IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,276

JAMES ROGER HUFF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT COURT, IN AND FOR SUMTER COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This capital case is before the Court on the summary denial, without hearing, of Appellant's petition for post-conviction relief. This brief replies to the State's Answer Brief. Oral argument has been scheduled by the Court for April 7, 1993.

The citation method employed in this brief is as follows: The record on direct appeal is referred to as "R. ___." The record on appeal in the current Rule 3.850 proceedings is referred to as "M. ___." All other references are self-explanatory or otherwise explained.

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ARGUMENT IN REPLY

(I)

THE CIRCUIT COURT'S ERRONEOUS TREATMENT OF APPELLANT'S CASE

The Appellee says that Appellant's case is "distinguishable from Rose v. State, 601 So. 2d 1181 (Fla 1992)" but then presents no argument actually distinguishing this case from Rose. The same errors which warranted reversal in Rose are apparent in the Rule 3.850 court's treatment of James Huff's case.

In Rose, as here, although there was no direct evidence (for example, no transcript) of ex parte communication between the prosecution and trial court, what transpired demonstrated that such communication must have taken place. In Rose, as here, on a silent record -- without a formal or informal record request by the trial court -- the State provided an order to the judge. In Rose, as here, the judge never stated for the record what he intended his findings to be, nor at any point openly indicated how he intended to rule on any claim. In Rose, as here, the State's order was nevertheless adopted in its entirety by the trial court, while the court never gave the defendant an opportunity to respond before the order was signed. In Rose, as here, "[this Court] must assume that the trial court, in an ex parte communication, had requested the State to prepare the proposed order." Rose v. State, 601 So. 2d at 1182-83 (emphasis supplied). The facts are the same in each case.

The State's current argument that the prosecution has an interest in seeing that cases "do not languish in the trial courts" (Answer Brief of Appellee, p. 3) does not excuse the denial of due process which occurred here. First, this case was not "languishing." After filing the motion to vacate, Appellant filed

additional written submissions discussing his claims and reiterating his request that an evidentiary hearing be conducted. The trial court declined even to schedule a status conference. And when the State's order was signed, the trial court had not yet received the record of the trial and sentencing proceedings.

Second, this Court rejected a similar contention in Rose, explaining: "No matter how pure the intent of the party who engages in [ex parte] contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case." Rose, 601 So.2d at 1183. No undue delay, and much less so an unreasonable one, would have been engendered had the trial judge allowed Appellant the opportunity to respond before the order was signed.

Notwithstanding the fact that the judge signed the State's order a) without notice to Appellant's counsel that the court was entertaining proposed orders, b) without any indication on the record by the judge that he was inclined to rule in the manner set out in the State's order, and c) without affording Appellant the chance to raise specific objections or comments before the order was signed (see n. 1, infra), the State now argues that Appellant did not raise "any specific objections to any specific matters addressed in the trial court's order" (Answer Brief of Appellee, p. 4).[1] In this regard the State is again in error.

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[1]The judge here never even stated for the record that he was inclined to deny an evidentiary hearing before he received the State's order. Even if the judge was inclined to deny relief, Appellant should have been afforded the opportunity to address the specifics of the order before it was signed, and thus the (continued...)

Mr. Huff did specifically object to the findings contained in the State's order when he first could -- in his motion for rehearing. As in this appeal, Appellant raised numerous objections to the procedure employed by the trial judge and to the findings in the State's order. Although by the time Appellant could first object (in his rehearing motion) the damage had been done -- the State's order was already signed and entered -- the rehearing motion is replete with examples of specific objections.[2] These specific objections ranged, inter alia, from Appellant's detailed objection to the ruling, drafted ex parte by the State and signed without a hearing by the Circuit Court, that the "Miranda sheet" discussed at trial was the one used by Officer Overly when he advised Mr. Huff of his rights,[3] to Appellant's objections to the denial of an evidentiary hearing and the order's rulings on various facets of the claims presented, including the claim of ineffective assistance of counsel. Mr. Huff, like any criminal defendant, deserved an impartial determination by the judge. He did not receive such treatment and, contrary to the State's current argument, he objected to the procedure employed when he first could

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[1](...continued)
opportunity to persuade the trial judge that a given ruling or finding within the order was not an appropriate one. Such a procedure is of special importance in a capital case, where a trial court's rulings on individual issues will have an impact on the subsequent rulings of reviewing courts.

[2]The trial court summarily denied rehearing in a pro forma order.

[3]Officer Overly testified that the sheet introduced at trial was not the one he used, while Appellant pled facts demonstrating that the sheet introduced at the trial was not the one Officer Overly used (See Claim II, Initial Brief of Appellant; see also Section II, infra).

-- in his motion for rehearing.

Mr. Huff, like the petitioner in Rose, has also shown prejudice under this Court's standard. The Rose court explained: "The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal." Rose, 601 So. 2d at 1183. In this case, as in Rose, there is no way to know whether the tribunal ever read, considered, and impartially judged the merits of Mr. Huff's claims. The State's arguments, presented in the State's order, were adopted wholesale. Appellant was given no reasonable chance to respond.

Indeed, there is absolutely no indication here that the 3.850 judge (who was not the original trial judge) was even provided with the record, including transcripts of the trial and sentencing proceedings, and even less so an indication that he reviewed the record before signing the State's order. This case accordingly involves error not only under Rose v. State, but also under Steinhorst v. State, 489 So. 2d 414 (Fla. 1986), where this Court expressly held that it was reversible error for a 3.850 trial court to deny relief without first reviewing the record.[4]

Contradicting its own earlier argument, the State finally asserts that the opportunity to file a motion for rehearing is sufficient to preserve a defendant's rights in cases such as this one and Rose. The defendant in Rose, like the defendant here, filed a motion for rehearing expressing his objections, including objections to the procedure employed in denying relief. In Rose,

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[4]The 3.850 judge in Steinhorst had also presided at the trial. The 3.850 judge here was a different judge than the one who had presided at trial. The error here is thus even more significant than the one found to warrant reversal in Steinhorst.

as here, the State suggested that the opportunity for rehearing cured the error. This Court did not accept the suggestion in Rose. The suggestion was not accepted for very important reasons -- once the judge engages in such practices and signs the order, the damage is done. The damage was done in this case, as it was in Rose, when the judge signed, verbatim, the State's order.

And here, as in Rose, the appearance of impartiality was certainly undermined. While many members of the judiciary have come to realize that the practice of calling "only one party to direct that party to prepare an order for the judge's signature" is "fraught with danger and gives the appearance of impropriety,'" Rose, 601 So.2d at 1183, the judge in this case, like the judge in Rose, failed to realize that the procedures he followed were improper. The procedures were also unfair to Mr. Huff, and resulted in a fundamentally flawed disposition of Appellant's Rule 3.850 claims. As in Rose, the errors warrant corrective action by this Court.[5]

(II)

THE PURPORTED STATEMENT

Mr. Huff was never advised that he had the right to court appointed counsel without expense if indigent. See Caso v. State, 524 So. 2d 422 (Fla. 1988). At trial, a purported statement elicited as a result of those inadequate warnings was introduced to establish guilt. Under the law then applied (law now expressly overturned by this Court), the admission of that purported

[5]Appellant respectfully refers the Court to the discussion in his Initial Brief relating to the trial court's errors in failing to allow an evidentiary hearing. In the interests of economy, that discussion is not repeated herein.

statement was upheld on direct appeal.

The law in effect at the time of Appellant's direct appeal, which held that it was not error to fail to advise the accused of the right to court appointed counsel if the accused is indigent, see Alvord v. State, 322 So. 2d 533 (Fla. 1975) (Alvord I), has since been overruled by this Court. This Court has also expressly held that a defendant similarly-situated to Mr. Huff is entitled to the application of the correct, current rule of law, and that such an application of the proper law should be undertaken in post-conviction proceedings. Thus, this Court applied Caso v. State, 524 So. 2d 422 (Fla. 1988) -- which overruled Alvord I -- in post-conviction proceedings and found that the defendant was entitled to review under the appropriate legal standards in Alvord v. Dugger, 541 So. 2d 598, 600 (Fla. 1989) (Alvord II).[6]

In Alvord II, the defendant argued that this Court "erred in affirming the trial court's admission of his statements when no proper warning of his right to counsel as an indigent was given.... [H]e argue[d] that since [the Florida Supreme Court] subsequently recognized this specific error in Caso v. State, 524 So. 2d 412 (Fla.), cert. denied, 109 S.Ct. 178 (1988), and expressly receded from [the Court's] earlier holding in Alvord I [the direct appeal ruling], we should now rectify this error and grant a new trial."

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[6]Caso emanated from the Supreme Court of Florida, is constitutional in nature, and was a development which significantly altered the law previously in effect. See Witt v. State, 387 So. 2d 922, 931 (Fla. 1980). This Court in Alvord II accordingly found that it warranted application to the defendant's case in post-conviction proceedings. Mr. Huff's conviction, like Mr. Alvord's, was affirmed on direct appeal under the pre-Caso law subsequently held by this Court to be constitutionally invalid. Like Mr. Alvord, Mr. Huff is entitled to application of the proper standard in his case in these proceedings. See Alvord, 541 So.2d at 600.

Alvord, 541 So. 2d at 599. This Court explained:

> [T]he detective read Alvord his rights but failed to explain that he had the right to appointed counsel if indigent. In Alvord I [the Alvord direct appeal decision], we held that his failure to give the correct Miranda warnings did not preclude the evidence from being admitted.... However, in Caso v. State, we receded from that holding...

Alvord, 541 So. 2d at 600.

The Court then held: "Recognizing that the admission of these statements was error, the question we must now address is whether this error was also harmless." Alvord, 541 So. 2d at 600 (emphasis added). The only question in Alvord II was whether the error, i.e., the admission of the purported statement, was harmless beyond a reasonable doubt. Under Alvord II, that question is now the only one for the Court to resolve in Mr. Huff's case.

In a strange twist on the rules of constitutional harmless error analysis, the State argues that the admission of the purported statement was harmless because Mr. Huff was previously convicted of this offense without resort to the purported statement. No case is cited by the State in support of this contention and no case has been uncovered by Appellant's counsel which even remotely supports such a proposition. Constitutional harmless error analysis, after all, is case-specific -- it focuses on the actual record of the proceedings at issue. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), relying on Chapman v. California, 386 U.S. 18 (1967). As a matter of constitutional law, the State's argument does not pass muster.

The State's argument also fails as a matter of fact. The prior conviction was reversed by this Court because of gross

prosecutorial misconduct. See Huff v. State, 437 So. 2d 1087 (Fla. 1983). As this Court stated: "[I]t is impossible to measure what impact the prosecutor's negative innuendoes had upon the jurors' deliberations." Id. at 1091. That conviction was consequently found to be inherently flawed and unreliable. It would be a strange and remarkably inappropriate twist on constitutional law to now rely on such a conviction to rule constitutional error harmless in this case.

Under the Chapman/DiGuilio standard, which this Court has held applicable to cases of Caso error, the error in Mr. Huff's case is one which cannot validly be found harmless beyond a reasonably doubt. In Thompson v. State, 17 FLW S78, S78-79 (Fla. Jan. 30, 1992) (quoting and relying on Caso), this Court ruled that such an error could not be deemed harmless in a case involving much more incriminating evidence in addition to the statement than the evidence involved in Appellant's case. The State's evidence in Mr. Huff's case, aside from the purported statement, was circumstantial at best and surely does not establish beyond a reasonable doubt that the admission of the statement can be deemed harmless. See Huff v. State, 495 So.2d 145, 147 (Fla. 1986) (outlining the prosecution's evidence). The statement was quite important to the State's case at Mr. Huff's retrial. Cf. Caso v. State (finding the error not harmless where the statement was important to the State's case).

Indeed, other than the purported statement, the State presented absolutely no direct evidence of Mr. Huff's guilt. The defense, on the other hand, presented evidence, including Mr. Huff's testimony, explaining that Mr. Huff (who was described by

witnesses as dizzy, groggy and injured shortly after the alleged offense) had been struck and rendered unconscious by a man who had approached his parents' car, that when he regained consciousness he found that his parents were unconscious, and that he then saw that they had been shot (See Initial Brief of Appellant, Claim II, p. 21, et seq., Claim III, p. 35 et seq., Claim IV, p. 51, et seq., outlining the evidence).

No gun was recovered by the police, and there was a dearth of evidence contradicting Mr. Huff's account, other than the alleged statement.[7] Mr. Huff staggered to the nearby house of Francis Foster and asked for help. Mr. Foster testified that Mr. Huff was hysterical, yelling for help, concerned about his parents and asking for someone to call the police (R. 652-58; see also Initial Brief of Appellant, p. 17). Mr. Foster told his son to call the police (R. 659). Consistent with the defense case, Officer Overly, one of the first officers to arrive, testified that Mr. Huff was "hysterical" (R. 808); "really upset" (R. 800); "wasn't really cognizant of what was going on" (R. 800); and was "confused" (R. 805). Officer Overly additionally testified that Mr. Huff was "sobbing" (R. 852), while Chief Lynum testified that Mr. Huff was crying, hysterical, and worried about whether his parents were alive or dead (R. 869; 877). See Initial Brief of Appellant, Claims II, III and IV (outlining evidence).[8]

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[7]Mr. Huff has consistently maintained that he did not say what Sheriff Johnson claimed ("I shot them") but that what he said was "They shot them." (See generally, Initial Brief of Appellant, Claim IV.)

[8]Officer Overly's testimony that Mr. Huff did not "appear to understand what [Overly was] saying to him" (R. 852); his testimony (continued...)

In light of the facts of this case, the alleged statement was important to the State's case for guilt. Under these facts, there is no principled way to say beyond a reasonable doubt that Mr. Huff would have been convicted without the statement evidence. Appellant's case is thus manifestly different than the situation in Alvord v. Dugger where, although finding reconsideration appropriate in collateral proceedings due to the intervening change in law effectuated by Caso, this Court ultimately found the error harmless because there was direct evidence of Alvord's guilt independent of the statement -- the direct evidence about Alvord's involvement in the crime provided by Alvord's girlfriend, including her testimony about the independent confession Alvord made to her.[9] As this Court noted, the statement evidence in Alvord was "cumulative to the primary evidence presented by his girlfriend." Alvord, 541 So.2d at 601. There is no principled way to similarly

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[8](...continued)
that "[I] just can't say that [Mr. Huff] understood his rights" (R. 808); evidence regarding Mr. Huff's assertion of his right to silence and law enforcement's failure to honor the right; and other issues relating to the validity of the alleged statement and defense counsel's ineffective assistance in litigating issues relating to the statement evidence are discussed at pp. 21-33 of Appellant's Initial Brief. The facts relating to the Caso/Alvord issue are discussed at pp. 13-21 of the Initial Brief.

[9]In Alvord II this Court explained that "[t]he principal part of the state's case was not Alvord's custodial statements but the testimony of his girlfriend, Zelma Hurley. She recounted a conversation she had with Alvord the morning following the murders. She testified that Alvord told her that he went over to Ann's house the previous night to 'rub out' the victims; he entered the house after kicking the door in; he placed Ann, Lynn, and Georgia in separate rooms and strangled them; he did not want to strangle the older woman but did so to avoid witnesses; and he left the home with money. The importance of her testimony was reflected in Alvord's brief on direct appeal where he stated: 'The evidence on which the state primarily built its case was the testimony of Zelma Hurley.'" Alvord, 541 So. 2d at 600.

conclude that the introduction of the statement evidence was harmless under the facts of Mr. Huff's case.

Other than the alleged statement, the State's case at Mr. Huff's trial was totally circumstantial. There was no direct evidence whatsoever linking Mr. Huff to the offense. Paraphrasing this Court's statement in Huff I, "it is impossible to measure what impact the [purported statement] had upon the jurors' deliberations" in this trial. Huff, 437 So. 2d at 1091. It certainly cannot be said that the purported statement had no effect beyond a reasonable doubt.

Mr. Huff has pled a valid claim for relief which is cognizable due to the intervening decisions in Caso and Alvord II. Mr. Huff was entitled to an evidentiary hearing and full and fair resolution by the trial court (See Initial Brief of Appellant, Claims I and II; see also section I, supra). Mr. Huff also pled that his former trial attorneys had ineffectively litigated the claim. An evidentiary hearing in this regard was also appropriate (See Initial Brief of Appellant, Claims I and II).

The Circuit Court denied 3.850 relief by signing the State's order. Notwithstanding Officer Overly's express testimony that the Wildwood Police Department "Miranda sheet" introduced at trial was not the one he used (R. 838, "No, this doesn't look like the one"; R. 839-40, "I don't remember line 4, if you cannot afford to hire a lawyer, one will be appointed to represent you for any questioning"); notwithstanding Officer Overly's express testimony that the provision of counsel warning was not included in the "rights" he provided (R. 838-40); and notwithstanding the allegations of fact in Appellant's Rule 3.850 motion that the

"Miranda sheet" introduced by the State at trial was not the one Officer Overly used and that the provision of counsel right had not been provided to Appellant -- allegations which surely required an evidentiary hearing -- the trial court accepted the State's invitation to make findings contrary to Appellant's allegations without affording Appellant the opportunity to prove his claim at a hearing or even to object or comment on the State's order (See Initial Brief of Appellant, Claim II). Accepting the State's order wholesale, the order signed by the trial court cited the existence of the Wildwood "sheet" -- a "sheet" Officer Overly said was not the one he used (R. 838-40) -- to support the denial of relief on this claim (see M. 393, citing R. 967-75). The facts pled, however, entitled Appellant to an evidentiary hearing. The trial court erred in not allowing one.

As Appellant also noted in his Initial Brief, an evidentiary hearing on the issue of ineffective assistance of counsel relevant to the handling of the suppression motions is also necessary under Rule 3.850. Mr. Huff has pled facts and presented issues which require evidentiary resolution. The 3.850 court, however, did not afford him full and fair adjudication. An evidentiary hearing, and, thereafter, relief are appropriate.[10]

(III)

INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES

The state incorrectly argues that the testimony of an expert on the processing of the crime scene would have been collateral and

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[10]Appellant respectfully refers the Court to the discussion in his Initial Brief (Claim II) with respect to the additional facets of his claim and relies on that discussion in reply to any additional arguments made by the State.

irrelevant. The State is wrong.

The trial judge ruled that general testimony about crime scene investigation would be improper. The issue raised here concerns the fact that defense counsel inadequately prepared his expert, Mr. White, to discuss the specific details of this crime scene, and to provide specific testimony about the crime scene investigation, the scene reconstruction and the forensic procedures employed in this case. Such evidence would have been highly relevant and important to the outcome of Appellant's trial in this circumstantial case -- a case in which the prosecution relied precisely on such crime scene forensic and reconstruction evidence to try to prove its case.

The State does not address in any way trial defense counsel's ineffective assistance as to the crime scene reconstruction and forensic evidence, or the other instances of ineffective assistance presented in this case. Ineffective assistance of counsel is at the core of the issues raised in this claim. The issues relating to counsel's ineffective assistance warrant an evidentiary hearing.

The facts and allegations raised by Mr. Huff entitle him to an evidentiary hearing. The 3.850 court erred in failing to allow one.[11]

(IV)

CONFRONTATION AND INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant relies on the discussion in his Initial Brief and respectfully refers the Court to that discussion.

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[11]Appellant respectfully refers the Court to the discussion in his Initial Brief (Claim III) with respect to the additional facets of his claim and relies on that discussion in reply to any additional arguments made by the State.

(V)

COMMENTS ON RIGHT TO SILENCE AND
INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant relies on the discussion in his Initial Brief and respectfully refers the Court to that discussion.

(VI)

CONSTITUTIONAL INFIRMITY IN THE DEATH SENTENCE

The State argues that this claim is not cognizable in Rule 3.850 proceedings (presumably because the claim is cognizable in habeas corpus proceedings) since "the allegations are directed to this court's [direct appeal] actions" (Brief of Appellee, at p. 30). This Court has held, however, that claims founded on changes in law should be presented in Rule 3.850 actions. Hall v. State, 541 So. 2d 1125 (Fla. 1989).[12]

The United States Supreme Court has now also issued its decision in Espinosa v. Florida, 505 U.S.__, 120 L.Ed.2d 854, 112 S.Ct.__ (1992). Espinosa further establishes that the proceedings resulting in James Huff's death sentence were constitutionally infirm. The construction employed by the trial judge in finding the "heinous, atrocious, cruel" and "cold, calculated, premeditated" aggravators was constitutionally overbroad and vague. These procedures ensured that a "thumb [was pressed on] death's side of the scale," Stringer v. Black, 112 S.Ct. ___, ___ (1992), and resulted in a fundamentally flawed death sentence. The issues

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[12]The State also argues, inconsistently, that these issues were or should have been raised on direct appeal (Brief of Appellee, at pg. 31). These issues were raised on direct appeal. Recent constitutional precedent establishes that the prior decision involved error and therefore that that decision should be reconsidered in this action.

discussed in section VI of Appellant's initial brief warrant the granting of relief.[13]

(VII)

INAPPROPRIATE EXCLUSION OF JURORS

The State argues that this claim is without merit because it involves peremptory challenges, rather than challenges for cause. However, this Court has ruled that peremptory challenges can form the basis for claims of jury selection error. In State v. Neil, 457 So. 2d 481 (Fla. 1984), this Court set out the appropriate test for determining whether peremptory challenges have been used in a discriminatory fashion. As set out in Neil, the initial presumption is of non-discrimination. A party who wishes to raise an issue must make a timely objection and demonstrate that the challenged persons are members of a distinct group, and that there is a likelihood that they have been challenged because of their inclusion in that group. If the trial court then determines that there is a likelihood that the challenges are being exercised on the basis of membership in the group, the burden shifts to the complained-about party to show on the record a neutral, non-discriminatory reason for the peremptory challenges. If the court finds that the challenges were made on the basis of inclusion in the group, it should dismiss that jury pool. Neil, 457 So. 2d at 486-7.

While Neil involved peremptory challenges to members of racial groups, it specifically left open the applicability to other groups

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[13]As to additional issues regarding aggravation, mitigation, and other facets of the claim, Appellant respectfully refers the Court to the discussion in his Initial Brief (Claim VI) and relies on that discussion in reply to any additional arguments made by the State.

to "be determined as such cases arise." Neil, 457 So. 2d at 487. This is such a case.

Defense counsel's failure to object in this case deprived Mr. Huff of the right to a fair and impartial jury, and counsel's ineffectiveness warrants an evidentiary hearing. A distinct group of people were systematically excluded by the prosecution through the use of peremptory challenges. An evidentiary hearing and relief are appropriate.[14]

(VIII)

INVALID WAIVER AND INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant relies on the discussion in his Initial Brief and respectfully refers the Court to that discussion.

CONCLUSION

On the basis of the foregoing and the discussion presented in his Initial Brief, Appellant prays that the Court reverse the lower court's ruling, remand for an evidentiary hearing, and set aside his unconstitutional convictions and death sentences.

Respectfully submitted,

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[14]Appellant respectfully refers the Court to the discussion in his Initial Brief (Claim VII) with respect to the additional facets of his claim and relies on that discussion in reply to any additional arguments made by the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Kellie Nielan, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 13th day of January, 1993.

Julie D. Naylon
Attorney