so heavily relies is not a rule of law underlying the decision. It is a mere observation of the Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been furnished by Steven A. Reiss and the law firm of Weil, Gotshal & Manges by United States mail to Robert Landry, Esq. Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 26th day of November, 1990.

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