IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,084

THOMAS DEWEY POPE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Chief Assistant CCR
Florida Bar No. 0899641

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1444 Biscayne Boulevard
Suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of an order summarily denying Thomas Dewey Pope's second motion for postconviction relief and an amendment thereto, and a motion to appoint conflict-free counsel. The motion for postconviction relief was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R"— record on direct appeal to this Court;

"PC-R" -- record on instant 3.850 appeal to this Court;

"Supp. PC-R." -- Supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Pope has been sentenced to death, The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Pope, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT . . . . , ... i

REQUESTFORORALARGUMENT i

TABLEOFCONTENTS ii

TABLE OF AUTHORITIES . . . . . . , . . . **iv**

STATEMENT OF THE CASE AND THE FACTS , . , ... , , , , ... 1

SUMMARYOFARGUMENT 6

ARGUMENT I

MR. POPE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A RELIABLE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. . . , , ... 8

A. INTRODUCTION. . . , , , ... , , ... 8

B. PROCEDURAL DISCUSSION. , , ... , , , ... 8

C. MR. POPE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL. 10

1. Failure to Seek Suppression of Inadmissible Statements and Evidence. . . . . . . , ... 11

2. Involuntary Statements to the Police. . . . . . , , , , ... 13

3. Improper Photographic Line-up Identification. , ... 17

4. Failure to Conduct Reasonably Effective Voir Dire. 17

5. **Failure to Object to Improper Judicial Commentary. 18**

6. **Failure to Object to Improper Prosecutorial Commentary. . . 19**

7. Failure to Effectively Cross-Examine State Witnesses. 22

8. Failure to Interview and Prepare Defense Witnesses. 27

9. Failure to Present Other Evidence of Innocence. , , ... 30

10. Failure to Present Effective Closing Argument. . . . . . . , , . . 32

11. Failure to Submit and Argue Proper Jury Instructions. 34

12. Ignorance of Criminal Law and Defense Principles. 34

D. CONCLUSION. 34

ARGUMENT II

MR POPE'S SENTENCING JURY RECEIVED UNCONSTITUTIONALLY VAGUE JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF ESPINOSA V. FLORIDA AND JACKSON V. STATE. MR. POPE RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO KNOW THE LAW AND ADEQUATELY OBJECT TO IMPROPER INSTRUCTIONS. , ... 36

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. POPE'S MOTION TO APPOINT CONFLICT-FREE COUNSEL AND HIS AMENDED MOTION FOR POSTCONVICTION RELIEF. . , . . . 38

CONCLUSION . . , ... 41

TABLE OF AUTHORITIES

Page

Barkauskas v. Lane,
878 F.2d 1031 (7th Cir. 1989) 10

Bradv v. Marvland,
373 U.S. 83 (1963) 8

Breedlove v. Singletary,
595 So. 2d 8 (Fla. 1992) 10

Caldwell v. Mississippi,
472 U.S. 320 (1985) 17

Cuvler v. Sullivan,
446 U.S.335 (1980) 40

Darden v. Wainwright,
477 U.S. 168 (1986) 21

Darden v. Wainwright,
699 F. 2d 1031 (11th Cir. 1983) 2 1

Davis v. Alaska,
415 U.S. 308 (1974) 22

Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 21

Easter v. Endell,
37 F. 3d 1343 (8th Cir. 1994) 9

Erp v. Carroll,
438 So. 2d 31 (Fla. 5th DCA 1983) 29

Espinosa v. Florida,
112 S. Ct. 2926 (1992) 36

Florida v. Rover,
460 U.S. 491 (1983) 14

Godfrev v. Geornia,

446 U.S. 420 (1980) 37

Griffin v. California,
380 U.S. 609 (1965) 22

Jackson v. State,
648 So. 2d 85 (Fla. 1994) 36

James v. State,
615 So. 2d 668 (Fla. 1993) 37

Kimmelman v. Morrison,
477 U.S. 365 (1986) 37

Lambrix v. State
21 Fla. L. 'Weakly S365 (Fla. Sept. 12, 1996) 9

Lemon v. State,
498 So. 2d 923 (Fla. 1986) 34

Nussdorf v. State,
508 So. 2d 1273 (Fla. 4th DCA 1987) 29

Orozco v. Texas
394 U.S. 324 (1969) 14

Pose v. Sinaletarv,
No. 91-6717-CIV-PAINE
(Order on Petition for Writ of Habeas Corpus)
(S.D. Fla. March 28, 1994). 2

Pope v. State,
441 So. 2d 1073 (Fla. 1983) 1

Pope v. State,
569 So. 2d 1241 (Fla. 1990) 1

Pope v. Wainwright,
496 So. 2d 798 (Fla. 1986) 1, 20

Pooe v. Wainwright,
496 So. 2d 798 (Fla. 1986) . . . .

Remeta v. State,

559 So. 2d 1132 (Fla. 1990) 9

Richmond v. Lewis
113 S. ct. 528 (1992) , , , , , , , , , , ... , , , , ...37

Smelly v. State,
500 So. 2d 318 (Fla. 1st DCA 1986) , ... , , , ...29

Smith v. Balkcom,
660 F. 2d 573 (5th Cir. 1981) 1 8

Smith v. Dugger,
911 F. 2d 494 (11th Cir. 1990) 11

Spalding v. Dugger,
526 So. 2d 71 (Fla. 1988) . . . . , , , , , , ... , ... 9, 40

Spalding v. Dugger,
526 So. 2d 71 (Fla.1988) . . . . *

Soaziano v. State,
660 So. 2d 1363 (Fla. 1995) , , , , ... , , , ... , ... 9

Starr v. Lockhart,
23 F. 3d 1280 (8th Cir. 1994) 34, 37

Starr v. Lockhart,
23 F. 3d 1280 (8th Cir. 1994) , ... , , , , , , ... •

State v. Breedlove,
655 So. 2d 74 (Fla. 1995) 37

State v. Dixon,
283 So. 2d 1 (Fla. 1973) 36

Strickland v. Washington,
466 U.S. 668 (1984) . . . . . , , , , , , , ... , , ... 8

Strinaer v. Black,
112 S. ct. 1130 (1992) . . . . , , , , , , , ... , , , , ...37

Tavlor v. Louisiana,
419 U.S. 522 (1975) , , , , , , , , ... , , , ... , ...19

United States v. Bagley,
473 U.S. 667 (1985) 8

United States v. Cronic,
466 U.S. 648 (1984) 22

United States v. Mendenhall,
446 U.S. 544 (1980) 14

Wainwright v. Sykes,
433 U.S. 72 (1977) 18

Wingate v. New Deal Cab Co,
217 So. 2d 612 (Fla. 1st DCA 1969) 29

Witherspoon v. Illinois,
391 U.S. 510 (1968) 17

STATEMENT OF THE CASE AND THE FACTS

Thomas Dewey Pope was convicted by a jury of three counts of first-degree murder on February 25, 1982 (R. 1257-59). The sentencing jury recommended life imprisonment on two counts, and the death penalty as to the third count (R. 1274-82). The trial court imposed sentence in accordance with the jury's sentencing decision (R. 265-69). Mr. Pope's convictions and sentences, including his sentence of death, were affirmed on direct appeal. Pooe v. State, 441 So. 2d **1073** (Fla. 1983).

On September 18, 1984, Mr. Pope filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. While that motion was pending, Mr. Pope sought habeas corpus relief in this Court. On October 16, 1986, this Court denied habeas corpus relief. Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986).

Mr. Pope's motion for postconviction relief was thereafter denied by the lower court following a partial evidentiary hearing on one limited issue. On appeal, this Court affirmed the denial of all requested relief. Pope v. State, 569 So. 2d 1241 **(Fla. 1990).**

On September 4, 1991, Mr. Pope filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. In its response to Mr. Pope's habeas petition, the State of Florida argued that some of the claims presented had not been exhausted in the state courts. On March 28, 1994, United States District Court Judge James C. Paine dismissed Mr. Pope's federal habeas petition as a mixed petition and allowed Mr. Pope to return to state

court to exhaust the claims to which the State had asserted nonexhaustion. Pope v. Sinaletarv, No. 91-6717-CIV-PAINE (Order on Petition for Writ of Habeas Corpus) (S.D. Fla. March 28, 1994).

Mr. Pope thereafter filed a Motion to Vacate Conviction and Sentence Pursuant to Fla. R. Crim. P. 3.850 (PC-R. 1-151). The lower court, Judge Howard M. Zeidwig, ordered the State of Florida to respond to Mr. Pope's motion within thirty (30) days (PC-R. 157). The State of Florida thereafter sought a sixty (60) day extension of time within which to file its response (PC-R. 159-60). The lower court granted the State's motion (PC-R. 161). Immediately prior to the expiration of the extension period, the State requested an additional sixty (60) day extension of time within which to file its response (PC-R. 162-63). The lower court granted the State's motion (PC-R. 164). Immediately prior to the expiration of this extension period, the State requested an additional forty-five (45) days within which to file its response (PC-R. 165-66). The lower court again granted the State's motion (PC-R. 167). Immediately prior to the expiration of this extension period, the State requested an additional seven (7) days within which to file its response (PC-R. 168-69). On December 26, 1995, the State of Florida filed its response (PC-R. 221-239).

Just prior to the filing of the State's response, Mr. Pope filed several *pro se* pleadings, including a Motion to Hold Proceedings in Abeyance Pending Resolution of Status of Representation (PC-R. 170-72), Motion for Hearing to Determine Competency. of Appointed Collateral Counsel and Consolidated Motion for the

Appointment of the Capital Collateral Representative (PC-R. 173-75), and an amended Rule 3.850 motion (PC-R. 176-218). Mr. Pope's volunteer counsel thereafter filed a motion to withdraw as counsel, noting that "Mr. Pope no longer desires the undersigned to provide counsel to him or represent his interests and, in fact, is of the belief that the advice and counsel rendered thus far is constitutionally defective" (PC-R. 595). The Office of the Capital Collateral Representative thereafter filed a Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel, arguing that CCR could not assume Mr. Pope's representation due to excessive caseload conflicts and requesting that Mr. Pope's postconviction proceedings be stayed until effective CCR counsel could be designated (PC-R. 597-98).

During a phone hearing on the matter of Mr. Pope's legal representation, Mr. Pope's volunteer counsel argued that he was "not knowledgeable enough in the nuances of capital representation to know one way or the other" about the law relating to death penalty issues, especially procedural bars (Supp. PC-R. 9-10), and "have no expertise in knowing the ins and outs of the law as it relates to capital representation" (Supp. PC-R. 10). The State argued that volunteer counsel should stay on the case until the resolution of the pending postconviction motions (Supp. PC-R. 9).

The lower court thereafter entered an order that volunteer counsel was to remain representing Mr. Pope until such time as the court ruled on the pending

Rule 3.850 motions (PC-R. 621). The lower court also denied the various motions filed *pro* se by Mr. Pope as well as the CCR office (PC-R. 616).

On February 22, 1996, Mr. Pope filed a *pro* se Motion to Appoint Conflict-Free Counsel, alleging that he was being denied his statutory right to effective and conflict-free representation because the court allowed volunteer counsel to withdraw, but only after resolution of the pending postconviction motions (PC-R. 618-20).

On May 29, 1996, the lower court entered an order denying Mr. Pope's motion for postconviction relief as well as Mr. Pope's *pro* se motion to appoint conflict-free counsel (PC-R. 622).

On June 12, 1996, the Office of the Capital Collateral Representative filed a Motion to Clarify Status of Counsel, to Reconsider Dismissal of Motion for Postconviction Relief, and Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel (PC-R, 624). In its motion, CCR argued that, due to the court's prior order regarding volunteer counsel, "[i]t is not clear [] whether volunteer counsel or CCR, or Mr. Pope, pro se, can file a motion for rehearing as authorized by Fla. R. Crim. P. 3.850(g)" (PC-R. 625). In response, the State of Florida argued that "because Mr. Wagner filed the Motion for Post-Conviction Relief on behalf of the Defendant, Mr. Wagner, and not Capital Collateral Representative, should file the motion for rehearing, if he deems it necessary" (PC-R. 628). The State also argued that the lower court "should treat the pro-se motion as a separate and distinct motion for post-conviction relief and

allow the Capital Collateral Representative to represent the Defendant on that motion" (PC-R. 629).

On July 3, 1996, the lower court entered an order that "the CCR would be the appropriate counsel to represent Defendant in any further pleadings before this Court" and that "the Court finds no reason to reconsider its dismissal of either the Motion or Amended Motion for Postconviction Relief, as they were both successive" (PC-R. 632). A notice of appeal was thereafter timely filed (PC-R. 633).

SUMMARY OF ARGUMENT

1. Mr. Pope received constitutionally ineffective assistance of counsel at his capital trial. Due to numerous failures to cross-examine witnesses, present evidence, investigate the case, read witness statements and depositions, prepare witnesses in advance of calling them at trial, and other omissions, Mr. Pope was denied his right to effective counsel. The number and severity of counsel's prejucial omissions was tantamount to a complete deprivation of counsel. Although this is Mr. Pope's second motion to vacate, under the unique circumstances of this case Mr. Pope requests that the Court overlook and/or forgive any procedural default found by the lower court.

2. Mr. Pope's sentencing jury received constitutionally inadequate instructions on the heinous, atrocious, or cruel aggravating circumstance, and the cold, calculated, and premeditated aggravating circumstance. The instruction failed to adequately channel the sentencing jury's discretion. To the extent that trial counsel failed to know the law and submit proposed instructions, defense counsel rendered prejudicially deficient performance. A new sentencing proceeding, free from the taint of the Eighth Amendment error, should be ordered.

3. The lower court denied Mr. Pope's right to effective counsel during these postconviction proceedings. The lower court permitted volunteer counsel to withdraw from Mr. Pope's representation due to a conflict of interest, yet refused to allow them to withdraw until the court ruled on the pending motion for postconviction relief. Mr. Pope was therefore represented by conflicted counsel.

The lower court also erred in permitting the Office of the Capital Collateral Representative to represent Mr. Pope on his amended postconviction motion, despite the State's position that such motion needed to be "fairly litigated" by Mr. Pope and his CCR counsel.

ARGUMENT I

MR. POPE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A RELIABLE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION.

A criminal defendant is entitled to a fair trial, As the United States Supreme Court has explained:

> a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washinnton, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment"'. United States v. Baglev, 473 U.S. 667, 674 (1985), auotinn Bradv v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland. Mr. Pope was denied a reliable adversarial testing. In order "to ensure that a miscarriage of justice [did] not occur," Baalev, 473 U.S. at 675, it was essential for the jury to hear all the evidence.

B. PROCEDURAL DISCUSSION.

The lower court denied Mr. Pope's second motion for postconviction relief as successive and therefore procedurally barred (PC-R. 622). The allegations of ineffective assistance of counsel that were raised in the instant postconviction motion were raised in Mr. Pope's federal habeas petition, but the State raised a nonexhaustion defense, and Mr.

Pope therefore filed the motion in question. The State thereupon argued that the allegations contained in the instant petition are time barred because prior collateral counsel failed to present them in Mr. Pope's initial Rule 3.850 motion.

To the extent that the allegations contained in the instant postconviction motion were not raised by prior collateral counsel, Mr. Pope received ineffective assistance of counsel during his initial postconviction litigation. Mr. Pope is and was entitled to effective representation of collateral counsel under Florida statutory law and this Court's interpretation of such law, See § 27.702 (1), Florida Statutes (1996); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Spaziano v. State, 660 So. 2d 1363 (Fla. 1995). When the State establishes a right to counsel, "this statutory right necessarily carries with it the right to have effective assistance of counsel." Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990). "The appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation." Id. (emphasis in original). See also Easter v. Endell, 37 F. 3d 1343, 1345 (8th Cir. 1994) ("once such a [state statutory right to counsel] is granted by the state, its operation must conform to the due process requirements of the 14th Amendment"). But cf. Lambrix v. State, 21 Fla. L. Weekly S365 (Fla. Sept. 12, 1996).

Mr. Pope submits that under the unique circumstances of this case, the serious and substantial errors alleged in the postconviction motion should be heard at this time. Prior collateral counsel, under these circumstances, acted unreasonably in not presenting these matters in Mr. Pope's prior petition.[1] Because the right to collateral counsel is "meaningless" without some assurance that counsel give effective representation, Remeta,

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[1]Mr. Pope in no way waives and/or abandons any claims regarding exhaustion that were made in federal court.

559 So. 2d at 1135, Mr. Pope requests that the Court visit these matters at this time. This Court can overlook a procedural default under the unique circumtances of a case, Breedlove v. Sinaletary, 595 So. 2d 8 (Fla. 1992), and this is one of those cases, as the severity of the allegations regarding trial counsel's ineffectiveness, discussed infra, establishes.

C. MR. POPE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

At trial, Mr. Pope was represented by attorney Scott Eber. Prior to representing Mr. Pope, Eber had only conducted three or four jury trials of any kind (PC-R. 8).[2] Counsel's inexperience was demonstrated by his deficiencies in representing Mr. Pope during his capital trial. Had Mr. Pope received the level of assistance of counsel to which he was entitled under the Constitution, there is certainly a reasonable probability of a different outcome. Strickland, 466 U.S. at 694. Even without the information that counsel unreasonably failed to present to the jury, the jury deliberated for over twelve hours. See R. 1074-92; 1257-60. Had counsel's performance been constitutionally adequate, the unpresented evidence would "have pushed the jury over the edge into the region of reasonable doubt." Barkauskas v. Lang, 878 F.2d 1031 (7th Cir. 1989). However, due to Eber's unreasonable and prejudicial performance, Mr. Pope's case was never subjected to the crucible of an adversarial testing. In fact, the putative assistance of counsel that Mr. Pope did receive was tantamount to no counsel at all.

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[2]Eber had been appointed as substitute counsel, replacing public defender Douglas McNeil who had withdrawn after seven months as counsel for Mr. Pope. McNeill moved to withdraw on October 2, 1981 (R. 1205), and at a hearing on October 8, the motion to withdraw was denied. The record contains no order granting withdrawal, no order appointing Eber as substitute counsel, and no notice of appearance from Eber. Eber first appears on behalf of Mr. Pope at a pretrial hearing on November 19, 1981.

Mr. Pope's postconviction motion alleged various substantial deficiencies in counsel's performance, deficiencies that prejudiced Mr. Pope and rendered the outcome of the guilt proceedings constitutionally unreliable. Singularly and/or cumulatively, these errors constitute unreasonable attorney performance, and confidence in the outcome is undermined as a result.

1. Failure to Seek Suppression of Inadmissible Statements and Evidence.

Trial counsel wholly failed in his duty to zealously represent Mr. Pope. Counsel failed to seek exclusion from evidence of numerous statements and items of evidence that were prejudicial to Mr. Pope and inadmissible. Prior encounters with law enforcement, involuntary statements, and unpredicated eyewitness identification all were admitted at Mr. Pope's trial without any objection whatsoever. Counsel simply stood mute as more and more prejudicial and inadmissible evidence was presented by the State. Counsel filed no motions to suppress and no motions in limine. Counsel's performance was prejudicially deficient. Smith v. Dugger, 91 1 F. 2d 494, 497 (1 lth Cir. 1990).

The only discussion on the record regarding the admissibility of Mr. Pope's statements to law enforcement occurred after the jury was sworn in and just prior to the opening statement by the prosecution:

> MR. GARFIELD: For the record, I plan to refer, in my opening statement, to the statements made by the defendant to various police officers.
>
> THE COURT: Have I ruled on them?
>
> MR. GARFIELD: Statements made by the defendant to police officers. Mr. Eber has not filed a motion. It is my understanding that he has no objection to the various statements to be admit&d but I wanted a clear answer before we start.
>
> THE COURT: Any problem with that?

MR. EBER: Judge, I'm not -- as far as my objections later on, I'm not going to object to him referring to whatever he wants to in his opening. . . .

MR. GARFIELD: ~~Well, there has not been a motion to~~ suppress filed on the statements. I assume I can go ahead and use them.

(R. 198-200).

A prosecutor is not entitled to refer to "whatever he wants to" during a capital trial. A prosecutor can only refer to and seek inclusion into evidence of admissible evidence. In Mr. Pope's case, counsel failed to preclude the State from presenting inadmissible evidence of prior unrelated and irrelevant encounters between Mr. Pope and law enforcement officers. During redirect examination of the State's most important witness, Susan Eckhart, the prosecutor brought out an encounter between Mr. Pope and the Boca Raton police some six months before the crimes in question, an encounter unrelated to the instant one. The State, seeing that no objection would be forthcoming from Eber, was free to elicit totally irrelevant information about guns and silencers that had nothing to do with this case (R. 694-95). Not once but twice did the prosecutor mention a gun of Mr. Pope's being "confiscated by the Boca Raton police" (Id.). At neither time did Eber make any objection or otherwise prevent the State from introducing irrelevant and highly prejudicial information to the jury.

Another previous unrelated investigation of Mr. Pope was introduced during the testimony of state's witness Agent Therman Nelson of the North Carolina State Bureau of Investigation:

Q Had you, in the course of your duties, spent any time in regard to Tom Pope?

A. Yes, sir. He was questioned in a prior investigation that I had conducted in that county, yes, sir..

> Q . . . I was familiar with Mr. Pooe, that he had been interviewed, not bv mvself, but bv an officer that I was workina with, in a prior investination.

(R. 536). Again Eber did not object to these clearly irrelevant and highly prejudicial remarks elicited by the prosecution. Mr. Pope was denied the effective assistance of counsel because of counsel's failure to object.

2. Involuntary Statements to the Police.

Defense counsel also wholly failed to undertake any steps to exclude statements made by Mr. Pope to law enforcement, made while Mr. Pope was in custody, without counsel, and without the Miranda warnings.[3] Mr. Pope's first direct interrogation occurred on January 21, 1981, two days after the discovery of the homicides of Doranz and DiRusso. Detectives Perry and Verdegem showed up at the door of attorney Ronald Dubner's apartment, where Mr. Pope had been staying, and invited themselves in (R. 280). Less than an hour earlier, they had interviewed Susan Eckhart, who informed them that she and Mr. Pope had been to Doranz' apartment the evening of January 16. After noticing a box of .22 caliber cartridges on the table when they were speaking to Mr. Pope, the detectives "talked to him about his knowledge of Al Doranz, Christine Walters, and Caesar DiRusso, advised him we were involved in a homicide investigation" (R. 280). After discussing whether Mr. Pope owned any weapons and about his whereabouts on the night of January 16, 1981, and "once he did tell us he was at that apartment and in fact had the .22 caliber weapons[,] . . . [a]t that time, we felt it necessary to read his Miranda warnings" (R. 283). Detective Perry's various reports varied as to when he gave Mr. Pope

[3]In its discovery responses, the State had alerted Eber of its intention to use these statements. See R. 1187, 1218.

the Miranda warnings, vacillating from after Susan Eckhart told police she and Mr. Pope were at the Doranz apartment the evening of January 16, to after the police entered Mr. Pope's domicile, to after Mr. Pope was told that the police were investigating a homicide, to after Mr. Pope turned over four .22 caliber handguns.[4] Mr. Pope should have been advised of his Miranda warnings before any of these interrogations, particularly given Detective Verdegem's view that Mr. Pope was "involved in this thing" from the outset (Deposition of Verdegem at p. 10). A "reasonable person" in Mr. Pope's position "would have believed he was not free to leave." Florida v. Rover, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980). See also Orozco v. Texas, 394 U.S. 324, 326 (1969) (reversing murder conviction where "trial testimony clearly shows that the officers questioned petitioner [in his own home] about incriminating facts without first informing him of his right to remain silent, his right to have a lawyer," etc."). The statements made by Mr. Pope to Detectives Perry and Verdegem before he was given the requisite Miranda warnings were clearly used against him by the State, as evidenced by the State's closing argument. See R. 958, 965, 968-69, 957, 976. Defense counsel failed to seek the suppression of these inadmissible statements.

Statements made immediately after the aforementioned statements were likewise subject to suppression as fruits of the earlier illegal interrogation. After the interrogation in the apartment, Perry and Verdegem asked Mr. Pope "if he would be willing to come to Oakland Park [Police Department] and talk to us further" (Deposition of Perry at p. 12). Mr. Pope told the detective that "he would be glad to come down and talk with us, but

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[4]Notably, there is no written acknowledgement or waiver by Mr. Pope of his Miranda rights that the detectives claimed to have given him while at the apartment.

that he would like to contact his lawver and have his lawver present when he did talk to us" (Id.). However, Mr. Pope "talked quite a bit with Detective Lieutenant Hemp, before the attorney arrived . . ." (Id.).[5]

Numerous police reports of that evening detail the police agents' repeated efforts to interrogate Mr. Pope before his attorney arrives, despite Mr. Pope's expressed desire not to speak without his attorney present. It is abundantly clear that the police were clamoring to get information out of Mr. Pope **before** his attorney, known by the detectives to be "enroute" to the police station (and who had called twice), could arrive to stop the interrogation:

> Undersigned officer had an occasion to talk to POPE while he was in the police building. Althouah it should be noted POPE was in fact waitinq for his attornev who had already been Summoned & was believed enroute to the PD. The attorney is identified as one RONALD N. DUBNER.
>
> . . . Prior to DUBNER's arrival, . . . POPE was questioned as to the four weapons he had turned over to Det. Perry and Det. Verdegem. . . In addition he indicated that he knew ALBERT DORANZ and was at DORANZ'S apt. on Friday, 1/16/81 [followed by a lengthy description of **Mr. Pope's** account of that evening's events].
>
> . . . POPE was then asked by the undersigned officer if any of the weapons he had turned over to the police were used in connection with the death of CAESAR DIRUSSO or AL DORANZ.
>
> . . . The undersigned office then question[ed] POPE as to any dealings or transactions that he may have had with DORANZ . . .

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[5] In fact, at Mr. Pope's trial, Hemp testified that Mr. Pope told him that he knew Al Doranz, was at Doranz's and Christine Walter's apartment on the January **16,** but that he did not know anyone by the name of Caesar DiRusso (R. 501-02). These were the statements made by Mr. Pope after asking for an attorney to be present. Notably, Hemp, in his testimony, omits the significant fact that Mr. Pope had requested counsel before speaking to him.

(Police Report of Hemp, 1/21/81).

The bad faith of the police and the illegality of this interrogation are further illustrated by Verdegem's police report dated January 26, 1981, wherein he relates what occurred when Mr. Pope was taken to the police station:

> These officers then asked MR. POPE if in fact he would like to accompany us back to the OPPSD in order that he might be questioned. He stated he would if he could contact his lawyer, which he did. . . . Upon reaching OPPDS, this officer did in fact make coffee. . , We also met with Sgt. Strachan and MR. POPE sat in Sgt. Strachan's office awaitina his lawver to come down so that he could talk to the lawver. . . . I also durinn this time asked MR. POPE if he in fact he had anv narcotics . . , He became quite irate at this time . . . I left that area and got a cup of coffee and returned and asked him the same auestion . . . I went out once more and came back to Sgt. Strachan's office and asked the same auestion aaain. . . He immediately became very irate . . . At this time he stated that he did not want to answer anv more auestiong and I left the room. I, prior to leavinq the room, this officer looked at MR. POPE and asked him the followinn auestion. "DID YOU KILL THOSE PEOPLE IN OAKLAND PARK?"

Hemp further testified at trial to additional conversations he had with Mr. Pope on January 23, two days later. Mr. Pope had gone to the police station to reclaim the guns that were confiscated on January 21 . Despite being instructed by Mr. Pope's attorney not to question Mr. Pope, Hemp proceeded to ask Mr. Pope questions, and he testified to such at the trial. Hemp elicited more details from Mr. Pope which were inconsistent with other statements, providing yet more grist for the prosecutor's closing attack on Mr. Pope as a "liar" (R. 503-05). Despite the instructions from Mr. Pope's attorney, Detective Rhodes had a lengthy interview of Mr. Pope on January 28, after inviting Mr. Pope down to the police station, once again, to retrieve his guns. The January 28 conversation between Mr. Pope and Rhodes was detailed to the jury by Rhodes himself (R. 508-1 1), and provided

further evidence from which the State was later able to argue, without objection, that is had caught Mr. Pope in a "web of lies."

Not once before or during Mr. Pope's capital trial did defense counsel raise a single objection or raise any question with regard to the voluntariness of these numerous statements. These statements were clearly elicited in violation of the Fifth, Sixth, and Fourteenth Amendments. Eber's failure to challenge the admissibility of these statements, and the testimony of Perry, Hemp, and Rogers, constitutes unreasonably prejudicial attorney performance. Confidence is undermined in the result.

3. Improper Photographic Line-up Identification.

During trial, gun shop clerk Mark Morganstern testified to his identification of Mr. Pope from a ten-photo array as the individual who accompanied Al Doranz during the purchase of the AR-7 rifle alleged to have been the murder weapon (R. 391-92).[6] Defense counsel made no inquiry into the validity of the photo line-up and made no inquiry into the procedures used by law enforcement, He simply indicated he had "no objection, Judge" when the State introduced this evidence (R. 391). Eber's wholesale failure to address this issue either pretrial or before the jury constitutes ineffective assistance of counsel.

4. Failure to Conduct Reasonably Effective Voir Dire.

Jury selection is a critical part of defense counsel's function at a capital trial. See, e.g. Witherspoon v. Illinois, 391 U.S. 510 (1968); Caldwell v. Mississippi, 472 U.S. 320 (1985). In Mr. Pope's case, defense counsel Eber asked no questions about jurors' death penalty views. He made no attempt to determine whether any cause or peremptory

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[6]Morganstern, notably, was unable to make an in-court identification of Mr. Pope (R. 390).

challenges could be predicated on the jurors' strong or intractable views in favor of the death penalty. This is prejudicially deficient performance. See Smith v. Balkcom, 660 F. 2d 573, 578-79 (5th Cir. 1981) ("All veniremen are potentially biased. The process of voir dire is designed to cull . . . [for example] those who, in spite of the evidence would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence"). Likewise, defense counsel asked only once during voir dire concerning jurors' pretrial exposure to the media (R. 1 10).[7]

Counsel completely failed to utilize voir dire for its essential purposes -- to expose bias and predisposition as to guilt and punishment and to educate the jury on sensitive and pertinent issues in the case. The only consistent theme that counsel played on during the voir dire was to discuss their feelings about the phrase "where there's smoke there's fire." See R. 111, 112, 113, 114, 115, 121, 122, 123, 124, 125, 163, 164, 154, 166, 182, 183, 184. Of course, this phrase contradicts the presumption of innocence. Counsel failed to make any pertinent and meaningful inquiry during voir dire, in violation of the Sixth Amendment.

5. Failure to Object to Improper Judicial Commentary.

One of counsel's basic functions at a trial is to object in a timely fashion to various instances of objectionable commentary or evidence. See Wainwriaht v. Svkes, 433 U.S. 72, 86-90 (1977) (failure to object at trial prevents "direct review" of asserted error). During Mr. Pope's capital trial, defense counsel wholly failed to object to facially erroneous and prejudicial commentary. For example, the trial court repeatedly informed the jurors that serving on Mr. Pope's jury was entirely optional (R. 18, 1 16). Taking its cue from the

[7]The trial court had to repeatedly explain to the jurors what in fact defense counsel was attempting to ask. See R. 133, 135, 137, 149, 164.

trial court, the prosecutor also adopted a similar position with the jurors (R. 159-60). These comments by the court and the State were clearly improper, yet they were made without objection by defense counsel. The United States Supreme Court has "unambiguously declared that the American concept of jury trial contemplates a jury drawn from a fair cross section of the community," Taylor v. Louisiana, 419 U.S. 522, 527 (1975). The practice of excusing jurors because they do not wish to serve undermines the goal of selecting a jury that represents a randomly-selected cross section. Defense counsel's failure to object constitutes prejudicially deficient performance.

6. Failure to Object to Improper Prosecutorial Commentary.

Defense counsel's attitude that the State could, in essence, do anything it wanted during Mr. Pope's trial, also led to his wholesale failure to object to repeated improper commentary by the State. For example, during its opening statement, the prosecutor repeatedly vouched for the "thoroughness" of the police investigation, unveiling a strategy of damage control for what were, in reality, substantial loopholes in its case against Mr. Pope (R. 207, 213). The State flagrantly misrepresented what the evidence would be, setting up highly prejudicial conclusions that would never be substantiated. For example, the prosecutor drastically misquoted Mr. Pope's alleged statement to Detective Rhodes that "if I ever want to confess to these crimes, . . . [it will be to you]," adding the words "to these crimes" to what Rhodes would be testifying (R. 222); cf. R. 515 (Rhodes testimony). The intentional misimpression was thus conveyed that Mr. Pope considered confessing "to these crimes" when in fact he was referring only to a future willingness to disclose other facts the investigators might want.

The prosecutor also muddled the statements from a North Carolina gunshop owner with another in South Florida, setting up a purported discrepancy that in fact did not exist,

so that it could later call Mr. Pope a liar (R. 224, 967; cf. R. 847). The State also told the jury, without any evidentiary basis, that Mr. Pope was "outraged" at the quality of an alleged cocaine sample (R. 225, 232), implying that this might have been the motive for the instant murders. The prosecutory also improperly characterized Mr. Pope's open relations with the police investigators as intending to create an "appearance of cooperation" (R. 222), and argued that Mr. Pope "coached" Susan Eckhart with a "bogus cover story" (R. 235). The state also used its opening to present in effect testimony from the prosecutor himself, who explained how guns work (R. 208), that exploding ammunition does not lend itself to ballistic analysis (R. 212), and gave extended dissertations on ballistics (R. 215) and fingerprint analysis (R. 338). All of these improper comments made by the prosecutor were met by silence from the defense table. Opening statement epitomized the course of this trial -- impropriety after impropriety by the state, and silence from defense counsel.[8] The outcome of this one-sided "trial" is undermined.

During closing argument, the prosecutor's improper commentary continued, as did defense counsel's silence. For example, the prosecutor repeatedly invoked his own opinion and expertise into the argument (R. 972, 980, 956, 965, 966, 970, 971, 984, 985). The prosecutor told the jury that he "felt" that defense counsel's argument that Mr. Pope was innocent was "a little bit galling" (R. 1043). As to the claims made by the defense, the prosecutor told the jury that "I don't understand exactly why they are doing that" (R. 955). Nowhere during closing argument does defense counsel object to this blatantly improper commentary.

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[8] When Mr. Pope sought review of various improper comments in a state habeas petition, alleging ineffective assistance of appellate counsel, defense counsel's failure to object is referred to at least eight times in this Court's opinion denying relief. See Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986).

The prosecutor also repeatedly called Mr. Pope a "liar" before the jury. See R. 976 ("I'm catching him in lies"); 975 ("He is caught in a trillion lies"); 953 (Mr. Pope gave "devious testimony"); 968-70 ("the guy doesn't even believe himself. . . He admits he's a liar so we won't count that"); 1045 ("That, basically, has been Mr. Pope's defense, Forget that I'm a liar"); 1053 ("Remember . . . who lied through his teeth, why he lied through his teeth"). It is improper for a prosecutor to level such accusations against an accused. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Darden v. Wainwrisht, 699 F. 2d 1031 (1 lth Cir. 1983).[9] Defense counsel sat mute while the State repeatedly called his client a liar.

The prosecutor further misrepresented the evidence at trial without any objection from defense counsel. For example, the prosecutory told the jury, without any evidentiary basis, that Mr. Pope's motive in the case was $100,000 (R. 952). In reality, the State could not show any motive -- other than the fabricated $100,000 story -- for Mr. Pope to have committed the crimes. There is not one shred of evidence in this case about $100,000 worth of cocaine, or that this was the motive behind the killings. In fact, the deposition testimony of Detective Hemp and that of Detective Ken Perry establish the exact opposite. See Deposition of Charles Hemp at 9 ("There would seem to be very little evidence that there was cocaine, other than perhaps a small amount"); Deposition of Ken Perry at p. 26 ("I was never able to establish anything in large quantity"). The State's argument is peppered with further misrepresentations of the evidence. See R. 961 (misrepresentation of testimony of Buddy Lagle); R. 967-68 (misrepresentations

[9]See also Darden v. Wainwright, 477 U.S. 168, 181-81 (1986), adopting panel opinion as to impropriety of comments but finding comments were "invited" and outweighed by "overwhelming evidence" of guilt.

concerning conversation between Mr. Pope and North Carolina gunshop owner). All of these comments were met with silence from defense counsel.

The State also improperly and repeatedly commented on Mr. Pope's exercise of his Fifth Amendment right against self-incrimination, See R. 881, 883, 987. The Fifth Amendment "forbids comment by the prosecution on the accused's silence." Griffin v. California, 380 US. 609, 615 (1965). However, defense counsel let these comments go without any objection.

7. Failure to Effectively Cross-Examine State Witnesses.

Cross-examination of state witnesses has been recognizes by the United States Supreme Court as "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). See also Ford v. Wainwrinht, 106 S.Ct. 2595, 2605 (1986" ("Cross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of the truth"). The denial of cross-examination results in a failure "to subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659 (1984).

Defense counsel's cross-examination of the state's witnesses was, like his performance at the other stages of trial, prejudicially deficient. For example, as to witness Tommy Hurd, trial counsel failed to bring to the jury's attention serious inconsistencies with the State's case, According to Susan Eckhart, the State's key witness, Mr. Pope arrived home late Friday night and obliquely indicated that he had just killed Al Doranz and Caesar DiRusso. Any evidence to contradict the State's theory that Mr. Pope murdered Doranz and DiRusso in Doranz's apartment on Friday night would be significant. Witness Hurd had given statements that there were complaints about loud music coming from Doranz's apartment on Monday morning, several days after the murders were allegedly

committed. Hurd also testified in his deposition that a neighbor had reported hearing music on Sunday evening (Deposition of Hurd at 9-10). Defense counsel never questioned Hurd about these vital facts, facts which were helpful to the defense. Any familiarity with Hurd's pretrial statements would have led reasonable counsel to elicit that the music became loud late Sunday, an important glitch in Eckhart's testimony. Reasonably effective counsel would have left no doubt in the jurors' minds that there was activity in the Duranz apartment late Sunday, nearly two days after the murders were committed according to the State's key witness, Eckhart.

Defense counsel also failed to effectively cross-examine Detective Dusty Rhodes. The State had recalled Rhodes on rebuttal to refute the testimony of defense witness Sherry Heinrich that she might have seen Doranz on the Saturday after he was allegedly killed. Although she had initially told police she was "absolutely positive" she saw Duranz that Saturday, Heinrich ultimately testified she "wasn't sure" what day it was (R. 712-13). In fact, Heinrich was one of three witnesses who initially told police that they were "positive" they saw Duranz alive on Saturday. Defense counsel possessed Rhodes' deposition, wherein Rhodes acknowledged that there were witnesses who saw Duranz alive on Saturday, yet failed to confront Rhodes with the deposition. Defense counsel also failed to confront Rhodes with his own police report, made on January 25, 1981, which stated that Heinrich stated "she is absolutely positive of the time being approximately 1:45 pm Sat., I/I 7/81." Rather than confronting Rhodes with his police report, Eber allowed Rhodes to testify to undocumented and unsubstantiated conversations between Heinrich

and two other detectives in May, 198 1, where she allegedly deviated from being "absolutely positive." Defense counsel rendered prejudicially deficient performance."

Counsel also failed to cross-examine Rhodes concerning the significant evidence that had been discovered concerning the high risk underworld activities of victims Doranz and DiRusso. In fact, DiRusso had been the subject of an entirely separate investigation regarding some $130,000 worth of stolen jewelry (Deposition of Rhodes at 16). "Everybody" told Rhodes that DiRusso "was involved somewhere in the Mafia" (Deposition of Rhodes at 18). Because of DiRusso's known underworld connections, Rhodes and his associates "were looking at a lot of Caesar [DiRusso]'s associates, things of that nature" (Deposition of Rhodes at 26). For example, Rhodes learned from several sources that the night before he was murdered, DiRusso had dinner with one James "Jimmy" Tomasello, from New York. The purpose of the dinner, according to one of DuRusso's associates, was "some business . . . to straighten out the problem with the gold" (Sworn Statement of Dennis Scudera, 2/5/81, at p. 5). DiRusso had told Scudera that he (DiRusso) owed "payments" in New York for gold (Id. at 14). Curiously, although Scudera did not know Mr. Pope, he had heard of Doranz by his nickname "Spock, " and Susan Eckhart's picture was "very familiar" to him (Id. at 6). None of this information was brought out by defense counsel.

Rhodes and his partner Verdegem also had additional information from a "Judy" about the dinner in New York with DiRusso and Tomasello. In Tomasello's statement, he

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"Defense counsel similarly failed to confront Rhodes with Mary Colantuono's sworn statement, wherein she swore under oath to seeing Doranz on that Saturday (Deposition of William Rhodes at 14). Competent counsel would have utilized Colantuono's sworn statement to Rhodes during Rhodes' rebuttal testimony to show the jury that these individuals were unambiguously certain back at the time of the key events at issue.

told Rhodes that DiRusso left the restaurant with two ladies, Judy and Lisa (Sworn Statement of James Tomasello, 1/23/81, at 3). In a January 26 report authored by Verdegum, he reports that "Judy" was told by Tomasello that "if she didn't keep her mouth shut , . . and if she had told the police anything she might find herself in the same condition as the w/f in the trunk, meaning KRISTINE WALTERS." Notably, Verdegum's interview with Judy took place only one day after the discovery of Ms. Walter's body. Hence the threat from Tomasello may well have preceded this discovery.

Judy was not the only person threatened with her life if she talked about what she knew. Rhodes also interviewed a Lana Gelman on January 27, who told Rhodes that DiRusso was killed "because he owes someone in excess of $190,000 cash and he was informed approx. one week before his death if he did not pay he would be taken care of." Gelman further stated that "this subject is . . . to her knowledge possibly in organized crime up north . . . [and] when she went to the viewing of Caesar DiRusso's body this person or persons close to him advised her to keep her mouth shut and not say anything or she could end up like the other three." Although Lara Gelman was called as a defense witness, counsel never asked her one question about the threats on her or DiRusso's life. Counsel also failed to question Rhodes about these threats.

The State also called Detective Ken Perry. Like Rhodes, Perry had received information exculpatory to Mr. Pope, yet never was questioned about it by defense counsel. Perry knew that Caesar DiRusso was not the only victim in the case with large debts and mean enemies. For example, he knew that Al Doranz was in debt to drug dealers and others for "quite a bit of money and there were people looking for him" (Deposition of Perry at 8). Perry had also been contacted by one of his "confidential informants" on January 27 who "knew many of the people involved in this incident," had

had drug dealings with Caesar DiRusso, and had observed DiRusso on more than one occasion point large guns with silencers at other drug dealers and threaten to "take care of" them (Report of Perry, **1/28/81).** Perry also possessed information that Dennis **Scudera,** the brother of Joseph **Scudera,** told Perry on January 20 that he last saw Caesar DiRusso around 9:30 on Friday, January 16, after which he and his partner Tony Fiorentino waited until approximately midnight." This information would have confirmed the presence of other suspects with DiRusso around the time he was supposedly killed by Mr. Pope. The involvement of these other suspects should have been further supported by witnesses called by the defense, whose importance was lost. For example, Sherry Heinrich testified at trial that the individual who was with Al Doranz on Saturday, January 17, "could have been a hairdresser" (R. 715). Joseph **Scudera,** who was visiting from New York that weekend, was "in the hairgrooming business," as noted in Detective Perry's January 24 police report. Heinrich also told police that the person she saw that Saturday with Doranz "possibly had Jewish or Italian blood lines in his person." This description fit Joseph Scudera. None of this information was elicited by defense counsel at Mr. Pope's capital trial.

Defense counsel likewise failed to effectively cross examine Detective Charles Hemp. As with the other officers, Hemp possessed significant information that was exculpatory to Tom Pope. For example, in his deposition, Hemp stated that there were three individuals who saw Al Doranz alive on the Saturday after he was supposedly killed by Mr. Pope (according to Susan Eckhart). **See** Deposition of Hemp at 24. Hemp, like Perry, had concluded that there was "very little evidence that there was cocaine, other than perhaps a small amount." **Id.** at 9. Hemp also was questioned during his deposition about a subsequent break-in at the crime scene apartment. Significantly, fingerprints and

sneakerprints were recovered that were not Mr. Pope's (Report of Det. Verdegem, 1/26/81). Equally as, significant, it was the belief of veteran detective Hemp that the break-in "had something to do with this case" (Deposition of Hemp at 21). Defense counsel should have been familiar with these statements and depositions, yet never brought up these critical facts.

As to Officer Gary Drent, defense counsel was flagrantly unfamiliar with Dent's deposition and police reports, and as a result, failed to elicit significant exculpatory evidence. In his deposition, Dent described that only 39 of the 93 latent prints lifted from the crime scene were "of value." During trial, defense counsel exhibited a lack of knowledge about basic fingerprint techniques and comparison procedures. Defense counsel never inquired as to whether the unidentified latents were compared to known suspects in the case, namely Joseph Scudera, Dennis Scudera, James Tomasello, and Tony Fiorentino.

Defense counsel likewise failed to question Drent about his investigation in tot he break-in at the victim's apartment within a week of the discovery of the murders. In his report on the break-in, Drent noted that "there were some latent prints of value obtained" as well a "footprint was observed on the small night stand located right below the window." Although veteran detective Hemp had explained in his deposition that this burglary was connected to the homicides, defense counsel failed to question Drent about these facts. Effective counsel would have brought out all this exculpatory evidence. Mr. Pope's counsel did not.

8. Failure to Interview and Prepare Defense Witnesses.

It is manifestly clear from the record that by the time the State rested its case, defense counsel had not located or subpoenaed his witnesses. See R. 707-08, 722-24,

742-45. The records of service and attempted service of trial subpoenas evidence the last-minute efforts undertaken during trial to locate these witnesses. Defense counsel did not even speak to most of the witnesses before he put them on the stand. At best, he spent a minute or two in the hallway of the courthouse figuring out what witness had what to say and how that figured into the case.

As to witness Mary Colantuono, defense counsel failed to elicit clearly exculpatory evidence from this witness. Colantuono, a disinterested witness, had told the police that she saw Al Doranz on Saturday, the day after Susan Eckhart testified that Mr. Pope had killed him. Her statement to the police and her sworn statement established the certainty of the day and time in question. However, defense counsel never spoke with Ms. Colantuono before putting her on the stand, and certainly never prepared her for her testimony. Because of inadequate preparation, Colantuono testified at trial that she was "not positive" about seeing Doranz on that Saturday (R. 927). Defense counsel never went over her police statement to Det. Rhodes or her sworn statement, both of which were made close to the time of her observations. To make matters worse, the prosecutor then used Colantuono's sworn statement to show that she was unsure of her observations (R. 931). When defense counsel attempted to rehabilitate her on redirect, bullied defense counsel into not asking Colantuono the proper questions, and because he did not know what questions to ask, wound up having the State's objection to these questions sustained (R. 933-34). With a modicum of preparation, including preparing the witness for her testimony, would have prevented this complete break-down in front of the jury."

"Defense counsel likewise failed to talk to or prepare witnesses Dubner and Cribb before putting them on the stand.

As to defense witness Nancy Woodbury, she lived in the apartment complex where the murders took place. Ms. Woodbury's direct examination comprised two pages of transcript. The gist of her testimony was that approximately one month before he was killed, Al Doranz had given Woodbury his address book to hold onto for several days because "he said that something was going to be coming down":

> He knew some of the people he was dealing with; and I knew some of the business that he was doing, and I was under the impression it was something that he may have made an enemy with or something.

(R. 718). During her deposition, however, Woodbury provided additional information that was exculpatory. For example, Woodbury confirmed in her deposition that Mary Colantuono saw Duranz on Saturday (Deposition of Woodbury at 9-1 1). Colantuono's statement to Woodbury, critical to Mr. Pope's defense, would have been admissible through Woodbury for a variety of reasons."

Additionally, Woodbury also had personal knowledge of Doranz's high risk lifestyle, that he "was messing around in a lot of things he shouldn't have been messing around with" (Deposition of Woodbury at 12-14). Woodbury also knew that Steve Schultz, a neighbor and colleague of Duranz who had been an early suspect in the case, told Sherry Heinrich that Al Doranz and Kris Walters owed him $50,000, and that he would "like to kill them." There were thus a number of matters within the personal knowledge of Ms. Woodbury that were exculpatory to Tom Pope. However, defense counsel elicited none of it.

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[12]See Wingate v. New Deal Cab Co., 217 So. 2d 612 (Fla. 1st DCA 1969); Nussdorf v. State, 508 So. 2d 1273 (Fla. 4th DCA 1987); Smelly v. State, 500 So. 2d 318 (Fla. 1st DCA 1986); Erp v. Carroll, 438 So. 2d 31 (Fla. 5th DCA 1983).

9. Failure to Present Other Evidence of Innocence.

Not only did defense counsel Eber fail to effectively present the available exculpatory evidence he had by cross-examining the State's witnesses, he possessed additional evidence that he affirmatively failed to present in the defense case. For example, Eber did not call Steve Schultz or present any evidence about this witness. Schultz was an admitted colleague and partner in crime with Al Doranz. Det. Rhodes was certain that Schultz "might have some knowledge" about the murders because he was "acting very strange" and "very suspicious" (Police Report of Rhodes, 1/25/81). Numerous tenants in the apartment complex pointed to Schultz as a suspect. See Deposition of Strachan at 5.

Schultz was interviewed by Det. Perry and gave a sworn statement on January 28. Perry asked him point-blank who he believed was responsible for the murders:

> Q Do you have any idea who might have killed Al and Caesar and Kristine?
>
> A. Al owed so many people so much money and Caesar was in the hole, I think Caesar was in the hole for a whole bunch of money, I think maybe they decided to get Caesar through Al.
>
> Q Who is they, do you have any idea7
>
> A. Whoever Caesar owed money to.
>
> Q But you don't know in particular?
>
> A. I.. (sic) the only thing I , . (sic) I saw Caesar once uh . . (sic) New Years' and the time before that was us $ . . (sic) last July, JUne, when I was still friend with Al.

(Sworn Statement of Schultz at 9). Schultz's response here is very important. He was asked who Caesar owed money to that might have "decided to get Caesar through Al." He responded that he saw Caesar on New Year's. Where did he see Caesar on New Year?

At Tony Fiorentino's parents house, as Fiorentino stated during his statement on February 5 (Swown Statement of Fiorentino at 2). This account was confirmed by Fiorentino's roommate and pizza partner Dennis Scudera (Swown Statement of Scudera at 12). Almost immediately after the murders, Schultz virtually disappeared, never to resurface during the investigation. See Deposition of Woodbury at 4; 20. Mr. Pope's jury never knew any of this exculpatory information.

Mr. Pope himself cooperated with the police in their investigation. When he was initially confronted by police, they confiscated four guns from him, along with an unidentified white powdery substance. Mr. Pope contacted them to arrange for the return of the guns and to inquire as to the results of the testing on the white powder. Indeed, until the return of his guns and the final determination that the substance was not cocaine, Mr. Pope, in his dealings with law enforcement, was more concerned about retrieving his guns and assuring Susan Eckhart's parents that the substance was not cocaine than he was with the investigation. This is manifestly uncharacteristic of what one would expect from a guilty person. In fact, Mr. Pope was described almost universally by the detectives as "very cooperative." See Depositions of Rhodes at 8; Perry at 11; Verdegum at 16. On January 31, Mr. Pope contacted Det. Rhodes to tell him that he was going to North Carolina the following day, volunteered the flight information, and gave him his mother's telephone number in China Grove, North Carolina (Report of Rhodes, 2/2/81). The next day, Rhodes went with Mr. Pope to the West Palm Beach Airport to see Mr. Pope off (Id.). Before boarding his flight, Mr. Pope "insisted on opening" his suitcase to let Rhodes look

inside (Id). Eber never confronted the jury with Mr. Pope's own actions which were exculpatory.[13]

Finally, defense counsel failed to call to the attention of the jury one additional piece of exculpatory evidence. During the state's closing argument, it sought to compensate for the lack of physical evidence it had produced to support Susan Eckhart's damning testimony, arguing repeatedly that Mr. Pope was a methodical "cover up" artist (R. 958, 960, 968-69, 1045) who would "do everything to cover his tracks" (R. 953). However, this characterization of Mr. Pope neglected to address one key evidentiary matter that was never explained -- if Mr. Pope killed Kristine Walters, why would he throw the AR-7 rifle he had purchased with Al Doranz and used to kill all three victims on top of Ms. Walters' body in a ditch? Indeed, the fact that the rifle was found literally with the body of Kristine Walters would reasonably indicate that Mr. Pope was not the killer and that the rifle was disposed of in such an obvious manner as to frame Mr. Pope for the murder. Defense counsel failed to present and argue the obvious.

10. Failure to Present Effective Closing Argument.

In his closing argument, defense counsel was hampered in summarizing the evidence by the fact that he had not presented much to summarize and had not meaningfully confronted the State's witnesses. The wealth of exculpatory evidence, and the evidence establishing a reasonable doubt as to Mr. Pope, was not presented and therefore was unavailable to argue.

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[13] Mr. Pope's postconviction motion further alleged that defense counsel Eber failed to inform the jury of various statements by state witness Buddy Lagle to the effect that he did not believe Mr. Pope was guilty. See PC-R, 103-05.

Counsel's closing was not only unhelpful, it was affirmatively harmful. For example, counsel described his client as follows:

> Remember, this is the passive-aggressive personality. This is the guy that doesn't get mad. He holds it in and he figures out some way to get you back. That, to him, is more status for him.

(R. 1010). Counsel's attack on Mr. Pope continued by counsel calling his own client a liar:

> Sure, Tom was lying. But he wasn't lying in the manner and spirit that the State would have you believe. Tom was lying because he wanted to jerk the police all over the place, just they way they were doing to him. It's as simple as that.

(R. 1014). Counsel continued:

> . . . When Tom wants to get back at somebody, he doesn't jump on you and hit you. He thinks of some way that's sneaky. . .

(R. 997).

Counsel also argued that Mr. Pope would not kill for a pecuniary motive as paltry as $250, implying that Mr. Pope would command a greater monetary incentive to kill:

> A few hundred dollars worth of cocaine was not important to him. It was not something that the man would kill over.

(R. 994). Counsel also argued that the manner in which the killing were effectuated were "not his style . . . [I]t is not his style to do it in that fashion" (R. 1021). Counsel was clearly sending the message that Mr. Pope might be a murderer, but these particular murders were "not his style." These arguments are simply outrageous.

When he wasn't calling his client a liar, Eber was misstating the evidence in such a way as to prejudice Mr. Pope. See R. 1011 (confusion about testimony of Buddy Lagle); R. 591 (inaccurate representation of testimony of Susan Eckhart). Counsel also distanced

himself from his innocent client by stating that "we are not claiming that somebody else did it" (R. 995). Counsel's actions were severely prejudicial to Mr. Pope.

11. Failure to Submit and Argue Proper Jury Instructions.

The trial and appellate records reflect that defense counsel proposed no jury instructions, conducted no charge conference, or in any way argued the propriety or impropriety of the jury instructions in this capital case. Such a failure constitutes deficient attorney performance under any reasonable objective standard. See Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994).

12. Ignorance of Criminal Law and Defense Principles.

Throughout his representation of Mr. Pope, defense counsel displayed an ignorance of the most basic principles of criminal law and criminal defense, In addition to the instances set forth infra, defense counsel displayed his inexperience and ignorance of fundamental principles of criminal defense in his handling of the fingerprint evidence, see R. 337 et. seq., as well as his handling of physical evidence, such as the introduction of evidence not in any way related to this case. See R. 367-68. Defense counsel also displayed his unfamiliarity with the law when he argued in support of a motion for a directed verdict that "[t]here are certainly some circumstances that point at Thomas Pope. But there are just as certainly circumstances that point at very reasonable other explanations" (R. 705-07). Eber's handling of these critical motions was prejudicially deficient.

D. CONCLUSION.

The lower court erred in summarily denying these allegations without the benefit of an evidentiary hearing. Lemon v. State, 498 So. 2d 923 (Fla. 1986). Mr. Pope requests that the Court reverse and remand for an evidentiary hearing on the significant allegations

of ineffective assistance of counsel in this case. Mr. Pope received nothing even approaching the level of assistance of counsel to which he is constitutionally entitled. Strickland v. Washinaton. Relief is warranted.

ARGUMENT II

MR POPE'S SENTENCING JURY RECEIVED UNCONSTITUTIONALLY VAGUE JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF ESPINOSA V. FLORIDA AND JACKSON. MR. POPE RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO KNOW THE LAW AND ADEQUATELY OBJECT TO IMPROPER INSTRUCTIONS.

Mr. Pope's sentencing jury received instructions on the aggravating circumstances that violated the Eighth and Fourteenth Amendments. The trial court instructed the jury that it could find the HAC factor if it found that the murder was "especially wicked, evil, atrocious, or cruel" (R. 1 122). The instruction given the jury on the "heinous, atrocious, or cruel" aggravator was almost identical to the instruction struck down in Espinosa v. Florida, 112 S. Ct. 2926 (1992). The jury was never instructed that this aggravator applied only to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

The jury instruction on "cold, calculated and premeditated" provided that the jury could find this aggravator if it found that the homicide was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification (R. 1 122). This instruction likewise violates the Eighth Amendment because its description "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Jackson v. State, 648 So. 2d 85 (Fla. 1994) (quoting Espinosa, 1 12 S. Ct. at 2928). The instruction given to Mr. Pope's jury was unconstitutionally vague, and the jury did not receive the required limiting constructions of the factor. Jackson v. State.

To the extent that trial counsel failed to properly preserve this issue, his performance was deficient and Mr. Pope was prejudiced. Kimmelman v. Morrison, 477 U.S. 365 (1986); Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994). Trial counsel was clearly ignorant of criminal law in general, and issues relating specifically to capital cases. See Argument I, supra. The legal tools were available at the time of Mr. Pope's trial for reasonably effective counsel to know that Florida's standard jury instructions violated the Eighth Amendment. See Godfrev v. Georgia, 446 U.S. 420 (1980). See also State v. Breedlove, 655 So. 2d 74 (Fla. 1995). This Court will consider the merits of an Espinosa claim if the issue was preserved at trial and raised on direct appeal. James v. State, 615 So. 2d 668 (Fla. 1993). Mr. Pope therefore is prejudiced by counsel's failure to adequately object.

Mr. Pope's jury failed to receive complete and accurate instructions defining aggravating circumstances in a constitutionally narrow fashion. Consequently, the jury's death recommendation (which was given great weight by the trial court) was tainted by consideration of invalid aggravating circumstances, and Mr. Pope's death sentence is unconstitutional. Espinosa.

While this Court has adopted narrowing constructions, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either bv the sentencer or bv the appellate court in a reweiqhina in order to cure the facial invaliditv. Richmond v. Lewis, 1 13 S. Ct. 528, 535 (1992). In Mr. Pope's case, a constitutionally adequate sentencing calculus was not performed. Relying on invalid aggravating circumstances in a weighing state invalidates the death sentence. Strinaer v. Black, 1 12 S. Ct. 1130 (1992). Mr. Pope is entitled to relief,

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. POPE'S MOTION TO APPOINT CONFLICT-FREE COUNSEL AND HIS AMENDED MOTION FOR POSTCONVICTION RELIEF.

Prior to the filing of the State's response to the second Rule 3.850 motion, Mr. Pope filed several *pro* se pleadings, including a Motion to Hold Proceedings in Abeyance Pending Resolution of Status of Representation (PC-R. 170-72), Motion for Hearing to Determine Competency of Appointed Collateral Counsel and Consolidated Motion for the Appointment of the Capital Collateral Representative (PC-R. 173-75), and an amended Rule 3.850 'motion (PC-R. 176-218). Mr. Pope's volunteer counsel thereafter filed a motion to withdraw as counsel, noting that "Mr. Pope no longer desires the undersigned to provide counsel to him or represent his interests and, in fact, is of the belief that the advice and counsel rendered thus far is constitutionally defective" (PC-R. 595). The Office of the Capital Collateral Representative thereafter filed a Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel, arguing that CCR could not assume Mr. Pope's representation due to excessive caseload conflicts and requesting that Mr. Pope's postconviction proceedings be stayed until effective CCR counsel could be designated (PC-R. 597-98).

During a phone hearing on the matter of Mr. Pope's legal representation, Mr. Pope's volunteer counsel argued that he was "not knowledgeable enough in the nuances of capital representation to know one way or the other" about the law relating to death penalty issues, especially procedural bars (Supp. PC-R. 9-10), and "have no expertise in knowing the ins and outs of the law as it relates to capital representation" (Supp. PC-R. 10). The State argued that volunteer counsel should stay on the case until the resolution of the pending postconviction motions (Supp. PC-R. 9).

The lower court thereafter entered an order that volunteer counsel was to remain representing Mr. Pope until such time as the court ruled on the pending Rule 3.850 motions (PC-R. 621). The lower court also denied the various motions filed *pro se* by Mr. Pope as well as the CCR office (PC-R. 616).

On February 22, 1996, Mr. Pope filed a *pro* se Motion to Appoint Conflict-Free Counsel, alleging that he was being denied his statutory right to effective and conflict-free representation because the court allowed volunteer counsel to withdraw, but only after resolution of the pending postconviction motions (PC-R. 618-20).

On May 29, 1996, the lower court entered an order denying Mr. Pope's motion for postconviction relief as well as Mr. Pope's *pro* se motion to appoint conflict-free counsel (PC-R. 622).

On June 12, 1996, the Office of the Capital Collateral Representative filed a Motion to Clarify Status of Counsel, to Reconsider Dismissal of Motion for Postconviction Relief, and Motion to Hold Proceedings in Abeyance Pending Resolution of Designation of Counsel (PC-R. 624). In its motion, CCR argued that, due to the court's prior order regarding volunteer counsel, "[i]t is not clear [] whether volunteer counsel or CCR, or Mr. Pope, pro se, can file a motion for rehearing as authorized by Fla. R. Crim. P. 3.850(g)" (PC-R. 625). In response, the State of Florida argued that "because Mr. Wagner filed the Motion for Post-Conviction Relief on behalf of the Defendant, Mr. Wagner, and not Capital Collateral Representative, should file the motion for rehearing, if he deems it necessary" (PC-R. 628). The State also argued that the lower court "should treat the pro-se motion as a separate and distinct motion for post-conviction relief and allow the Capital Collateral Representative to represent the Defendant on that motion" (PC-R. 629).

On July 3, 1996, the lower court entered an order that "the CCR would be the appropriate counsel to represent Defendant in any further pleadings before this Court" and that "the Court finds no reason to reconsider its dismissal of either the Motion or Amended Motion for Postconviction Relief, as they were both successive" (PC-R. 632).

Mr. Pope submits that the lower court erred in denying the request for the appointment of conflict-free counsel. The lower court found that volunteer counsel had a conflict and could withdraw, but only after the lower court made a determination of Mr. Pope's pending motions. However, either counsel had a conflict or not. Here, the lower court granted counsel's motion to withdraw due to the conflict, yet forced Mr. Pope to remain represented by the conflicted attorneys until resolution of the pending motions to vacate. Because volunteer counsel were actively representing conflicting interests, Mr. Pope's right to effective assistance of collateral counsel was sacrificed. Cuvler v. Sullivan, 446 U.S. 335 (1980); Spalding v. Duaner, 526 So. 2d 71 (Fla. 1988).

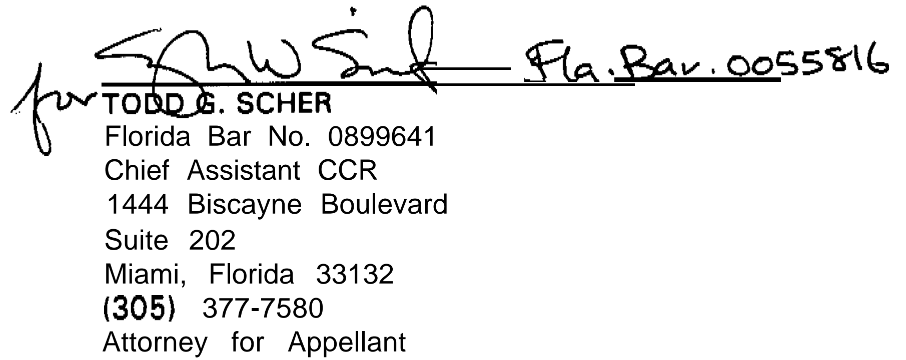
The lower court also erred in failing to permit Mr. Pope, through CCR, to litigate his amended motion to vacate, which he had filed *pro* se. The State of Florida took the position below that CCR should be allowed to represent Mr. Pope on the amended motion to vacate, which "must be fairly litigated" (PC-R. 629). However, the lower court simply denied the amended motion outright (PC-R. 632), as well as CCR's request to hold the matter in abeyance so that CCR counsel could be appointed and become familiar with the status of the case and the particular facts of the case (PC-R. 624-25). Although finding that CCR "would be the appropriate counsel to represent Defendant in any further pleadings before this Court," the lower court refused to reconsider its dismissal of Mr. Pope's amended motion, filed while Mr. Pope had conflicted counsel. This was error. By refusing to allow volunteer counsel to withdraw, and then refusing to permit CCR counsel

to review the case and litigate the amended Rule 3.850 motion filed by Mr. Pope, as the State had suggested, the lower court deprived Mr. Pope of his statutory right to effective representation in these proceedings. Relief is warranted at this time. Mr. Pope should be permitted, in the words of the State, to "fairly litigate" his claims for relief.

CONCLUSION

Based on the record and the arguments presented herein, Mr. Pope respectfully urges the Court to reverse the lower court's order, order a full evidentiary hearing, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 28, 1997.



TODD G. SCHER
Florida Bar No. 0899641
Chief Assistant CCR
1444 Biscayne Boulevard
Suite 202
Miami, Florida 33132
(305) 377-7580
Attorney for Appellant

Copies furnished to:

Sara D. Baggett
Assistant Attorney General
1655 Palm Beach Lakes Blvd.
Third Floor
West Palm Beach, FL 33401