IN THE SUPREME COURT OF FLORIDA

NO. 83,163

MILFORD WADE BYRD,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

MARTIN J. McCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR PETITIONER

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The Petitioner, Milford Wade Byrd hereby replies to the response of the State of Florida. The failure to reply to any issue contested by the Respondent is not a waiver of that claim.

The ineffectiveness of Mr. Byrd's appellate counsel is a violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the principle claim of his petition. Evitts v. Lucey, 469 U.S. 387 (1985). The criteria for proving a claim of ineffective assistance of appellate counsel mirror the standard set out for similar claims dealing with trial counsel. Mr. Byrd must point to specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and that the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985), citing Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

Mr. Byrd has presented to this Court a petition alleging that he was denied the effective assistance of counsel on direct appeal of his conviction for first degree murder and his sentence of death. In this petition, as required by Wilson, he has set out "specific errors and omissions" which show that his appellate counsel's performance fell well below the range of professionally acceptable performance. These errors include, among other issues, appellate counsel's failure to raise issues concerning

the Mr. Byrd's right to remain silent[1], the failure of the trial court to file a timely sentencing order, failure of the trial court to allow cross examination and whether the aggravating circumstances were vague under the Eighth Amendment to the United States Constitution. The failure of direct appeal counsel seriously undermines any confidence in Mr. Byrd's conviction and sentence of death. The performance of counsel compromises the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson; Johnson.

The state did not explain how acceptable performance for appellate counsel can be reconciled with the failure to present to the Florida Supreme Court fundamental issues of law when a man's life rests in the balance. This Court has stated:

> The propriety of the death penalty is in every case an issue requiring the closest scrutiny.

Wilson v. Wainwright, 474 So.2d at 1164. This Court cannot maintain its close scrutiny when counsel fails to point out significant violations of state and federal law that have led to the condemnation of an innocent man.

This Court has admitted that its own review of any case is:

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[1]Mr. Byrd does assert that appellate counsel raised this issue and that this Court considered this issue on direct appeal. In light of the State's recent position that the issue was not adequately raised by appellate counsel, Mr. Byrd asserts appellate counsel's failure to adequately raise the issue was deficient performance. Mr. Byrd would also note that during 3.850 proceedings, the State asserted that the issue was raised on direct appeal (3.850 Answer Brief at 65).

> no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson v. Wainwright, 474 So.2d at 1164. Mr. Byrd was deprived of this type of zealous advocate on direct appeal. Because he was deprived of this type of counsel numerous errors in Mr. Byrd's case were not pointed out to the Florida Supreme Court on direct appeal.

The deficient performance of appellate counsel has prejudiced Mr. Byrd to such a degree that there is no longer any confidence in the conviction and sentence of death. Serious allegations of Mr. Byrd's innocence of this crime and the sentence of death, that were not presented on direct appeal, when they could have been, wilt any confidence in the appellate result. Not only is Mr. Byrd's conviction and sentence of death undermined by his innocence but they are also shown to be wrong by improper jury instructions and the failure of the trial court to allow Mr. Byrd any opportunity to present his defense of innocence at trial.

Mr. Byrd has presented to this Court fundamental violations of the federal constitution by which he was denied the basic right of effective assistance of counsel on direct appeal. This Court stated in Wilson, at 1164:

> ...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.

This is the first time Mr. Byrd has presented to this Court his lack of zealous counsel on direct appeal. He has set out specific instances of ineffective assistance.

CLAIM I

THE STATE OF FLORIDA VIOLATED MR. BYRD'S RIGHT TO REMAIN SILENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION.

With respect to this claim, the State makes numerous factual misrepresentations. The testimony of the police officers involved indicate Mr. Byrd maintained silence after signing the acknowledgment of his rights:

> Q. Well, isn't it true that he never verbally articulated anything to you and that he maintained his silence during nearly three hours of your telling him what you thought the facts were?
>
> A. Yes, except at the end we did make certain confessions.

(R. 681).

Moreover, the "consent to interview form" was in fact, a document advising Mr. Byrd of his rights. His signature on the form was an acknowledgment of his rights, including his right of silence (R. 1424). There is no evidence that Mr. Byrd expressly stated a desire to be interviewed or questioned by the police, contrary to the Response at 15. In fact, the police indicated that Mr. Byrd did not indicate that he wished to make a statement until hours later:

Q. At what point in time did Mr. Byrd tell you he wanted to make a statement, sir, roughly?

A. Approximately 0445 hours.

(R. 1426).

The State initially argues that both United State v. Ramsey, 992 F.2d 301 (11th Cir. 1993) and Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) are not binding upon this court. The State contends that under Eutzy v. State, 541 So.2d 1143 (Fla. 1989) neither Jacobs or Ramsey can be given retroactive effect, since they are new law since Mr. Byrd's conviction. What the State misunderstands is that Eutzy only forbids the retroactive application of lower federal cases when those cases create new law. This court said in Witt v. State, 387 So.2d 922, 930 (Fla. 1980) that only this court and the United States Supreme Court can adopt a change of law sufficient to precipitate a post conviction challenge to a final conviction and sentence. However, this is apparently no longer Florida law. In Johnston v. Singletary, ___ So. 2d ___ (Fla. June 16, 1994), this Court revisited an earlier decision because of an intervening ruling by a federal district court. In light of Johnston, this Court does honor and follow decisions by lower federal courts.

The opinions of the Eleventh Circuit Court of Appeals cited by Mr. Byrd do not announce new law, they merely establish that Mr. Byrd's right to silence was violated. Compare Johnston v. Singletary, wherein this Court honored a federal district court finding that Eighth Amendment error occurred. Both Jacobs and

Ramsey rest on long standing cases that compel a grant of relief. Both Jacobs and Ramsey stem from the right to remain silent under the fifth amendment set out in Miranda v. Arizona, 384 U.S. 436 (1966). In Ramsey, the most recent case cited by Mr. Byrd, the Eleventh Circuit quoted from Miranda, when it found that Mr. Ramsey's right to remain silent was violated. Not only was Ramsey based upon Miranda's discussion of the fifth amendment right to remain silent, but the Eleventh Circuit also relied upon Rhode Island v. Innis, 446 U.S. 291 (1980) as well as United State v. Hernandez, 574 F.2d 1362 (5th Cir. 1978). Both the Jacobs and Ramsey opinions are binding on this court as applications of long standing constitutional law. No new rule or law was announced in these opinions. They are the most recent decisions of the federal court concerning this constitutional issue. However, these decisions establish that Mr. Byrd's right to silence was violated.[2]

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[2]Recently the United States Supreme Court discussed the validity of a confession given by an uncounseled defendant when he had made a vague request for counsel. Davis v. United States, 1994 WL 276708 (1994). In Davis, the Supreme Court only addressed the Sixth Amendment right to counsel during a custodial interrogation. The Davis case is not controlling in this matter. The violation in Mr. Byrd's case is of the Fifth Amendment. The teaching of the Supreme Court on this issue has remained unchanged since the decision in Miranda. The Davis case does not make any change in the long standing constitutional principle -- that for a significant period of time after a suspect has exercised his right to remain silent, whether unequivocally or equivocally, "the police must refrain from questioning the suspect unless the suspect both initiates further conversation and waives the previously asserted right to silence." United States v. Ramsey, 992 F.2d 301, 305 (11th Cir. 1993); quoting Jacobs v. Singletary, 952 F.2d at 1293. The police did not cease questioning Mr. Byrd after three hours of silence, nor did they

(continued...)

Contrary to the Respondent's argument both Jacobs and Ramsey are on point with the facts in Mr. Byrd's case. Mr. Byrd's comment that he did not "hurt anyone" is not a waiver, either explicit or implicit, of his right to remain silent. Even if that comment were some form of waiver, any questioning must cease if "the individual indicates in any manner, at the time prior to or during questioning, that he wishes to remain silent..." Jacobs v. Singletary, 952 F.2d 1282, 1291 (11th Cir. 1992) quoting Lightbourne v. Dugger, 829 F.2d 1012, 1018 (11th Cir. 1987)(emphasis in original). The quotation from Lightbourne is originally found in Miranda.

If Mr. Byrd made this statement when he was arrested at his home at approximately 2:00 a.m. he was unequivocal about his right to remain silent at the police station. For almost three hours the agents of the Respondent cajoled Mr. Byrd into making a statement. Officer Newcomb testified that during the period before Mr. Byrd made any statements Mr. Byrd remained silent except to request that he speak to Jody Clymer, his girlfriend.

> Q. And isn't it true, Detective Newcomb, that during this two-and-a-half hour period that you told Mr. Byrd that you did not know how to deal with his silence?
>
> A. There was a lot said during that period. I may have said that.

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[2](...continued)
attempt to clarify the meaning of his silence. They also reinitiated questioning after he spoke to his companion, even though Mr. Byrd did not reinitiate the contact and did not make any waiver of this rights.

(R.679).

Q. Well, isn't it true that he never verbally articulated anything to you and that he maintained his silence during nearly three hours of your telling him what you thought the facts were ?

A. Yes, except at the end he did make certain confessions.

(R.681) (emphasis supplied).

Q. Isn't it true that he was initially arrested at or about 2:35 in the morning, 2:55 in the morning and that almost three hours passed before he gave a statement to you or any other person in your presence, sir?

A. That's correct.

Q. Isn't it true that during this entire three hours of almost time span that you and/or Detective Newcomb were telling Byrd what other witnesses had allegedly told you about the homicide?

A. The whole time, no, sir.

Q. During any point in time?

A. Yes, sir.

Q. Isn't it true that from 2:55 in the morning until 5:35 in the morning, almost three hours, that Wade Byrd had neither admitted his guilt or denied his guilt during the entire period of time ?

A. Not -- that is not totally true....

Q. He made statements during the interim that involved him in the homicide ?

A. He made statements to the effect that he wanted to talk to his girlfriend and would tell us the truth.

(R. 713-14).

The Eleventh Circuit Court of Appeals has said:

> Once a suspect has equivocally indicated that he wished to remain silent by refusing to speak, an investigator may ask questions designed only to clarify whether the suspect indeed wishes to remain silent. Jacobs, 952 F.2d at 1293 ("Although [the investigator] may have been unsure whether [the suspect] was indicating that she desired to remain silent, he was only entitled to clarify whether she wished to remain silent.") see also Christopher v. Florida, 824 F.2d 836, 841-42 (11th Cir. 1987), cert. denied, 484 U.S. 1077, 108 S.Ct. 1057 (1988). For a/ significant period of time after a suspect has exercised his right to remain silent, whether unequivocally or equivocally, "the police must refrain from questioning [the suspect] unless the suspect both initiates further conversation and waives the previously asserted right to silence." Jacobs, 952 F.2d at 1293 Impermissible interrogation includes both express questioning and words or actions by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

United States v. Ramsey, 992 F.2d 301, 305 (11th Cir. 1993).

After almost three hours of questioning with no response from Mr. Byrd the session ended to permit Mr. Byrd to talk to Ms. Clymer. That conversation lasted less than one minute and the interrogation began again without Miranda warnings. In Jacobs the Eleventh Circuit has held that twenty minutes is not sufficient time to be considered a "significant period" before questioning can be reinitiated. Jacobs, 952 F.2d at 1293.

The safeguards established in Miranda concerning custodial interrogation were further discussed in Michigan v. Mosely, 423 U.S. 96, 99-100 (1975). The Court set out the scope of the "right to cut off questioning." The Supreme Court set out that

this right "serves as an essential check on 'the coercive pressures of the custodial setting." Mosely reaffirmed the Miranda requirement that "interrogation must cease" when the person in custody "indicates in any manner" that he wishes to remain silent. Statements taken after a suspect indicates his desire to remain silent are inadmissible unless the suspect's right to cut off questioning was scrupulously honored. Mosley.

No matter how the state attempts to characterize the facts in this case the principles found in Miranda, Mosley, Christopher, Jacobs and Ramsey have remained the same for almost thirty years. The right to remain silent is a long standing constitutional principle that cannot be lightly tossed aside by the state. Jacobs and Ramsey are not statements of new law but merely the application of long standing constitutional guarantees.

To the extent that the State asserts that appellate counsel failed to adequately brief this issue on direct appeal, Mr. Byrd would note the recent holding by the Eighth Circuit Court of Appeals:

> We presume counsel's conduct to be within the range of competence demanded of attorneys under like circumstances. Strickland v. Washington 466 U.S. 668. However, when the appellant shows that defense counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would exhibit under similar circumstances," that presumption must fail. Hayes v. Lockhart, 766 F.2d 1247, 1251 (8th Cir. 1985).

Starr v. Lockhart, ___ F.3d ___ (8th Cir. 1994).

Any competent counsel would have raised this issue on direct appeal.[3] The law supporting this claim is long standing and would have been well known to reasonably competent counsel. This claim was strongly supported by the record from trial. A motion to suppress was vigorously argued to the trial court and denied. There was every chance that had this issue been presented the claim would have been successful. This court should grant the petition.

CLAIM II A AND B

APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO RAISE THE CONSTITUTIONAL INVALIDITY OF THE FLORIDA JURY INSTRUCTIONS CONCERNING THE AGGRAVATING CIRCUMSTANCES AND FOR FAILING TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL OF TRIAL COUNSEL.

Direct appeal counsel was ineffective for failing to raise the issue of trial counsel's ineffective assistance at trial and for failing to challenge the constitutionality of the instructions given to the jury on the aggravating circumstances.

> In evaluating counsel's performance, we must take into consideration all the circumstances, including the fact that this was a capital sentencing proceeding. The basic concerns of counsel during a capital sentencing proceeding are to neutralize the aggravating circumstances advanced by the state, and to present mitigating evidence.
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> * * * *

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[3]Again Mr. Byrd asserts that the issue was raised on direct appeal and/or considered by this Court pursuant to its mandatory review in capital cases. However, this Court reached an erroneous result in light of Jacobs and Ramsey.

> Since Furman v. Georgia, 408 U.S. 238 (1972), constitutional concern has been directed toward whether the aggravating circumstance used by states in death penalty proceeding adequately prevent the substantial risk of arbitrary and capricious imposition of the death penalty prohibited by the Eighth Amendment. Failure to investigate the constitutionality of the aggravating circumstances under which one's client is to be put in jeopardy of the death penalty falls well below the standard of representation required for capital defendants. See Lockhart v. Fretwell, 113 S.Ct. 838, 842 n. 1 (1993).

Starr v. Lockhart, ___ F.3d ___ (8th Cir. 1994).

A minimum of research would have revealed to any attorney with a minimum of legal training the defects in all of the aggravating circumstances argued by the state. Basic rules of trial practice dictate that objections should be lodged to protect these issues on appeal.

Consequently the jury was instructed on aggravating circumstances that tainted its weighing process. The state argues that this Court applied a narrowing construction of the "heinous, atrocious and cruel" aggravating circumstance and therefore the Eighth Amendment was not been violated. The flaw in this argument is that no narrowing construction was given to or applied by the sentencer. The jury, which is the sentencer, was instructed:

> 2. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

The jury was given no other instruction concerning this aggravating circumstance. This aggravating circumstance has been

held unconstitutional since the decision in Godfrey v. Georgia, 446 U.S. 420 (1980). The use of this unconstitutional aggravating circumstance violates the Eighth and Fourteenth Amendment to the United States Constitution. Sochor v. Florida, 112 S.Ct. 2114 (1992).

The adoption of a narrowing construction for this aggravating circumstance is insignificant unless that narrowing construction is given to and used by the sentencer. In this case it was not given to the jury.

Not only was this aggravating circumstance unconstitutional and improperly given to the jury but there was not sufficient evidence to support it. The narrowing construction of heinous, atrocious or cruel requires that the defendant intended "to inflict a high degree of pain or to otherwise torture." This narrowing construction can be found repeatedly in the Florida Supreme Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor

cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another") Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1977)(the presence of a mental or emotional disturbance may explain and negate heinous, atrocious, or cruel aggravating circumstances). There is a reasonable probability that, and most certainly a reasonable doubt whether, a properly instructed jury would have found this aggravating circumstance.

This Court has held that the language of the "cold, calculated and premeditated" aggravating circumstance is unconstitutionally vague under the Eighth Amendment. Jackson v. State, 19 Fla. L. Weekly S215 (1994). This Court said:

> A vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

Mr. Byrd's jury was instructed that to find him guilty of murder in the first degree it must find that he had formed the necessary premeditation. (R. 1857). Yet the jury was not told that to find this aggravating circumstance it must find a heightened degree of premeditation.

> Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may

> automatically characterize every premeditated murder as involving the CCP aggravator.

Jackson v. State, 19 Fla. L. Weekly at S216.

The state argues that these issues have not been preserved. However the state has previously argued that these matters have already been decided by this court. In the RESPONSE TO THE DEFENDANT'S RULE 3.850 MOTION the state, in discussing penalty phase jury instructions said,"...indeed on direct appeal the Supreme Court of Florida addressed certain issues concerning this Court's instructions." (Page 41) Later on appeal to this Court the state said, "...the validity of the aggravating circumstances herein was upheld on direct appeal." (Brief at 80). This Court conducts on direct appeal a mandatory review in all capital cases. However, it was not reasonable for appellate counsel to rely on this Court's mandatory review to consider these issues.

Espinosa v. Florida, 112 S. Ct. 2926 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); and Stringer v. Black, 112 S. Ct. 1130 (1992) demonstrate that Mr. Byrd was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the three aggravating factors submitted to the jury were vague and overbroad: "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. Additionally, the jury was urged to consider nonstatutory aggravation. The aggravating circumstances as set forth in the statute are facially vague and overbroad unless and until the

sentencer applies a narrowing construction. Appellate counsel should have raised this fundamental error on appeal. Similarly, trial counsel was ineffective in not objecting to the jury instructions. Starr v. Lockhart.

This court must grant a new direct appeal to consider these issues.

CLAIM IIC

APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE UNTIMELY FILING OF THE SENTENCING ORDER.

In its response that state argues that appellant counsel was not ineffective in failing to raise as an issue the trial court's failure to file his sentencing order timely. The failure to file the sentencing order in a timely fashion violates Florida law and the federal constitution.

The state argues that since the sentencing order was ultimately sent to the Florida Supreme Court that there is no violation of any law. State's Response at 31. What the state ignores is that the order was entered after the trial court had lost jurisdiction. The notice of appeal, transferring the jurisdiction of this case to the Florida Supreme Court was filed on August 13, 1982. The order entered by the trial court was entered on November 15, 1982, almost three months after the trial court had lost jurisdiction.

The cases cited by the state to support its theory, that this fundamental flaw is remedied if the order somehow is later sent to the court, in fact require these written findings at the

time of sentencing. In Cave v. State, 445 So.2d 341 (Fla. 1984), cited by the state, no written order was prepared by the judge, but his reasoning was dictated into the record before jurisdiction was lost to the Florida Supreme Court. This Court found that this "dictated" finding became a written finding as required by the statute but still felt it prudent to temporarily relinquish jurisdiction to the circuit court to have the judge enter a written order. The state had proposed the relinquishment of jurisdiction as a solution to the problem which the state admitted existed. Not only does this case, cited by the state, show that it recognized the lack of a written order as a flaw, but that this problem existed prior to 1988.[4]

In VanRoyal v. State, 497 So.2d 625, 628 (Fla. 1986) the Florida Supreme Court said that as long as the written findings required by statute are made any time prior to the circuit court losing jurisdiction there was no problem.

> Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem. Here, however, there are three factors present which we consider significant. First, the findings were not made until after the trial court surrendered jurisdiction to the Court. Second, we are faced with a mandatory statutory requirement that death sentences be supported by specific findings of fact. ... Third, although we could order that the record be supplemented in accordance with Florida Rule of Appellate Procedure 9.200(f) as was done in Cave and Ferguson, we are not inclined to do so when the record is inadequate and not merely incomplete.

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[4]The state has suggested in its reply that prior to 1988 this was not an issue.

All three criteria set out by this court in VanRoyal are present in Mr. Byrd's case. The untimely order was entered by the circuit court after it had lost jurisdiction to the Florida Supreme Court. The Florida Supreme Court was faced with a mandatory sentence review and finally the record in this case is inadequate.

Direct appeal counsel could have raised this issue. Two cases cited by the state and by the Florida Supreme Court concerning this issue were decided in the 1970s. This issue was apparent and available to appellate counsel. The failure to raise this issued deprived Mr. Byrd of the effective assistance of counsel. This court should grant Mr. Byrd a new direct appeal.

CLAIM IID

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING RAISE THE ISSUE OF NEWLY DISCOVERED EVIDENCE.

Mr. Byrd's appellate counsel was ineffective for failing to raise on direct appeal that newly discovered evidence would impeach the key government witness.

The state argues that counsel was not ineffective for failing to raise this issue since the new evidence was not fully presented to the trial court. The state argues that the admission made by Mr. Sullivan, a co-defendant and key state's witness, at a deposition that he in fact was not hired by Mr. Byrd to murder his wife, was only referred to by trial counsel in the hearing on the motion for a new trial. The state continues, that since the deposition was not actually attached or made a

part of the record appellate, counsel was not ineffective for raising this issue.

At the hearing on the motion for new trial, trial counsel for Mr. Byrd stated:

> MR. JOHNSON: Judge, might I just make one comment. Judge, I want to call the Court's attention to some matter that I did not raise up in my motion for new trial that I intended to file in an amended motion of new trial that would, in fact, cover this issue.
>
> On Monday or Tuesday of this week an attorney, whose name is LaRussa, convened a deposition of Ronald Sullivan in regards to a claim that, in fact, is going to take place in regards to the hundred thousand dollars --
>
> MR. LOPEZ: I would interpose an objection and would like to approach the bench at this particular time --
>
> MR. JOHNSON: Judge, I am addressing the Court, who, in fact, rendered the decision. There is no jury to influence and I would like the Court to hear me out and if the State has comments to the Court, they can make those comments.
>
> THE COURT: Go ahead, Mr. Johnson.
>
> MR. JOHNSON: During that time that deposition, that was not convened. I was not present. My law partner, Mr. Buckine, was there on behalf of Mr. Byrd, and during that deposition which was under oath and was the testimony of Ronald Sullivan, under oath Ronald Sullivan flatly denied, in response to my questions from Mr. Buckine that he had been hired by Wade Byrd to commit this homicide. He flatly denied that Wade Byrd had promised to give him any money to commit this homicide and that, Your Honor, flies directly in the face of what he said here as he sat here when he took the stand and it's my recollection during that time that he had said that he had been promised in the neighborhood of three to five thousand dollars to commit the crime.
>
> Several days later, after the trial is over and the smoke has cleared, he denied flatly that he

> was hired by Wade Byrd to commit this crime and Wade Byrd promised to give him any money at all to commit this crime.
>
> The State, I understand, takes this witness' word. But Ronald Sullivan, as I told the jury and as I demonstrated when he took the stand, is, in fact, a pathological liar, and we are talking about remorse. What remorse has he shown? He has marched in here on a white charge to tell us what we want to know by the State and we will let you lose --
>
> MR. LOPEZ: Your Honor, I object. Additionally, Mr. Johnson has had an opportunity to argue before this Court. He has had his chance, Your Honor. You have given him ample opportunities, Judge.
>
> MR. JOHNSON: Judge, that is his prerogative.
>
> THE COURT: Go ahead.
>
> MR. JOHNSON: He can contradict or sit there silently. That is his prerogative, but the fact remains that what I have, in fact, told this Court is embodied in the deposition which I will have transcribed and attached to my amended motion for a new trial. I ask this Court to consider that as well with the other items, other arguments that I have made as to why this man should not suffer the ultimate sanctions of death in this case.

(R. 1688-90). Even though the transcript was not provided, trial counsel had orally proffered the evidence. No more was required to preserve the issue. Direct appeal counsel failed in her duty to raise this matter. She was given more than sufficient notice of this substantial claim in the record. Florida law imposes an obligation upon counsel to investigate legal issues undermining the propriety of a judgment and sentence and advise a client of viable claims. Cf. Klokoc v. State, 589 So. 2d 219 (Fla. 1991)(appellate counsel required to act as advocate seeking to overturn judgment and sentence, even though client wished to

waive his appeal). "A lawyer's first duty is zealously to represent his or her client." Sandres v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

This evidence if presented to a jury would have so seriously undermined Mr. Sullivan's testimony that it would have probably resulted in Mr. Byrd's acquittal.

Appellate counsel had a duty to present this issue.

CLAIM IIE

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE CLAIMS CONCERNING THE EXCLUSION OF CRITICAL EVIDENCE.

Mr. Byrd relies on the arguments contained in his initial petition for habeas corpus relief and found elsewhere herein.

CLAIM IIF

MR BYRD WAS IMPROPERLY DENIED HIS RIGHT TO CROSS-EXAMINE KEY STATE WITNESSES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Byrd's trial counsel had the scope of his questioning curtailed to such an extent that the Sixth Amendment was violated. The failure of appellate counsel to raise this on direct appeal constituted ineffective assistance of counsel under the Sixth Amendment.

The failure of the trial attorney to object to the denial of the constitutional right of confrontation fell below any objective standard of reasonableness. Even the most cursory knowledge of Smith v. Illinois, 390 U.S. 129 (1968) and Davis v. Alaska, 415 U.S. 308 (1974) would have led counsel to object to the restriction placed upon his cross-examination by the trial

court. Because the trial attorney's ineffectiveness was so blatant, Mr. Byrd's appeal attorney was similarly ineffective in failing to raise this issue on direct appeal. Strickland, supra.

Mr. Byrd must be given a new direct appeal.

CLAIM IIG

THE UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF BY THE TRIAL COURT DEPRIVED MR. BYRD OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS AND HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ERROR ON DIRECT APPEAL.

The State mischaracterizes the holding of the Supreme Court in Hitchcock v. Dugger, 481 U.S. 393 (1987). Hitchcock held that the Eighth Amendment does apply to proceedings before Florida juries and not merely to proceedings before the judge. As such, the State's argument concerning "Hitchcock" and "non-Hitchcock" claims is disingenuous. The failure of the trial judge to instruct on the burden of proof "deprived [petitioner] of the individualized treatment to which he is entitled under the Constitution." Parker v. Dugger, 111 S.Ct. 731, 740 (1991), and violated the Eighth Amendment. Mr Byrd is entitled to a new direct since the failure to raise this issue on direct appeal denied him the effective assistance of counsel.

CLAIM IIH

MR. BYRD WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY VOUCHED FOR THE CREDIBILITY OF THE STATE'S WITNESSES AND THE STATE'S CASE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Byrd relies on the arguments contained in his initial petition for habeas corpus relief and found elsewhere herein.

CLAIM II-I

MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is interesting to note that the State does not deny that the statement obtained from Mr Byrd on the 30th October, 1981, was obtained in violation of his rights under the Constitution but instead chooses to center its argument on vague dicta setting forth the views of "most successful appellate counsel". The State contends that Mr. Byrd was not prejudiced by the admission of the October 30th statement. The State fails to note that the prosecutor specifically and deliberately introduced the October 30th statement. At that time, the State believed the October 30th statement was prejudicial and harmful to Mr. Byrd. Had appellate counsel raised the issue, a reversal would have been required. Mr. Byrd is entitled to a new direct appeal since the failure of appellate counsel to raise this issue on direct appeal denied Mr. Byrd of effective assistance of counsel.

CLAIM IIJ

THE TRIAL COURT'S FAILURE TO ASSURE MR. BYRD'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Byrd relies on the arguments contained in his initial petition for habeas corpus relief and found elsewhere herein.

CLAIM IIK

MR. BYRD'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO LITIGATE THIS ISSUE.

The juries awesome responsibility in deciding whether Mr. Byrd should live or die was diminished by inaccurate comments by the state. These comments were not corrected by the trial court. These comments violated the Eighth Amendment to the United States Constitution. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

The comments made by the state at trial, as set out in the petition are as egregious, if not worse than the comments made in Mann. Since the Florida jury is part of the sentencing process the jury cannot be told that it is merely making a recommendation.

Longstanding case law has established the basis of this issue as a claim. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Mr. Byrd should be granted a new direct appeal since the failure

of to raise this issue denied him the effective assistance of counsel on direct appeal.

CLAIM III.

THE WRITTEN JURY INSTRUCTIONS FAILED TO CORRESPOND TO THE ORAL INSTRUCTIONS AND AS A RESULT THE JURY WAS INCORRECTLY INSTRUCTED ON AN IRRELEVANT AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MR. BYRD'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state argues that since there was no argument made on the "hinder the lawful exercise of any governmental function" aggravating circumstance that it can be presumed that the jury did not rely on this invalid and mistakenly given aggravating circumstance.

The question is not what this court or the state may think the meaning or application of the instruction might but, instead the question is what a "reasonable juror could have understood the charge as meaning." Sandstrom v. California, 442 U.S. 510, 516-17 (1979).

> In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.

Mills v. Maryland, 108 S.Ct. 1866 (1988).

Giving the jury an additional aggravating circumstance that is not supported by the evidence undermines any confidence in the sentence of death and violates the Eighth and Fourteenth Amendments to the United States Constitution.

The failure of appellate counsel to read the record prejudiced Mr. Byrd. He should be granted a new direct appeal.

CLAIM III

NEWLY DISCOVERED EVIDENCE THAT MR. BYRD'S CODEFENDANT RECEIVED A LIFE SENTENCE SHOWS THAT MR. BYRD'S DEATH SENTENCE IS DISPROPORTIONATE AND INVALID UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. ACTIONS BY THE STATE SINCE MR. BYRD'S TRIAL ARE ALSO NEWLY DISCOVERED EVIDENCE OF DEALS MADE BY THE STATE FOR TESTIMONY.

The State fundamentally misunderstands the issue of disproportionate sentencing. In Slater v. State, 316 So.2d 539 (Fla. 1975) the Florida Supreme Court held that co-defendants should not be treated differently upon the same or similar facts. In Scott v. Dugger, 604 So.2d 465 (Fla. 1992), this Court held for the first time that a co-defendant's life sentence may establish that a death sentence is disproportionate. Had Mr. Endress' life sentence been known at the time Mr. Byrd was sentenced or at the time of his direct appeal, he too probably would have received a life sentence. This claim must be cognizable in a habeas action in that it goes to the appellate review process. This Court has not held previously that this claim cannot be presented in a habeas proceeding. Mr. Byrd is therefore entitled to relief. Scott, supra.

CLAIM IV

MR. BYRD WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN HE WAS FORCED TO LITIGATE HIS PREVIOUS RULE 3.850 WHEN HIS COLLATERAL COUNSEL WAS DEPRIVED OF ADEQUATE TIME AND ADEQUATE FUNDS.

The practice of the then Governor of Florida, Robert Martinez, in signing death warrants in order to "move cases

through the system" has now been recognized as being counter-productive and not in the interests of justice and has been discontinued by the Governor's successor, Lawton Chiles. See In re Rule 3.851, 18 Fla. L. Weekly S553 (Fla. Oct. 21, 1993).

The crushing case load of Mr. Byrd's attorney prevented the adequate research and preparation required for a death penalty case, and so violated Mr. Byrd's rights to due process under both the United States Constitution and Florida law. The State asserts that Mr. Byrd's counsel failed to assert a claim of inadequate time previously. However, counsel asserted this claim in the 3.850 court and in this Court. CCR filed a number of pleadings in this Court during 1989 and 1990 advising this Court of its inability to provide adequate representation. In October of 1990, this Court in fact constituted a Commission to look into the problem. That Commission found that CCR had been inadequately funded and have been overwhelmed by its caseload. CCR and undersigned counsel participated in those proceedings and advised that Commission of the inadequacy of the representation to Mr. Byrd and other CCR clients. See attached documents. Rule 3.851 as adopted in October of 1993 and this Court's comments to that rule were a direct result of CCR and undersigned counsel's efforts to advise this Court of the inadequate funding and time provided to Mr. Byrd and other CCR clients. Mr. Byrd is entitled to relief.

CONCLUSION

Mr. Byrd was denied the effective assistance of counsel on direct appeal to the Florida Supreme Court in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Byrd has set out specific instances of ineffective assistance of counsel on direct appeal. He has also shown that confidence in the appellate result is seriously undermined. Mr. Byrd should be given a new direct appeal where he can present these serious issues to this Court.

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 18, 1994.

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

MARTIN J. MCCLAIN
Chief Assistant
Florida Bar No. 0754773

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: MARTIN J. McCLAIN
Counsel for Petitioner

Copies furnished to:

Fariba Komeily
Dade County Regional Service Center
401 NW Second Ave.
Suite 921N
Miami, Florida 33128

ATTACHMENT

May 31, 1991

The Honorable Leander J. Shaw, Jr.
Chief Justice
Supreme Court of Florida
Tallahassee, Florida 32399-1925

Dear Mr. Chief Justice:

As Chairman of the Supreme Court Committee on Postconviction Relief in Capital Cases, I am pleased to submit the attached Report of the Committee with its three specific recommendations and one member's attached dissent.

The Committee was created because of the inability of the Capital Collateral Representative to properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delays in those cases. As you expressed in your order creating the Committee, the credibility of the judiciary is adversely affected by the untimely manner in which these matters are considered and resolved by the court system.

The Committee sought to achieve three objectives in addressing this difficult and sensitive problem. First, the Committee wanted to assure that each death penalty defendant be assigned counsel who could begin work on a postconviction relief motion immediately upon completion of the appeal on the merits. Second, the Committee sought to avoid situations where the governor's signing of a death warrant acts as the triggering mechanism for the postconviction relief process and, as important, to provide a means to assure that the process is timely. Third, the committee recognized the critical need to develop a means for the judicial administrative control of the process.

The Florida Bar, through its President and President-Elect, as well as the Volunteer Lawyer's Resource Center, has expressed a willingness to assist in obtaining pro bono counsel to provide some temporary relief to the Capital Collateral Representative until his office receives proper and adequate funding to provide timely representation of these death penalty defendants.

Critical to the implementation of these recommendations is the utilization of time guidelines, which the governor believes is essential in order for him to withhold the signing of warrants for a period of two years and eight months after the death penalty has been affirmed on the merits. The recommended guidelines provide one year to file the initial pleading in the state court system, 270 days for the state court to resolve the issues, 60 days to file the initial pleading in the federal court system, and 270 days for the federal courts to resolve the issues. These periods of time were considered by a majority of the Committee to be a reasonable compromise that would assure a time period for resolution of postconviction relief proceedings without the threat of a death warrant. In suggesting these time guidelines, the Committee was not singling out the death penalty process since time standards have already been adopted by the Court for almost every type of case in the judicial process. I should note that some members of the majority desired a shorter time period and other members of the majority desired a longer period. One member of the Committee dissented, believing there should be no court time periods.

In its final recommendation, the Committee stresses the importance of central administrative control to assure that these proceedings proceed in a timely manner which allows proper deliberative consideration of the issues.

The members of the Committee should be commended for their conscientious effort to address a problem that affects both the executive and the judicial branches and that can be resolved only by a cooperative effort which recognizes the responsibilities of each branch in the death penalty process.

Very truly yours,

Ben F. Overton

BFO/lm

REPORT OF

THE SUPREME COURT COMMITTEE ON

POSTCONVICTION RELIEF IN CAPITAL CASES

The Chief Justice of the Supreme Court created this committee because the credibility of the death penalty postconviction process is being jeopardized by the untimely manner in which such matters are considered and resolved. The order appointing the committee noted that the capital collateral representative has asserted in several cases that he is unable to represent death penalty inmates in postconviction relief matters because of a lack of funds and staff; that the capital collateral representative has requested that private counsel be appointed to represent death penalty inmates in postconviction relief proceedings and that such counsel be paid by county funds from the counties in which the cases arose; and that the capital collateral representative regularly has failed to comply with briefing time schedules, resulting in substantial delays, e.g., failing to file an answer brief in one case for over fourteen months.

At the outset, the committee recognized that, to make this process work properly, each death row inmate should have competent counsel to represent him or her in postconviction relief proceedings. It acknowledged that one of the major problems with the process was that the triggering mechanism to start or assure movement of the postconviction relief proceedings was the signing of a death warrant. In a number of instances, the courts were not aware of problems concerning representation of a defendant until a death warrant was signed. In other instances, where postconviction relief motions had been filed, they clearly had not moved at an orderly pace, and the signing of a warrant had been used to expedite the process.

Further, the committee recognized that the office of the capital collateral representative was created and funded to handle approximately twelve to fifteen postconviction proceedings per year. During 1988, 1989, and 1990, the governor signed 38, 40, and 38 death warrants, respectively, and the Florida Supreme Court affirmed the imposition of the death penalty on direct appeal in 19, 8, and 19 cases, respectively. These numbers are not likely to decrease in the coming years. While pro bono representation is providing some assistance in representing these defendants, the number of such volunteers has not kept up with the need, primarily because of the immediate pressure that the signing of a death warrant brings to bear on pro bono counsel.

In addition, the committee has found a lack of administrative coordination of these death penalty cases at the trial court level, concerning both postconviction relief proceedings and cases on remand for new trials and sentencing hearings. Part of this problem stems from the fact that in many instances different counsel represent the parties at the trial level than have represented the parties on appeal. For example, the state attorney represents the state at trial or retrial, while the attorney general represents the state on appeal and in postconviction proceedings, and the public defender may represent a defendant at trial, appeal, retrial, or resentencing, while the capital collateral representative may represent the defendant in postconviction proceedings. In addition, the assignment of different judges to a case may contribute to the coordination problem.

This committee, in addressing these issues, has concluded that, pending adequate funding by the legislature, there is an immediate, temporary need for pro bono counsel to represent some death penalty defendants in order to allow the capital collateral representative an opportunity to eliminate his backlog of

cases; that the governor should allow a greater number of days between the signing of a death warrant and the date set for the execution; and, finally, that the courts should provide special administrative monitoring and coordination in order to assure that there are no unjustified delays. The committee further recognizes that, in order to make this death penalty postconviction process work effectively, there must be a coordinated effort by the courts--state and federal, the office of the governor, the offices of the attorney general and state attorneys, the office of the capital collateral representative, and other counsel representing defendants in these proceedings. In order to provide a process which allows for adequate deliberation without undue delay, the committee makes the following recommendations:

RECOMMENDATION I. Specific named counsel should be designated to represent each defendant whose death sentence has been affirmed not later than 30 days after the mandate has issued from the Supreme Court of Florida or certiorari is denied by the United States Supreme Court, whichever is later. The capital collateral representative is, by law, responsible for representing these defendants. This committee recognizes that the capital collateral representative needs additional staff and funds in order to handle his current caseload. However, because of the level of funding presently available and the number of death penalty cases presently pending in the courts, it is not possible for that office to represent all of these defendants in a timely manner. The committee therefore recommends that The Florida Bar and the Volunteer Lawyer's Resource Center of Florida, Inc., assist in obtaining pro bono counsel to take ten new death penalty cases within the next year. With this assistance, the capital collateral representative will have some temporary relief, which should enable him to timely represent defendants, but this temporary assistance will not eliminate the need for adequate funding to assure proper and timely representation of all death penalty defendants. The committee acknowledges that additional pro bono counsel may still be required in the future, particularly for cases where conflicts exist concerning representation by the capital collateral representative.

RECOMMENDATION II. The courts, agencies, and attorneys involved in this process should do everything necessary to assure that the initial round of capital postconviction proceedings may be completed in both the state and federal courts within a period of two years and seven months. During this time, the governor should hold in

abeyance the signing of a death warrant to allow the first postconviction relief motion to proceed in a timely and orderly manner. The following are suggested guidelines:

A. State court postconviction pleading - 365 days

Although Florida Rule of Criminal Procedure 3.850 presently provides for a two-year time limitation for the initiation of postconviction proceedings, capital collateral counsel should file the motion to vacate judgment of conviction and sentence of death in the trial court within one year from the issuance of a mandate by the Supreme Court of Florida on direct appeal or the denial of certiorari from the United States Supreme Court, whichever is later. While this period could perhaps be shortened to six months if the capital collateral representative's office were fully funded, we find that, presently, one year is the proper period to assure an adequate pool of pro bono counsel to accept these cases.

B. State court system - 270 days

1. Trial court - 90 days

(a) Filing of the rule 3.850 motion invokes the jurisdiction of the trial court.

(b) The state's response should be filed within 20 days after the filing of the rule 3.850 motion.

(c) A status conference should be held within 10 days after the state's response is filed.

(d) A hearing, including any evidentiary hearing, should be held within 45 days after the status conference.

(e) The trial court's order should be entered within 15 days after the hearing.

2. Supreme Court of Florida - 180 days

(a) A notice of appeal should be filed by the non-prevailing party within 10 days of the trial court's final order granting or denying relief on the rule 3.850 motion.

(b) The record on appeal should be filed with the Supreme Court within 20 days of the filing of the notice of appeal.

(c) The appellant's initial brief should be filed within 30 days of the filing of the record on appeal.

(d) Any petition for habeas corpus (based on ineffective assistance of appellate counsel) should be filed simultaneously with the capital petitioner's initial brief.

(e) The appellee's answer brief should be filed within 20 days of the filing of the appellant's initial brief.

(f) The appellant's reply brief should be filed within 10 days of the filing of the appellee's answer brief.

(g) Oral argument should be set on the next calendar or within 30 days.

(h) The Supreme Court of Florida should issue its opinion within 60 days of oral argument.

C. Federal court postconviction pleading - 60 days

The committee suggests that a petition for habeas corpus should be filed in the United States District Court within 60 days of the issuance of a mandate by the Supreme Court of Florida. It is expected that in most instances the issues therein will be the same as the issues set forth in the postconviction relief motion in the state courts.

D. Federal court system - 270 days

The committee believes that federal habeas corpus review and disposition should be completed within 270 days of the filing of the petition in the district court.

TOTAL TIME: 2 years, 8 months.

The committee recognizes that the circumstances of some cases might require that the time periods specified above be exceeded. These are guidelines, not absolute time periods. Further, a review of this process should be made in two years.

RECOMMENDATION III. The courts, particularly the state courts, should establish a means to administratively monitor and coordinate death penalty postconviction proceedings in order to assure that there are no unjustified delays. The clerk of the supreme court has assured the committee that his office can maintain, with the cooperation of the parties and the other courts, a current log of the status of each of these cases. Effective administrative monitoring requires that the lawyer currently responsible for each case be identified by name in the log; that a specific trial judge be assigned

responsibility for each case; that such assignment be maintained in a current status by the chief judge of the circuit; and that the clerk of the circuit court of each of the counties designate one person responsible to regularly monitor the current status of all cases for which the death penalty has been affirmed and to immediately notify the chief judge, assigned trial judge, and the clerk of the supreme court of any change in the status of a case. The committee suggests that the clerk of the supreme court be responsible for keeping track of these proceedings and for providing all status information to the affected federal courts to assure that they may timely assign and set these matters for consideration when they enter the federal system.

The committee recommends that the status of death penalty cases that have been remanded for subsequent proceedings also be monitored in the administrative log. In carrying out its responsibilities, this committee found a number of cases that had been remanded for further proceedings and on which no action had been taken for a substantial period of time. In some cases, not only had the proceedings not been held, but the assigned trial judge did not even know that the case was there for retrial or for a hearing. It is important that not only the lawyers involved but also the chief judge and assigned judge be immediately notified of any remand for further proceedings.

To eliminate administrative delays, the committee strongly recommends that one person be designated in the office of the clerk of the circuit court, the office of the state attorney, and the office of the public defender, who will receive notification whenever a postconviction relief pleading is filed or a death penalty case is remanded for further action. The assigned judge and the chief judge must receive immediate notification to assure that the matter will proceed expeditiously.

Respectfully submitted,

Ben F. Overton, Chairman
Justice
Supreme Court of Florida

Robert A. Butterworth
Attorney General of Florida

Larry Spalding
Capital Collateral Representative

J. Hardin Peterson
General Counsel to the Governor

Steven M. Goldstein
Professor of Law
Florida State University

James Fox Miller
President
The Florida Bar

Benjamin H. Hill, III
President-elect
The Florida Bar

James C. Rinaman, Jr.
Former President
The Florida Bar

DISSENTING STATEMENT OF COMMITTEE MEMBER STEVEN GOLDSTEIN

There is much that is both implicit and explicit in the committee report with which I agree. First, I endorse what I perceive to be an implicit committee conclusion that state and federal collateral postconviction review plays an important role in ensuring that the legal process which results in a death sentence is free from legal error. Second, I also share what I perceive to be the committee's explicit conclusion that providing competent counsel to represent death-sentenced individuals in post-conviction proceedings is necessary if that review process is to be fair and to produce reliable outcomes.[1] Finally, I also agree with what I understand to be the committee's principal recommendation, that no death warrants be signed during the initial round of state and federal collateral post-conviction review provided that this review process moves forward in an orderly and fair fashion. Where I differ with the committee, however, is with its recommended means to ensure that the post-conviction review process does proceed in an orderly and reasonable manner. That is, I disagree with its decision to utilize presumptive timetables, particularly judicial timetables, to achieve this end. In my judgment, the committee recommended

[1] Indeed, it is likely that much of the delay in the judicial review process in capital cases is attributable to the absence of competent counsel with the resources necessary to provide effective representation. In the post conviction context, the committee report implicitly suggests as much. The committee recommendations designed to ensure that competent, properly funded collateral post conviction counsel is available are likely to reduce the delay in capital post conviction review proceedings.

timetables, with limited exceptions, are unnecessary, unreasonable, may impact on the willingness of volunteer pro bono counsel to undertake representation, and may result in an unfair and unreliable resolution of the complex questions presented in capital post-conviction proceedings.

Ensuring that the collateral post-conviction review process in capital cases proceeds in an orderly and fair fashion requires addressing two concerns; first, providing a means to ensure that collateral post-conviction review, both state and federal, is initiated, and second finding a way to ensure that once such proceedings have begun, that they are resolved within a reasonable time.

Regarding initiating post-conviction review, the committee suggests a de facto[2] one-year statute of limitations on initiating the principal state collateral post-conviction remedy, a motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure[3] and a 60-day statute of limitations on initiating

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[2] I use the term de facto since although the committee recommended timetables are characterized as guidelines, the quid pro quo for the Governor agreeing to not sign a death warrant during the initial round of state and federal collateral post conviction review is that the case proceed in a manner consistent with the recommended timetables. Implicitly then, if the case does not proceed in this fashion, a death warrant is a real possibility and may be forthcoming.

[3] Presently there is a two-year statute of limitations on initiating Rule 3.850 proceedings. Certain post conviction claims, principally those relating to the appellate review process, are also cognizable in state habeas corpus proceedings. There is presently no statute of limitations on initiating such habeas proceedings. The committee recommends that a state habeas petition should be filed simultaneously with a capital petitioner's initial appeal brief in the Florida Supreme Court

federal collateral review.[4] I have no objection to the suggested time frame for initiating Rule 3.850 proceedings, assuming that counsel, principally the office of the Capital Collateral Representative, is adequately funded so as to be able to competently meet this timetable.[5] I do, however, believe that the suggested presumptive timetable for initiating federal review is not warranted.[6] I reach this conclusion for a number of

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when a trial court 3.850 ruling is being reviewed.

[4] There is presently no statute of limitations on initiating federal habeas corpus proceedings, the principal federal collateral post conviction remedy available to state prisoners.

[5] Because of the uncertainty regarding whether such funding will become available, I agree with what I understand to be the committee's implicit conclusion that its timetables not be incorporated into rules which would create state procedural bars; see the committee comment following recommendation II, which recommendation sets out the committee's proposed timetables, "These are guidelines not absolute time periods, . . . " Further, in the context of the suggested time frame for initiating Rule 3.850 proceedings, it is also instructive to note that it is difficult to predict how many death cases the Florida Supreme Court will affirm each year. For example, in 1990, the Florida Supreme Court affirmed 19 death sentences on direct appeal. As of May 28, 1991, the Court has affirmed 14 death sentences in 1991, over 70% of the number it had affirmed in 1990. On May 28, 1990, it had only affirmed six death sentences. The number of death cases affirmed by the Florida Supreme Court will obviously impact on the ability of CCR to meet any suggested 3.850 timetable.

[6] In assessing the reasonableness of this timetable as well as the other timetables which the committee recommends, I have assumed that the committee believes that the suggested timetables would be reasonable in the vast majority of capital post conviction cases. Put another way, I have presumed the committee believes that it would be reasonable to expect the post conviction review process to move forward in a manner consistent with the recommended timetables in at least 80% of the capital post conviction cases. If the committee did not believe these timetables to be reasonable, i.e., could reasonably be adhered to in the vast majority of capital post conviction cases, it is inexplicable to me why they would recommend them.

reasons. First, the recent U.S. Supreme Court decision in McCleskey v. Zant,[7] significantly limiting the circumstances under which successor federal habeas corpus petitions will be entertained, underscores the importance of giving counsel a significant period of time to prepare his federal habeas petition and to decide which claims he wishes to pursue. In my judgment, the 60-day de facto statute of limitations recommended by the committee is inconsistent with the implicit demands of McCleskey. Second, although it is true that the federal habeas petition is most likely to include only those federal constitutional claims that have been presented to the state courts, given the passage of time between when many of those claims were addressed on direct appeal and when federal habeas proceedings must be initiated given the committee's recommended timetable, it is likely that there will have been significant developments and/or changes in the law, requiring further analysis and consideration by federal habeas counsel. I believe this consideration further militates against a de facto 60-day federal habeas statute of limitations. Third, it bears emphasizing that many of the lawyers who would be subject to this de facto statute of limitations will be handling these cases on a volunteer, pro bono basis. Put another way, their other professional obligations suggest that it would be unwarranted to expect such counsel to meet the recommended committee de facto statute of limitations. Indeed the proposed timetable may impact on their willingness to

[7] 111 S.Ct. 1454 (1991).

undertake representation in the first instance.[8] Fourth, assuming that the committee's presumptive timetable runs from the date the Florida Supreme Court denies state post-conviction relief[9], the effect of the committee recommendation will be either to require the death-sentenced individual to forego his legal right to seek certiorari in the U.S. Supreme Court following state post-conviction review[10] or to require that he prepare his certiorari petition at the same time he must be preparing his federal habeas petition. Again, I believe this consideration militates against the committee's recommended de facto federal habeas statute of limitations. Fifth and finally and perhaps most importantly, given the committee's recommended presumptive timetables for resolving federal post-conviction proceedings once they are initiated, it must be emphasized that counsel cannot simply spend the 60-day committee recommended time period preparing his federal habeas petition. Rather, he must

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[8] In this context, the committee recognizes the importance of recruiting volunteer counsel if its proposed recommendations are to remedy the problems presently plaguing the collateral post conviction review process in capital cases.

[9] The committee recommendation that the first round of state and federal collateral review be completed within two years and eight months when coupled with its specific timetables for individual stages in the review process indicates that it has assumed that its de facto federal habeas statute of limitations would run from when the Florida Supreme Court denies state post conviction relief.

[10] The Rules of the United States Supreme Court allow a death-sentenced individual 90 days, following the denial of state post conviction relief, to file a petition of certiorari, see S.Ct. R. 13.1. This 90-day period can also be extended for up to 60 days upon a showing of good cause, S.Ct. R. 13.2.

also be getting ready for litigating his federal habeas petition which in many cases may require discovery and an evidentiary hearing. Put another way, the presumptive time limits on federal court resolution of the federal habeas petition once it is filed[11] makes it unreasonable to assume that the committee's recommended 60-day period can or will be devoted solely to preparing the federal habeas petition.

Although I believe then that the committee's recommended 60-day de facto federal habeas statute of limitations is unwarranted, I recognize that if the Governor is not to sign death warrants during the initial round of collateral review, there must be some understanding as to when, in this context, federal habeas review will be initiated. I believe that 90 days from a decision on a petition for certiorari in the U.S. Supreme Court seeking review of the Florida Supreme Court's state post-conviction ruling would provide a more appropriate recommended timetable.[12] Or if any presumptive de facto federal habeas statute of limitations is to run from when the Florida Supreme

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[11] The committee decided not to recommend specific timetables for each stage of the federal collateral review process, i.e., federal district court, U.S. Court of Appeals, and U.S. Supreme Court review, choosing instead to provide that federal collateral review should be completed within 330 days. Given the 60-day period allotted for initiating federal habeas proceedings, this assumes that once begun, federal collateral review will be completed within 270 days. Put another way, on average, each stage of the federal collateral review process, including federal district court consideration, is to take 90 days.

[12] If certiorari was not sought, then this 90-day period would run from the date when the authorization to seek certiorari has expired.

Court denies state post-conviction relief, I would suggest a six-month recommended guideline.

Regarding ensuring that collateral post-conviction review proceedings are resolved in an orderly, fair and reliable manner once such proceedings are initiated, my own view is that the committee's presumptive judicial timetables are unnecessary, unreasonable, and significantly underestimate the difficulty of generalizing how "quickly", in death cases, post-conviction review proceedings should be completed. If perceived by the courts as more than simple guidelines, they are likely to impact on the willingness of volunteer counsel to undertake representation in the first instance and also raise the possibility that the process employed to resolve post-conviction claims may not be fair and that the outcomes reached may not be reliable.[13]

In my judgment, implicit in the committee decision to recommend seemingly presumptive judicial timetables is the belief that the judiciary, both at the trial and appellate level, cannot be relied upon to ensure that capital cases are decided in an orderly and fair manner. I reject what I perceive to be this implicit conclusion of the committee. I see no reason why the judiciary cannot ensure that capital post-conviction proceedings

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[13] I say this with all deference to the other committee members. I in no way mean to suggest that any committee member would be in favor of a judicial review process, particularly in capital cases, that is not likely to be fair and produce reliable outcomes. My disagreement with the committee is solely over whether the pressures imposed by the committee recommended presumptive timetables might lead to these results.

are resolved in an orderly, deliberate, and fair manner. To me, a judge(s) responsible for resolving the case, whether they be at the trial or appellate level, are in the best position to determine how quickly a case should proceed consistent with the overriding societal interest in a fair and reliable outcome. I would note also that if for some reason the case is not proceeding as expeditiously as the state believes it should, particularly at the trial level, there is no reason why the state could not take action, in much the same way any litigant would, if they believed the matter needed to be resolved more expeditiously.[14]

I also believe that the committee's recommended timetables particularly, at the trial level[15], are unreasonable and as noted earlier raise the possibility, particularly if perceived by trial judges as more than simple guidelines, that the process employed to resolve post-conviction claims may not be fair and that the outcomes reached may not be reliable. In part, I reach this conclusion because the committee fails to take into consideration the uniqueness and complexity of post-conviction capital proceedings. For example, the committee recommends that presumptively trial court review of a state collateral post-

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[14] The committee recommendations concerning monitoring of cases, if implemented, should also render unnecessary the need for presumptive judicial timetables.

[15] As referenced earlier, see n. 11 above, the committee did not suggest specific timetables for each individual stage of the federal collateral review process but on average one can make a judgment about how long it anticipated the case remaining in the federal district court.

conviction petition should be completed within 90 days. Yet, the committee draws no distinction between cases that may require an evidentiary hearing and those that may not or cases where the judge who presided at the petitioner's trial is able to hear the post-conviction petition and those in which he may not. To my mind, this failing is illustrative of the unreasonableness of the committee's recommended presumptive timetables.[16]

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[16] As to the reasonableness of some of the other committee proposed timetables, I find it incongruous that the committee recommends that appellate review in the Florida Supreme Court should take 180 days while appellate review in the United States Court of Appeals for the Eleventh Circuit should only take 90 days when the Florida Supreme Court, unlike the Eleventh Circuit, should already be familiar with the case from its direct appeal review and when the Florida Supreme Court will be considering fewer issues than those which must be addressed by the Eleventh Circuit since it will not be considering the claims exhausted on direct appeal which claims the Eleventh Circuit must resolve in addition to the post conviction claims. Indeed, I consider it somewhat presumptuous to suggest judicial timetables to the federal courts when no member of the federal judiciary was a participant in our deliberations. I would also note in this context that the committee recommends that United States Supreme Court consideration of a federal habeas petition should take 90 days, notwithstanding the fact that a death sentenced individual currently has 90 days to file such a petition. I do recognize, however, that in informal discussions between one member of the committee and the Chief Judge of the Eleventh Circuit Court of Appeals, the Chief Judge indicated his general agreement with the committee proposed time-tables. However, I believe it might have been best for the committee to not address the federal collateral review process. The principal problem that prompted the committee's formation was C.C.R.'s inability to handle its case load, particularly new cases. This in turn was primarily attributable to the number of death warrants signed by former Governor Martinez. The vast majority of these warrants were signed because the former Governor believed that the state post conviction review process should be initiated within one year of the conviction and sentence becoming final, notwithstanding the Rule 3.850 two-year statute of limitations. Given that I assume that all the members of the committee are in general agreement that 3.850 proceedings should be initiated at least within one year, but note regarding this issue my caveat expressed earlier, and that if this is done, no death warrant should be signed prior

Finally, I simply do not believe it useful or prudent to generalize about how long collateral post-conviction proceedings should take to resolve once such proceedings are initiated. Unlike the question of when such proceedings should be initiated, there are too many variables involved, some to which I have previously alluded, which in my judgment do not make it helpful to generalize regarding this question. Rather, as I have previously stated, I believe we must rely on the judiciary, that branch of government which because of its independence is most responsible for ensuring that the rights of the powerless are respected, to ensure that the capital post-conviction review process is completed in an orderly and fair manner.[17]

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to that time, it would seem that the committee could have addressed the principal problem which prompted its formation without mandating suggested judicial timetables. Certainly, given the committee recommendations, those that are critical of the pace of the collateral post conviction process should not fault the Governor or the Attorney General for signing off on these recommendations for their only "concession", if it be perceived as such, was to not insist on a shorter time frame for the initiation of Rule 3.850 proceedings than one year. But to do so would be to go even further than former Governor Martinez was apparently willing to go.

[17] This is also the conclusion of the American Bar Association Death Penalty Habeas Corpus Task Force.

> "A final word is in order concerning time requirements. . . . The American Bar Association Task Force on Death Penalty Habeas Corpus considered formulating a "model timetable" for the post conviction litigation of capital cases. After much discussion, the Task Force rejected the idea, for two important reasons. First, the paramount purpose of the recommended limitations period is only to get the case into court. . . . The American Bar Association's approach is directed at (providing competent) counsel. A

As Chief Judge Donald Lay of the United States Court of Appeals for the Eighth Circuit has written:

> Human life is our most precious possession. Our natural instincts guide us from birth to sustain life by protecting ourselves and protecting others. All notions of morality

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> suggested time line, on the other hand, presumably would be directed at judges as well, recommending periods within which judges should dispose of their death penalty litigation. The American Bar Association strongly believes that that is the wrong approach to take. Trust must be placed in the good faith and ability of state, federal and Supreme Court judges and justices to review these cases diligently, at the same time recognizing the need for them to manage their own caseloads and dockets considering the circumstances of their jurisdiction.
>
> Second, because of the complexity and nuances of individual death cases, it would be unrealistic to develop a time line that would be optimal for many, or most, of the cases. There is simply no "garden variety" death penalty case. Depending on the circumstances, for example, investigation in one case may take only a matter of weeks; in other cases it may take many months. To have a model timetable, then, would be unfair to one party or the other in the many cases that fall on either side of the line. Such an approach might therefore result in delay in the many cases in which there now is very little. While perhaps these variances could be accounted for by recommending that judges be authorized to allow departures from the timetable, the American Bar Association believes that there would then be too much time spent litigating those requested departures."

A.B.A., "Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus." (I. Robbins, Reporter, 1990 at 33.) (Emphasis added.)

> focus on the right to live and all of man's laws seek to preserve this most important right. When presented with challenges to a capital sentence, it would be easy to respond rhetorically by asking, 'what about the victim whom the defendant has been found guilty of unmercifully killing.' But this approach fails to reflect on the ideal that a government founded by a moral and civilized society should not act as unmercifully as the defendant is accused of acting. If the original murder cannot be justified under man's laws, it is equally unlawful and inhumane to commit the same atrocity in the name of the state. What separates the unlawful killing by man and the lawful killing by the state are the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon. It should thus be readily apparent that the legal process in a civilized society must not rush to judgment and thereafter rush to execute a person found guilty of taking the life of another.[18]

In closing, I of course recognize the frustration that is engendered by what some perceive to be the unreasonably slow pace of the judicial review process in capital cases. But the subject the committee is addressing involves, in my judgment, perhaps the gravest decision a state can make, that is the decision to take a human life in a deliberate fashion. Given the magnitude of that decision and its irrevocable nature, I would prefer to err on the side of taking the extra step to ensure that this decision is

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[18] Mercer v. Armontrout, 864 F.2d 1429, 1431 (8th Cir. 1988); see also Bass v. Estelle, 696 F.2d 1154, 1162 (5th Cir. (J. Goldberg, specially concurring) ("Yes, there must be an end to criminal litigation. . . . Our duty as judges, a duty we may not shirk, is to ensure that the ending is a constitutional one. Some things go beyond time."), cert. den. 464 U.S. 865 (1983).

arrived at pursuant to a judicial review process designed to ensure, as much as is humanly possible, that this decision is free of error.[19]

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[19] As former U.S. Supreme Court Justice Harlan has written:

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness . . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death.

Reid v. Covert, 354 U. S. 1, 77 (1957) (Harlan, J., concurring).