IN THE SUPREME COURT, OF FLORIDA

CASE NO. 90,963

MARC JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This reply brief addresses the arguments presented in the State's Answer Brief. Mr. Asay relies upon his Initial Brief as to issues not specifically addressed herein.

References to the Initial Brief will be designated as "IB" followed by the page number. References to the Answer Brief will be designated as "AB" followed by the page number. The remaining references if applicable are as follows:

"R. ___." The original record on direct appeal to this Court.

"PC-R.___." The instant postconviction record on appeal.

"Supp. PC-R.___." Supplemental postconviction record.

"PC-T.___." Transcribed postconviction proceedings.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Reply Brief of Petitioner has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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REPLY TO THE STATEMENT OF THE CASE AND FACTS

The Answer Brief disregards the rules governing appellate procedure. Rule 9.210 (c), Fla. R. App. Pro. provides:

> The answer brief shall be prepared in the same manner as the initial brief: Provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.

Appellee states: "Appellee does not accept Asay's Statement of the Case and Facts . . . ." (AB 1). Appellee however merely makes the conclusory allegation that "despite [the initial brief's] length, [it] is largely incomplete and argumentative" (AB 1). Despite this rather bold assertion, and contrary to the rule of procedure, Appellee relies on this Courts' previous opinion[1] for the facts and fails to follow the rule to clearly specify areas of disagreement. The Answer Brief is devoid of a clearly specified statement or presentation of the disputed facts[2]. Additionally, Mr. Asay notes that the state's recitation

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[1]Appellee relies on Asay v. State, 580 So. 2d 610, 610-612 (Fla. 1991) for the "primary facts of the case" (AB 1). That opinion was from the initial direct appeal of Mr. Asay's case. The instant appeal is before the Court after an evidentiary hearing was held on Mr. Asay's postconviction motion pursuant to Fla. R. Crim. P. 3.850. Clearly, the facts surrounding Mr. Asay's postconviction proceedings are also primary to this appeal.

[2]Appellee apparently attempts to argue the disputed facts in each individual argument instead of honoring the appellate rule of procedure requiring a clearly specified statement of the case and facts.

of the facts is of questionable reliability and at the least is presented out of context.[3]

REPLY TO POINT I

DENIAL OF MR. ASAY'S MOTION TO RECUSE JUDGE HADDOCK[4]

It is unrefuted that before the state rested its case-in-chief at trial, Judge Haddock stated that Mr. Asay's case would not go to the district court of appeal (R. 740).

Axiomatic in Florida's jurisprudence is the principle that only capital cases resulting in a death sentence go to this Court on appeal rather than one of the district courts of appeal. As stated by the Honorable Phillip J. Padovano:

> The Florida Supreme Court has jurisdiction over an appeal from a conviction in a capital case only if the trial court has sentenced the defendant to death. If a life sentence is imposed in a capital case, the appeal is to the district court of appeal. See, e.g., *Welch v. State*, 650 So.2d 1096 (Fla. 2d DCA 1995); *DePena v. State*, 652 So.2d 1273 (Fla. 3d DCA 1995); *Hubbard v. State*, 647 So.2d 1081 (Fla. 5th DCA 1995).

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[3]For example, the state represents that while Mr. Asay was voicing dissatisfaction with his trial attorney to the court that Mr. Asay stated that he intended to "talk" to the jury "the way he talked to the court" and cites to the original record, pages 537-46. In fact, Mr. Asay said, "Your Honor, I would not intend to insult the Court, but if that jury comes back out here, and I'm made to sit at that chair right there, I will address the jury as I just addressed you." (R. 544). Mr. Asay also stated that he was not going to disrupt the trial (R. 548). While at first glance this may appear to be a minor discrepancy, given the entire tone of the Answer Brief, the implication in the state's version of this exchange is that Mr. Asay was being intentionally disrespectful. The record does not support that implication.

[4]Trial counsel's failure to file a motion to recuse Judge Haddock during the trial constitutes ineffective assistance of counsel. This was raised in Mr. Asay's 3.850 motion, denied at the evidentiary hearing and presented in the Initial Brief.

Phillip J. Padovano, Florida Appellate Practice, section 3.3, at 48, fn. 2 (Second Edition, 1997)(internal citations original)(emphasis added).

The State responds to Mr. Asay's argument by characterizing it as "suspicious and paranoid" (AB 11). Judge Haddock's statement however, is a clear enunciation of where he had predetermined Mr. Asay's case would go -- to this Court -- by virtue of the death sentence. The logic of Judge Haddock's statement runs as follows: "The First District Court of Appeals won't hear the appeal in this case if there is a first degree conviction of murder . . ." (R. 740). District courts of appeal hear life sentences, not death sentences, *ergo* Mr. Asay will not receive a life sentence, Mr. Asay will receive a death sentence. Judge Haddock made this decision before he or the jury heard the defense's case, before the penalty phase, and before the sentencing hearing.

Although the State characterizes this argument as "suspicious" and "paranoid", that characterization does not make the facts, the logic, or the argument any less true. These facts "place a reasonably prudent person in fear of not receiving a fair and impartial trial." Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993 (quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)). Accordingly, Judge Haddock should have granted the Motion to Recuse based on these facts alone. His failure to do so was error and relief is proper.

Not only did Judge Haddock reveal his bias and impartiality through the comment discussed above, but also when he commented that the most appropriate position for a prospective juror who held the belief that no premeditated murder could be mitigated and that he did not want to pay for somebody to sit in a jail for years and years was to "put him [the juror] on the Supreme Court" (R. 350-351). This comment provides further evidence that Judge Haddock should not have remained on Mr. Asay's case at trial and/or the postconviction proceedings. The State attempts to explain Judge Haddock's comment by asserting that it was " . . . at most, a jocular expression of a legal philosophy not bearing on Asay's case" (AB 11).

The only "philosophy" that can be interpreted from Judge Haddock's comment is that this Court should abandon the established legal principals that only the most heightened degree of premeditated murders shall qualify for the imposition of the death penalty -- or that this Court should totally ignore fundamental principles of jurisprudence because justice takes time. One must question how this "philosophy" can be jocular. Further, if it is a legal philosophy held by the judge (as the State now contends) it certainly bears on Mr. Asay's case; especially when the person espousing the philosophy is the very same person deciding whether Mr. Asay should live or die. This attitude (expressed both by Judge Haddock and respondent) about the State's awesome authority to end a life is troubling to say the least. Moreover, the test is not whether a statement is

jocular. The test is whether the party seeking recusal has shown "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983)(quoting Dewell, 131 Fla. at 573, 179 So. at 697-698). Accord section 38.10, Fla. Stat. Even if Judge Haddock's statement is to be interpreted as the state contends, a reasonably prudent person would have a fear about the fairness of the proceedings wherein his life hangs in the balance. See, State ex rel. Auiar v. Chappell, 344 So. 2d 925, 926 (Fla. 3d DCA 1977)(a defendant need only demonstrate a "legally sufficient fear" of receiving an unfair trial to support disqualification). This is especially true given the seriousness and ramifications consequent to capital proceedings.

Canon 3(E), Code of Judicial Conduct provides that a judge shall disqualify himself where it is shown that his impartiality might reasonably be questioned. Furthermore, even the appearance of impropriety is to be avoided. Suarez v. Dugger, 527 So. 2d 190, 193-194 (Ehrlich, J., concurring specially with an opinion in which McDonald, C.J. and Overton and Kogan, JJ., concurred) ("No matter that the judge was not prejudiced, the perception is there and cannot be obliterated by protestation or denial, and the judicial and impartial effectiveness of the judge as to that matter is destroyed for all time".) This comment alone was grounds for Judge Haddock to grant the Motion to Recuse.

The comments that Mr. Asay's case would not go to the district court of appeal and that a juror who believed no premeditated murder could be mitigated should sit on the Supreme Court clearly demonstrate that Judge Haddock believed that death was mandatory for Mr. Asay -- before ever hearing from the defense. The two comments individually and taken together, required that the motion be granted. It was not and this was error. Remand before a neutral and impartial judge for a full and fair evidentiary hearing is warranted.

TIMELINESS OF MOTION TO RECUSE

The State contends that Mr. Asay's Motion to Recuse Judge Haddock was untimely under Florida Rule Judicial Administration 2.160 and relies upon Willacy v. State, 696 So.2d 693 (Fla. 1997) (AB 10). This contention is misplaced and Willacy is distinguishable. In Willacy, the defense filed a motion to recuse the judge after the ten days provided for in Fla. R. Jud. Admin. 2.160. The judge in that case denied the motion to recuse on the grounds that it was **untimely** and legally insufficient. Willacy at 695. In Mr. Asay's case, Judge Haddock **did not** rule regarding timeliness and denied it on other grounds. This Court stated in Quince v. State regarding a motion to recuse:

> Judge Johnson also denied the motion as untimely because it was filed the day of the hearing (November 8, 1996) and he had been the assigned judge for two months (September 4, 1996). However, this point is moot because the judge considered the motion and denied it on other grounds.

Quince v. State, 732 So. 2d 1059, 1062 fn. 5 (Fla. 1999) (emphasis added).

In Mr. Asay's case, Judge Haddock did not rule the motion untimely. He considered the motion and denied it on other grounds. Therefore, there is no issue of timeliness to be held against Mr. Asay. Moreover any assertion as to untimeliness at this juncture should be deemed waived. In addition, under both federal and state law, due process is required. As recognized by this Court: "There is no other conclusion that is consistent with one of the most important dictates of due process: that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair." Steinhorst v. State, 636 So. 2d at 500-501. See also Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). Accordingly, even if this Court were to determine that the Motion to Recuse was untimely, the state procedures in place governing timeliness cannot control the fundamental principles of the federal and state constitutions. See Steinhorst v. State, 695 So. 2d 1245 (Fla. 1997)(dissenting opinion of Kogan, C.J., at 1249 footnote 8).

The State further contends that the issue was to be raised during the evidentiary hearing, relying upon Rogers v. State, 630 So. 2d 513 (Fla. 1993) (AB 10). The language in Rogers however is permissive not mandatory for raising the issue mid-hearing. Rogers v. State, 630 So. 2d 513, 516 (Fla. 1993)("Where a party discovers mid-trial or mid-hearing that a motion for

disqualification is required, he or she **may** request a brief recess--which must be granted--in order to prepare the appropriate documents.")(emphasis added).

RECORD AS A WHOLE DEMONSTRATES JUDICIAL BIAS

The facts in this case are clear -- Judge Haddock was not impartial or at the very least created the appearance of impropriety. This is especially evident when the record is looked at in its entirety. Judge Haddock's conduct throughout the proceedings is demonstrative of his bias and at the very least creates the appearance of partiality. (See IB 51-53).

JUDICIAL BIAS RAISED IN 3.850 MOTION

Mr. Asay raised the fact that he was denied a fair and impartial tribunal in his Rule 3.850 motion and that he was deprived of his constitutional rights and received ineffective assistance of counsel due to trial counsel's failure to move for Judge Haddock's disqualification (See Claims II, and III PC-R. 97-101). The motion was timely filed under Fla. R. Crim P. 3.850 and thus properly submitted to the lower court. Judge Haddock erred in denying an evidentiary hearing (PC-T. 66; 262).

The State's response is that Claim III was an improper claim for a postconviction motion (AB 9, fn. 3). Contrary to the State's assertion, Claim III (and Claim II) constitutes a basis to attack the conviction and sentence. Due Process requires that an individual be afforded a fair trial and postconviction proceeding before a neutral and impartial tribunal (IB 51). Moreover, Claim II raised trial counsel's ineffective assistance

for his failure to move to disqualify Judge Haddock at the trial. Trial counsel failed to properly object to the issue and thus it was not raised on direct appeal. These are claims which are to be taken as true, which are not conclusively refuted by the record and which warranted an evidentiary hearing. Hoffman v. State, 571 So. 2d 449 (Fla. 1990; Lemon v. State, 489 SO. 2d 923 (Fla. (1986). The lower court's refusal to grant a hearing was error. Relief is proper.

REPLY TO POINT II

FAIRNESS OF EVIDENTIARY HEARING

Exclusion of Thomas Gross' Testimony

Contrary to the State's wishes, the Thomas Gross issue was sufficiently and timely presented to the lower court. Valle v. State, 705 So. 2d 337 (Fla. 1997); Gaskin v. State,____ So. 2d____, 24 Fla. L. Weekly S341 (Fla. July 1, 1999). In his 3.850 motion, Mr. Asay alleged that at trial the State "called one witness whose only purpose was to portray Mr. Asay as a racist and whose testimony the State knew to be wholly false, misleading, and in exchange for undisclosed benefit," in violation of Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963)(PC-R. 140; Claim XI). The motion identified Gross, citing the pages of the record where he testified. Furthermore, collateral counsel specifically identified the Giglio and Brady violations at the Huff hearing (PC-R. 395). Contrary to the State's position, the State was in fact on notice and had an ability to defend. Moreover, the lower

court ruled that it was not going to instruct counsel on how to draft their pleadings (PC-T. Vol IX, p. 220), and found: ". . . I think the state is not unduly burdened . . . ." (PC-T. Vol. IX, p. 221). The State's argument now for "equitable estoppel" is without merit.

Contrary to the State's suggestion, Mr. Asay timely presented these issues to the lower court. Mr. Asay filed an initial 3.850 motion on March 16, 1993, seven months in advance of his original two-year filing date, partly to invoke the jurisdiction of the trial court and compel state agencies to comply with public records requests. In fact, public records were not provided in an expeditious manner and the lower court ruled that Mr. Asay was entitled to amend his Rule 3.850 motion by November 24, 1993 (PC-T. Vol VIII, page 160-161). Mr. Asay timely filed that amendment. An amended motion is not a multiple or successive motion proscribed by Fla R. Crim. P. 3.850 (f). See Shaw v. State, 654 So. 2d 608 (4th DCA 1995). There is no reason a trial court should not entertain on the merits additional issues raised in an amended 3.850 motion timely filed prior to adjudication of the initial 3.850 motion. The State's assertion of a procedural bar would act only to punish Mr. Asay for having in good faith initiated his proceedings early so as to prompt the public agencies to comply with public records law. Such an action is contrary to this Court's ruling in Ventura v. State, 673 So. 2d 479, 481 (Fla. 1996)("The State cannot fail to furnish relevant information and then argue that the claim need

not be heard on its merits because of an asserted procedural default that was caused by the State's failure act."). Regardless of whether the claims raised in Mr. Asay's amended 3.850 motion related directly to the public records procured subsequent to the intervention of the court, the claims are not procedurally barred. This court held that "the two-year limitation does not preclude the enlargement of issues raised in a timely-filed first motion for post-conviction relief." Brown v. State, 596 So. 2d 1026 (Fla. 1992). The Court declined to reach the question of whether claims not contained in the original motion could be raised for the first time by amendment **after** the time for filing had run. The Court's use of the term `enlargement' refers to revision of issues already pled, rather than to the introduction of new issues. The Court implied that while the right to introduce new issues after the time had run was unclear, the right to introduce new issues within the time limit presented no such problem. See also Shaw v. State, 654 So. 2d 608 (4th DCA 1995)(introduction of additional issues in the amended 3.850 motion not raised in original motion did not violate the prohibition against multiple or successive motions established by Rule 3.850(f) since original motion had not been adjudicated). The procedural bar argument is without merit.

Also contrary to the State's assertion, the proffer of Gross was proper. See C. Ehrhardt, Florida Evidence, section 104.3 at 19 (1998 Edition)("Although the usual manner in which the offer is made is by having the witness answer the question on the

record out of the presence of the jury, an offer may also be made by including in the record a written statement of the anticipated answer **or by a professional statement by counsel to the court** disclosing the answer which is made on the record")(emphasis added)(footnotes omitted). The proffer satisfied its purpose as collateral counsel informed the lower court that Gross would have testified: that Mr. Asay never confessed to him while they were in jail together, that Mr. Asay showed Gross newspaper articles and told Mr. Gross what the police were saying he did, that Gross saw this as an opportunity to benefit himself because he was facing charges, that he had his attorney contact the state attorney and relay that he had information regarding Mr. Asay's case, that Gross met with the state attorney and told him what he read in the articles and what information the police had relayed to Mr. Asay, that the state attorney showed Gross pictures of Mr. Asay's tattoos, that Gross and Mr. Asay previously discussed Mr. Asay's tattoos but they never talked about the racial tattoos that the state attorney pointed out to Gross, that the state attorney helped him fabricate his testimony, that he smiled and winked at Gross while asking him "Marc Asay told you that he shot some niggers, didn't he" and "now you're sure that Asay related to you that he is prejudiced, didn't he" that the state attorney emphasized the words "didn't he," that Gross followed the state attorney's lead and replied yes, that Gross rehearsed his testimony with the state attorney who reworded his answers so they were more inflammatory and damaging to Mr. Asay and told

Gross to look directly at the jury and say "Marc Asay said I shot them niggers" (PC-T. 1057-1060). This proffer effectively established cognizable postconviction claims requiring evidentiary development.

Contrary to the State's assertion Gross's testimony was not insignificant. The State relies upon Mr. Asay's alleged statements to Robbie and O'Quinn to establish a racial motivation. However, at the evidentiary hearing, Judge Haddock sustained the state's objection preventing collateral counsel from developing critical inconsistencies in Robbie and O'Quinn's trial testimony and their pre-trial statements (PC-R. 602). Collateral counsel proffered the information and areas that he would have gone into at the evidentiary hearing if allowed to do so and they were accepted as Exhibits G and H. The proffer indicates that Bubba O'Quinn did not actually hear the statement or was equivocal at best regarding the statement of racial animus attributed to Mr. Asay. The proffer shows that Bubba was asked a question in a sworn pretrial statement taken August 1, 1987 about whether Mr. Asay made the racial slur. The proffer shows that O'Quinn's first response was "I ain't sure if he said that or not, he just said what the fuck is going on here." The proffer also shows that O'Quinn stated "I can't remember what Mark said at first . . . ." Then O'Quinn stated in his deposition that Robbie had told him what the conversation was. The proffer also indicates that Robbie was passed out at a time when he was supposed to have heard Mr. Asay make racial slurs.

These inconsistences as well as the numerous others outlined in the proffer critically undermine the State's theory that this offense was racially motivated. Thomas Gross's recanted testimony further undermines it[5]. The lower court refused to consider any of it. Mr. Asay is entitled to an evidentiary hearing on this issue.

As discussed in the Initial Brief, the lower court's refusal to consider the proffer also denied Mr. Asay a full and fair hearing regarding Mr. Asay's ineffective assistance of trial counsel claim (IB 66)[6].

REPLY TO POINT III

DENIAL OF PENALTY PHASE IAC

This issue is fully discussed in the Initial Brief (IB 66-84) and will not be repeated here. A few matters however, warrant mentioning. It is worth noting that the State concedes that Mr. "David was confronted with some of the evidence that collateral counsel contended he should have presented--**extensive accounts of abuse** within the Asay household and testimony that allegedly would dispute Asay's status as a racist." (AB 45)(emphasis added). The state is correct in one respect: extensive accounts of abuse were presented at the evidentiary

[5]The lower court quashed collateral counsel's subpoena duces tecum for public records preventing collateral counsel from access to the information in order to verify Gross's testimony. The lower Court's ruling further frustrated Mr. Asay's right to a full and fair evidentiary hearing.

[6]The lower court's refusal to consider certain evidence in mitigation is discussed in the Initial Brief at pages 63-66.

hearing (and were not rebutted). These accounts were not presented at Mr. Asay's trial. In fact, trial counsel never even conducted an adequate investigation to find out about this information, blaming it on Dr. Valleley's report, Mr. Asay and Mr. Asay's mother (AB 58). However, to blame his failure to conduct an investigation on Dr. Valleley's report is an empty assertion because Dr. Valleley was never given any of the unrebutted evidence of the extensive abuse. The state's assertion that because Valleley's report states that he was "aware of all pertinent matters" (AB 62) is unpersuasive. All it demonstrates is that he was aware of what he knew at the time. One cannot determine what information is pertinent if one does not know all the information.[7] The testimony at the evidentiary hearing established that David never knew and therefore could not inform anyone else of the mitigation that was available but not discovered (See e.g., PC-T. 944-945). Of course, David's testimony also reveals that he had never conducted a capital penalty phase before Mr. Asay's (PC-T. 501). Nor does the fact that trial counsel blamed Mr. Asay and his mother for the shortcomings of any investigation have merit. Deaton v. State, 635 So. 2d 4 (Fla. 1993). Furthermore, trial counsel cannot have a strategic reason for not using information that he never knew about to begin with. Horton v. Zant, 941 F. 2d 1449, 1462 (11th Cir. 1991). He had an obligation to Mr. Asay to find it and did

[7]These facts support Claim XII of the 3.850 motion that Mr. Asay was denied a competent and effective mental health expert. (See IB 99).

not. The jury never heard the extensive and tragic mitigating evidence of abuse that Mr. Asay suffered. Instead they heard only the testimony of two people; his mother who said he was a good boy and testimony based upon hypotheticals regarding the affect of alcohol on the average person. He was denied his right to an individualized sentencing proceeding. Confidence in the sentence has been undermined. Mr. Asay is entitled to a new penalty phase.

The state (as did the lower court) mischaracterizes Dr. Crown's testimony regarding the bee sting issue and has taken the testimony out of context (AB 63). It was never Dr. Crown's testimony that the neurotoxins from the bee stings erupted to an extent to be the sole cause of any behavior attributed to Mr. Asay.

The state also argues that Mr. Asay's family members would have had to testify about alleged violent acts attributed to Mr. Asay and therefore it would have been more harmful to present their testimony at the penalty phase (AB 69). However this suggestion is questionable, given the fact that the witnesses could testify about the actual abuse Mr. Asay suffered without testifying regarding any alleged propensity for violence or asserting peacefulness.

The state also argues that because of the state's theory of racial motivation that "it is difficult to conceive of anything that could significantly mitigate them" (AB 70). This assertion suggests that racial motivation was a permissible and recognized

statutory aggravating factor at the time of Mr. Asay's trial. (Fla. Stat. 921.141, 1988) It was not and argument to that affect is improper. Moreover, considering the arguments made in Mr. Asay's Initial Brief and herein that cast doubt upon the validity of the states theory of a racially motivated crime in conjunction with the available and extensive mitigation that was not presented at trial, it is clear that Mr. Asay was not afforded a penalty phase worthy of confidence.

REPLY TO POINT IV

DENIAL OF GUILT PHASE IAC

While this issue is also fully discussed in the Initial Brief (IB 84-91) a few comments are necessary.

The testimony of Douglas Stephens, David Hunter and Joe Collins demonstrated the reason behind Mr. Asay having racially negative tattoos and showed the nature of life in prison, in particular, the racial strife within the Texas prison system while Mr. Asay was confined there. The timing of the placement of the tattoos is not to be overlooked. Mr. Asay received these tattoos for protection while he was in the Texas system. This was due to the racial climate there at the time. The fact that Mr. Asay was able to get along with inmates of a different race while confined in Florida does not defeat his motivation for getting the tattoos while in Texas. In fact, it is arguable that it is probative of the situation in Texas and his motivation for getting the tattoos while he was there. It is also probative to defeat the racial and homosexual animus attributed to Mr. Asay

that he had a personal and sexual relationship with a male inmate of a different race. These witnesses were critical to explain the unique environment of prison life which is unfamiliar to many except for those who have been there. To ignore this fact is to be willfully blind. Interestingly, the state refers to these witnesses as "the scum of the earth" (AB 90), however such a characterization was not made when it suited the state to rely upon the testimony of an individual with a similar track record (Thomas Gross) in order to convict and sentence Mr. Asay to death.

REPLY TO POINTS V & VI

These issues have been addressed throughout the Initial Brief and repetition of them would serve only waste this Court's limited time. The arguments in the replies presented above are also applicable to points V and VI. Judge Haddock was biased and counsel was ineffective for failing to recuse him. No credible, strategic reason can be attached to the failure to disqualify a judge who clearly believed that death was mandatory for Mr. Asay, especially when that belief was revealed prior to presentation of all the evidence. Trial counsel's failure to effectively present a reasonable doubt defense was demonstrated by counsel's failure to thoroughly cross examine state witnesses with available inconsistencies -- inconsistencies when taken as a whole demonstrate the unreliability of the state's witnesses regarding the circumstances of the offense, including but not limited to the state's theory of racial motivation. The lower court's

action in precluding presentation of relevant evidence denied Mr. Asay a full and fair hearing on his meritorious claims.

CONCLUSION

Mr. Asay has presented meritorious claims to this Court upon which relief should be granted. For the reasons presented, Mr. Asay requests this Honorable Court remand his case for a full and fair evidentiary hearing and or a new penalty phase or any other relief this Court deems appropriate.

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 10, 1999.

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