IN THE SUPREME COURT OF FLORIDA

CLARENCE JONES,

Appellant,

vs. CASE NO. 90,976

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

For convenience, the State will use the same symbols as did Appellant to refer to the record, as set out in the Appellant's Preliminary Statement.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

This is an appeal from Judge Padavano's denial of postconviction relief. Two issues are raised: the effectiveness of trial counsel at the penalty phase and a Brady claim. The State does not oppose oral argument in this case.

STATEMENT OF THE CASE

The State accepts Appellant's Statement of the Case, with the following supplementation. First, the State would note that this Court's decision affirming Jones' conviction and death sentence was unanimous. Jones v. State, 580 So.2d 143 (Fla. 1991). Second, the State will address Judge Padavano's findings concerning the two issues raised on appeal.

As to the claim of ineffectiveness of counsel at the penalty phase, Judge Padavano found:

> During the evidentiary hearing, the defendant's postconviction counsel focused on the claim that his trial lawyer had failed to investigate potential mitigating evidence and that he had failed to obtain an adequate mental health evaluation. However, the record is clear that defense counsel did obtain a mental health evaluation and that he did present the testimony of the expert during the penalty phase. The problem is that the

evaluation did not yield a favorable result. Trial counsel explained during the evidentiary hearing that the reason he did not ask the expert a direct question regarding the existence of the statutory mitigating circumstances is that the expert had told him beforehand that he could not testify that those factors existed in the defendant's case. Trial counsel cannot be faulted for refraining from asking a question when he knew the answer would be harmful to his client. Nor can it be said that trial counsel was ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.

The defendant also claims that trial counsel failed to present testimony by family witnesses who could have provided mitigating evidence. This argument was refuted by attorney Davis' testimony that the relatives he was able to locate were not willing to come to Florida to attend the trial and that he did not think it was appropriate to compel their attendance. Moreover, the arguments Davis actually made in mitigation with the evidence available to the jury are generally the same those the defendant would have made with the testimony of the additional witnesses.

The court rejects the defendant's claim that trial counsel should have advised the jury that the defendant was infected with the AIDS virus. During the hearing on the postconviction motion, the defendant presented testimony regarding the nature of his illness and his prognosis. This evidence may have evoked sympathy among those jurors who would have been persuaded that the death penalty was unnecessary because the defendant would eventually die a painful death in any event, but the fear and stigma that some jurors might have associated with AIDS out of ignorance in 1989 may have outweighed the potential sympathy for the defendant. The defense attorney did not refer to the defendant's illness during the guilt phase and minimized its effect during the penalty phase. The court is not prepared to say that these decisions amount to ineffective assistance of counsel.

Mr. Davis obtained the defendant's medical records from the Department of Corrections in Maryland, he called family members in an effort to get them to testify in the penalty phase hearing, and he secured the services of a

> mental health expert who did testify in the penalty phase hearing. . . . [T]he attorney in this case did make a reasonable effort to investigate and present the available mitigating evidence.
>
> Postconviction counsel did discover additional evidence of mitigation, but the defendant has failed to show that it would have made a difference in the outcome of the penalty phase proceeding . . . [in light of the strong aggravation and the eleven to one death recommendation].

(2R 226-30). As for the Brady claim, Judge Padavano found that it was time barred, but would be denied anyway because the allegedly withheld information was neither exculpatory nor material:

> In this case, the missing document was a three-page memorandum prepared by detective Grea Bevis regarding his interview with Kevin Eason, the cellmate of codefendant Irvin Griffin. The defendant introduced into evidence only the first page of the memorandum, and, in that part of the document, the detective noted that Griffin told Eason that he, not the defendant, was the triggerman. Before the conclusion of the evidentiary hearing, the state produced the entire memorandum. On the third page of the memorandum detective Bevis noted that Griffin told Eason that the defendant Jones was the triggerman. This document is hearsay, but even if it could be admitted in evidence it would not be exculpatory to the defendant.
>
> Moreover, Kevin Eason appeared at the hearing in this case and testified that he did not tell detective Bevis that Griffin had said he was the triggerman. According to Eason's first-hand account given during the hearing on the defendant's postconviction motion, Griffin said that the defendant Jones was the triggerman. Likewise, Eason said that he told detective Bevis that Griffin said the defendant Jones was the triggerman. Eason said that he never told detective Bevis that Griffin had admitted to being the triggerman. Consequently, the missing document is not material to any issue in the case. At best it could only have been used to impeach the testimony of Kevin Eason, and that testimony would not have been admitted against the defendant in any event.

(2R 231-32).

STATEMENT OF THE FACTS

The State will offer its own Statement of the Facts. Because one of the two issues on appeal concerns the effectiveness of trial counsel, and the other involves a claim that certain material evidence was suppressed by the State at trial, a review of the original trial and penalty phase evidence is essential. This Statement of Facts will be divided into four parts: (1) guilt phase evidence, (2) sentencing phase evidence, (3) the defense postconviction evidence, and (4) the State's postconviction evidence.

(1) The guilt phase evidence. The basic facts of the crime are summarized in this Court's previous opinion:

> On July [8], 1988 Tallahassee police officers Greg Armstrong and Ernest Ponce de Leon responded to a call regarding a car parked behind a laundromat. They found Henry Goins, Clarence Jones, and Irvin Griffin, escapees from a Maryland prison, and Beverly Harris, a woman traveling with the trio, seated in the car. While Armstrong checked on the driver's identification and Ponce de Leon tried to run a computer check on the car's license tag, one of the car's passengers fired two shots at Ponce de Leon. Armstrong then engaged the car's occupants in a gun battle. Jones picked up Ponce de Leon's service weapon, and he and Griffin, both of whom were wounded, fled the scene on foot. They broke into a nearby home, where police captured them a short time later. Officer Ponce de Leon was dead at the scene from two gunshot wounds to the chest.

Jones v. State, 580 So.2d 143, 144 (Fla. 1991). As noted in the opinion, Beverly Harris testified at trial for the state and

identified Clarence Jones as the person who had shot officer Ponce de Leon. Ibid. Other testimony and circumstances corroborated her identification of the triggerman.

First, it is undisputed that neither Goins nor Harris fired a weapon and that, of all the weapons in the defendant's car, only two had been fired during the shootout--a .380 Baretta and a .357 Ruger revolver (13DR 2308-19). Griffin's fingerprint was found on the ammo clip of the .380 Baretta (12DR 2069-70, 2213). It was the Ruger, however, which was identified as the murder weapon (13DR 2313).

Second, Officer Armstrong testified that, while Harris and Goins were outside the car looking for identification, he suddenly looked up and saw a black male wearing a short-sleeve shirt standing on the other side of the car, shooting towards officer Ponce de Leon (8DR 1508-10, 1541). Armstrong then fired at this person, whom he could only see from the chest up (8DR 1510, 1515). Armstrong testified that there was no way that he could have shot this person below the chest area (8DR 1516). Subsequently, after firing at Goins as he tried to drive off, Armstrong shot at a black male wearing a greyish shirt as the latter ran up an embankment (8DR 1529). Other witnesses, who saw Jones and Griffin after they fled to a nearby house, testified that Jones was wearing a short-sleeve green hospital type smock or scrub suit and had been shot in the face (10DR 1817, 1825, 11DR 1900, 1917, 1935-36), while Griffin

was wearing a gray dress shirt and had been shot in the leg (11DR 1900, 1915-18).

Finally, two witnesses who saw Jones in jail testified that he admitted to them that he was the one who had killed the officer (13DR 2328, 2348).

Jones testified on his own behalf at trial. He denied having shot officer Ponce de Leon. However, he did not identify Griffin as the killer. On the contrary, Jones testified that Griffin had been asleep when the shooting started. The killer, Jones testified, was a drug dealer they had met the night before, and with whom they met the morning of the murder, planning to trade guns for drugs (18DR 3007-09). This drug dealer, Jones testified, got into the car and held both the .380 and the .357 (18DR 3009). When officers Armstrong and Ponce de Leon showed up, the drug dealer thought he was being set up (18DR 3009). While Goins and Harris were outside the car talking to the police, the drug dealer "got up and shot the police" (18DR 3013). Jones testified that he woke Griffin up; he "didn't know what was going on" (18DR 3013). He and Griffin ran away, hiding in a house a short distance away (18DR 3019). While they were there, the drug dealer who had shot the officer showed up and helped Jones take his hospital clothes off. Then he disappeared (18DR 3022).[1]

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[1] Jones' testimony was contradicted by Sindey Earle, Jr., who testified that, when he saw a young boy running away from a house, he went over to see what was going on and was accosted at

(2) The penalty phase evidence. The State introduced certified copies of Jones' previous convictions on four counts of robbery with a deadly weapon and two counts of attempted robbery with a deadly weapon (21DR 3431-36), and then rested (21DR 3437).

Jones called Dr. Lawrence Annis, a clinical and forensic psychologist (21DR 3437). Dr. Annis testified that, as of the time of the trial, he was the chief psychologist for the Corrections Mental Health Institution at Florida State Hospital, dealing with mentally ill prison inmates. In addition, he had a private practice and also taught part-time at Florida State University (21DR 3438). He has been published at least 30 times (21DR 3438). Dr. Annis had interviewed Jones for four hours on the Friday and Saturday before the commencement of the penalty phase proceedings (21DR 3449), and reviewed a number of documents from Jones' prison files in Maryland, including a presentence investigation, his intake summary, copies of his performance evaluations in prison, and his GED and other certificates Jones has been awarded over the years (21DR 3439-40). From these documents and his interviews with Jones, Dr. Annis obtained a family and personal history (21DR 3440). Dr. Annis testified that Jones was born in Maryland and had lived there all his life. His parents separated when he was six

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gunpoint by Jones, who ordered him to help him remove his clothes and to clean the blood off the porch (10DR 1816-22). Earle testified that he did not know Beverly Harris, had not seen her the night before the murder, and had not met her the morning of July 8, 1988 to sell drugs (11DR 1873-79).

years old and he went to live with his father. Jones felt that he had a happy life with his father. However, his father died in a house fire when Jones was twelve. This was a traumatic experience, compounded when he went to live with his mother and her boyfriend (21DR 3440-41). The boyfriend was a jealous and cold person, who was easily angered and who did not get along with Jones or his brother; the boyfriend was an emotionally abusive alcoholic who dominated Jones' mother and controlled the house (21DR 3441). Jones began using drugs as an escape, drinking, smoking marijuana, using LSD, and acquiring a heroin habit requiring as many as ten injections a day (21DR 3442). Later, he became involved with barbiturates and with cocaine; much of Jones' life at that time was "wrapped up" with acquiring and using drugs (21DR 3442). As a result of his drug habit, his criminal history began, with numerous arrests for theft (21DR 3442). Jones' entire life while not incarcerated was one of either being under the influence of drugs or trying to obtain drugs (21DR 3443).

Dr. Annis testified that Jones had lost many people he cared about. Besides his father, Jones lost one brother who was stabbed to death in 1969, another brother from a heart attack in 1978, his mother from a heart attack in 1975, and a daughter from crib death in 1984 (21DR 3443). Jones expressed concern that a congenital heart defect in his family might affect his children (21DR 3443). These losses have affected Jones; he feels that people he has

affection for will abandon him by dying, and feels helpless and hopeless--that he cannot do well at any of life's major chores (21DR 3444). Jones has very low self-esteem, is afraid to get close to others, and feels inadequate to make his own decisions (21DR 3444). Persons who feel this way are often dominated by other people (21DR 3445).

Jones advised Dr. Annis that he and Goins were lovers and that they had established rapport and trust; Jones continued to care for him (21DR 3445). However, since his arrest, Jones has found out that he is HIV positive (21DR 3446).

Dr. Annis testified that Jones had obtained his GED in Maryland. Jones is relatively adept at math, functioning at a fifth or sixth grade level, but Jones' reading and writing skills are at the first to third grade level (21DR 3446). Jones had scored 67 on an IQ test while still in public school. Dr. Annis tested Jones himself; this test showed Jones to have an IQ of 72 (21DR 3447). Dr. Annis testified that there normally will be some variation in scores between one testing session and the next, but Jones' IQ was probably between 70 and 75, which would place him in the dull-normal or borderline range, or in about the bottom three percent in intelligence (21DR 3447-48). Jones was cooperative throughout the evaluation, and expressed anxiety and remorse about his situation (21DR 3449).

No further testimonial evidence was introduced; however, Jones

introduced an award from the PTL ministry, a certificate of completion of an introductory Bible course, a certificate of attainment of his GED in Maryland, a continuing education certificate for completion of woodworking from Ft. Mead Military School, and the curriculum vitae of Dr. Annis (21DR 3454-55).

(3) The defense postconviction evidence. Jones presented the testimony of trial attorney Cliff Davis, social worker Cecilia Alfonso, Jones' sister Audrey Sullivan, Jones' former girlfriend Carolyn Felton, psychologists Jethro Toomer and Barry Crown, and physician Scott Folk. They testified as follows:

(a) Cliff Davis. Davis has been a member of the Florida Bar since 1971 (4R 18). At the time of the Jones trial, Davis had tried 12-15 cases in which capital juries had been qualified (4R 19). Two of his former clients are on death row (4R 20). Davis knew early on that this case was one in which a death sentence was highly likely if the defendant was convicted (4R 23). Jones gave Davis the names of some of his relatives in Baltimore. "[A]lmost immediately" after being appointed and meeting Jones, Davis called these relatives. He does not recall their names, but he talked to one "elderly" uncle, and older woman and a younger woman (4R 24). These three persons told Davis basically that Jones had been in prison a long time (4R 27). Davis subpoenaed Jones' Maryland prison records (4R 38), and found that to be the case; Jones had spent "most of his life in some kind of institution" (4R 29).

Jones told Davis that he had very little contact with his family; other than the people Davis contacted, Jones gave him no other names (4R 68). In Davis' own conversations with Jones' family, they showed little interest in him; in fact, prison records showed that his family had seldom visited him in prison (4R 27). In view of their expressed and demonstrated lack of interest, Davis did not go to Baltimore; he thought "it would have been a waste of my time and the resources available" (4R 29). Jones' family "did not have enough interest other than curiosity as to the outcome of the case to be terribly concerned about Mr. Jones" (4R 30).

Davis had no doubts about Jones' competence or sanity; Jones "never exhibited any kind of characteristics of not being alert, not being attentive, not knowing what was going on or not being able to assist me in his defense" (4R 31). However, he obtained the assistance of Dr. Annis to assist him "in presenting nonstatutory and/or statutory mitigators at sentencing" (4R 32). Although Davis had not retained Dr. Annis until the day the guilty verdict came in, he had already prepared that part of the penalty phase dealing with his history, which Dr. Annis was able to review and present to the factfinder (4R 33).

Davis did not attempt to force Jones' family to travel to Florida to testify; it would have been counterproductive to have done so, and he believed that all relevant family history could be elicited through Dr. Annis (4R 49-50). Because of Jones' long

history of incarceration, substantial information existed about Jones' life "that Dr. Annis was able to obtain without subpoenaing somebody that didn't really want to come to give it" (4R 65).

Davis learned at some point that Jones' son had emotional problems, but had no opportunity to talk to the mother of that child (4R 52).

Nor had Davis seen Defense Exhibit 5, which purported to be a police memorandum indicating that codefendant Griffin had told someone that he, and not Jones, had shot officer Ponce de Leon (4R 5-56).

Davis tried to "minimize" Jones' drug usage after his escape and before the murder; Davis did not think it "helpful as a defense to show that a person voluntarily uses illegal drugs and then commits a murder" (4R 66). Moreover, the murder had occurred early in the morning and there was no showing that anybody was "terribly under the influence at that time of the day" (4R 66). In addition, although Jones apparently had a drug and alcohol problem at an early age, there was no evidence from the prison records of his long-term incarceration that his drug and substance abuse continued during a substantial portion of his life (4R 73).

Likewise, Davis made a conscious decision to "minimize" the fact that Jones was HIV positive (4R 67).

Davis did not ask Dr. Annis specific questions about the presence of any statutory mitigators during his testimony because

the answers would not have been favorable to Jones (4R 68-69).

Finally, Jones had chosen to testify at the guilt phase, which affected penalty-phase strategy. Having denied his guilt, Jones could not now admit guilt and express remorse. The "only way to deal with it at that juncture" was to show that Jones had a "totally wasted life" and that he was to be pitied because he never had a chance to choose the right road, or, if he did, it was "snuffed out before he had an opportunity to take it" (4R 69-70).

(b) Cecilia Alfonso. Ms. Alfonso is a clinical social worker employed by a firm in Jersey City (4R 79). She traveled to Baltimore to interview three of Jones' sisters, the mother of Jones' son, and the son (4R 83). She did not talk to Jones himself (4R 107). Based on the interviews she did conduct, Alfonso presented a family history that, although more detailed, was in the main consistent with that presented by Dr. Annis at sentencing. She testified that Jones was still affected by his childhood and his dysfunctional family despite the lapse of time between that childhood and the crime (4R 106). She acknowledged on cross-examination, however, that because she had not talked to Jones, she could not "tell you it directly, you know, this is how it affected him" (4R 108). She also acknowledged that some of the events she described had occurred in Jones' absence--or even before he was born (4R 109-110).

(c) Audrey Sullivan. Ms. Sullivan is Jones' older sister (4R

114-16). Before they separated, Jones' parents fought and argued, mostly about the mother's boyfriend. Jones "might have" seen them fighting (4R 117). Three of Jones' brothers are dead. Sullivan herself had stabbed one of them to death (4R 123). Another brother had died of a heart attack (4R 124). A third, Michael, was stabbed to death during a crap game (4R 124). Sullivan did not know how Michael's death affected Jones; Jones was "locked up at the time" (4R 127). Nor did she know how Jones acted after his father died; she did not stay home too much after Jones got bigger. She testified that Jones "was doing what he wanted and I was doing what I wanted to do," so she would see him when she would see him (4R 128).

Sullivan testified that they grew up in a good neighborhood; there was some drinking, but no drugs, and all "us kids" used to run and play together (4R 126). Nor were there guns in the house; the only one in the family who had a gun was their father, who worked for the police (4R 125).

Sullivan testified on direct examination that no one called her about Jones' trial and that she would have come to Florida to testify if anyone had asked (4R 129). She acknowledged on cross examination, however, that Jones did not even know where she lived; he had written another sister, but not her (4R 130).[2] Although

[2] Apparently, that sister also either did not know where Sullivan lived or did not care, because she did not inform Sullivan of Jones' situation (4R 130). Nor did other brothers

Sullivan had served time for stabbing her brother Theodore, she was free at the time of Jones' trial (4R 131).

(d) Carolyn Felton. Felton--the mother of Jones' two children--testified that Jones had seen his brother Michael only an hour before he was murdered and was very upset about it (4R 142). Jones had just got out of jail when Michael was murdered, and he went back in not long after (4R 145). Jones was in jail between the births of his two children (4R 145). Felton has had no contact with Jones since 1983 or 1984, right after their second child's crib death. Felton had gone to jail to visit him and he had accused her of causing the death. That was "the end of it" (4R 150). Jones did not know where she was at the time of his trial, nor, apparently, did his family (4R 147).

(e) Dr. Jethro Toomer. Dr. Toomer, like Dr. Annis, is a clinical and forensic psychologist (5R 160). Dr. Toomer had met with Jones one two occasions, once in 1994 and once in 1995 (5R 164). In addition, he had reviewed Defendant's Exhibits 7 and 8, which include not only the Maryland DOC records which Dr. Annis had reviewed, but also Florida DOC records which were not in existence at the time of the trial (5R 166, 177). Dr. Toomer also had spoken to Audrey Sullivan and Carolyn Felton (5R 177).

Dr. Toomer administered several tests. Jones scored 67 on one

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and sisters, who knew where Sullivan was, contact her about the case (4R 135).

IQ test administered by Dr. Toomer, and 71 on another (5R 178). Achievement testing showed that Jones performed at the second grade level in reading and at the fifth grade level in math (5R 179). Psychological testing manifested profiles "similar" to those "produced by individuals whose behavior is characterized by depression, significant deficits in self-concept, an overall history of poor social adjustment as well as a history of substance abuse usually in response to unresolved emotional issues and trauma" (5R 179). Finally, the results on the Bender Gestalt Design "were suggestive" of brain damage (5R 179-80).

Dr. Toomer testified it was apparent from the materials he had reviewed that Jones had grown up in a dysfunctional family and community environment characterized by violence and lack of traditional social norms or stability (5R 180-81). These deficits, Dr. Toomer testified, are reflected in Jones' behavioral history. Jones dropped out of school, started using drugs, and began to "began to engage in behavior that could best be described as maladapted and inappropriate based upon poor logic and decision making" (5R 187). As a result of this maladaptive (i.e., criminal) behavior, Jones was incarcerated. Although he "evidently had not been using drugs while incarcerated," once he escaped from custody, he began using drugs again on a regular basis (5R 185).

Dr. Toomer testified that Jones' thinking was "concrete" and that Jones was incapable of "higher order thought processes" such

as weighing consequences and projecting alternatives. Therefore, his behavior was "impulsive," without any consideration of consequences (5R 190). These "impairments" were longstanding, and in 1988 Jones was suffering an extreme mental or emotional disturbance (5R 191). In addition, Jones' capacity to conform his conduct to the requirements of the law was substantially impaired (5R 195).

On cross-examination Dr. Toomer acknowledged that the records he reviewed indicated that Jones had managed to function well enough to have participated in an escape from a correctional institution in which he and the other escapees had managed to steal a car, leave the state, and travel great distances for a considerable length of time without being apprehended (5R 197). Furthermore, the post-escape drug usage that Dr. Toomer had referred to was nothing new; Dr. Toomer acknowledged that it had been presented at trial to the jury (5R 197). Finally, Dr. Toomer acknowledged that it was not unusual for persons incarcerated for capital crimes to be depressed, or to demonstrate poor social adjustment (5R 200).

(f) Dr. Barry Crown. Dr. Crown is a practitioner of neuropsychology (5R 206). He saw Jones in 1995, interviewed him briefly, and administered a group of neuropsychological tests designed to evaluate verbal and nonverbal processes, use of language, memory, concentration, attention, judgment, reasoning,

visual motor coordination, fine motor coordination, discrimination of verbal versus nonverbal memory, and transfer of information between the two hemispheres of the brain (5R 208-10). Based on this testing, Dr. Crown concludes that Jones has a "neuropsychological impairment," or, in other words, "organic brain damage" (5R 211-12). This "disturbance" is primarily "bilateral and anterior," and affects "concentration, attention, reasoning and judgment, problem solving and . . . language-based critical thinking" (5R 212). Jones also has auditory selective disorder, which means he is easily distracted (5R 212).

According to Dr. Crown, brain damage "falls into three categories: Anatomical, electrical and metabolic" (5R 232). In most instances of longstanding, nonspecific brain damage, the damage is more likely to be "metabolic" than anatomical or electrical (5R 213). Metabolic brain damage is particularly difficult to detect; not only is such brain damage usually undetectable by "gross observation," as in a clinical evaluation by a clinical psychologist, but it also cannot by detected by use of such technology as CT and MRI scans (which address only the "anatomy" of the brain), or an EEG (which addresses only the "electrical" activity of the brain) (5R 213). In fact, Dr. Crown testified, "metabolic" brain damage is undetectable by any "technology" that we now have, although he thinks that examination of brain tissue using an "electron microscope" may some day "yield

knowledge of anatomical differences that are simply not detectable now using the technology that we have" (5R 232). At present, according to Dr. Crown, the "neuropsychological test battery and neuropsychological tests are the only way of measuring [brain] function" (5R 213).[3]

Dr. Crown described Dr. Annis as having done "a good clinical evaluation from the standpoint of a clinical psychologist." However, "[c]linical psychologists and psychiatrists for that matter are the group of professionals, mental health professionals, who are most unlikely to diagnose brain damage when it exists because they tend to be focused more on mind rather than brain" (5R 225-26).

As to what might have caused Jones' "brain damage," Dr. Crown testified that the mother's alcohol consumption during pregnancy and neglect afterwards caused "problems with nutrition;" that head injuries resulted from being cared for by older siblings who played with him and "dropped [him] on his head any number of times;" that Jones' brain did not fully develop as a result of substance abuse during the development period, and that Jones' brain also did not

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[3] The State would that Dr. Crown did not produce any of the tests administered to Jones. Nor did he explain what each test is designed to measure. Nor is there any testimony or other evidence in this record establishing Jones' scores on any of these tests, or the extent to which any of his scores deviated from the norm, or the extent to which any such deviations from the norm could have been caused by factors other than brain damage.

develop fully because he quit school (5R 222-23, 225, 28-29).[4]

Like Dr. Toomer, Dr. Crown would find that Jones was under the influence of an extreme mental or emotional disturbance at the time of the crime, and that Jones' ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (5R 218).

On cross-examination, Dr. Crown acknowledged that "brain damage" is not a recognized diagnosis in his field of expertise and is not a valid "diagnostic label" (5R 227-28). He acknowledged that the tests he performed do not examine the "architecture" or "structure" of the brain (5R 230). Nor did he do any metabolic or chemical testing (5R 234). Instead, the tests he administered give results based solely upon what the defendant does and says during the test (5R 230). He was of the opinion, however, that Jones did not malinger or try to deceive him on these tests (5R 234).

(g) Dr. Scott Folk. Dr. Folk is a medical doctor. He testified about the normal progression of the AIDS disease.

(4) The State's postconviction evidence. Kevin Eason, now a federal prisoner, testified that, in June of 1989, he talked to Ervin Griffin in the Leon County jail and Griffin had told him that

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[4] The State would note that Dr. Crown is not a medical doctor. Moreover, the State is not aware of any testimony that Jones was dropped on his head numerous times as a child, or that Jones was not well fed by his father during the time that his mother was neglectful. Nor has the State ever before heard anyone suggest that quitting school can cause brain damage.

Jones had killed officer Ponce de Leon (5R 312). He does not recall ever telling detective Bevis that Griffin had admitted shooting officer Ponce de Leon himself (5R 313, 317).

Bevis testified that he had talked to Eason in reference to a planned escape attempt by Griffin and Jones (5R 321). Bevis acknowledged that he had written a three-page memo about this interview and that the first page of the memo indicates that Griffin had told Eason that he (Griffin) had shot the police officer (5R 322). However, on subsequent pages of the memo, it is reported that Griffin had told Eason that Jones had shot the officer (5R 322). Bevis explained that it was his understanding that Jones was the "triggerman" and that any other version was simply part of an escape plan in which Griffin would escape, then claim credit for the killing, after which Jones would plead guilty to the murder (but not as the triggerman). Jones would then have a better chance of breaking out himself after being transferred following his guilty plea to central Florida (5R 322-23).

Bevis testified that he was not involved in the investigation or prosecution of the murder trial; his focus was strictly on the escape and the security of the inmates (5R 323-24). However, although he did not recall passing the memo to the State Attorney's office, he did discuss this matter with them (5R 326).

SUMMARY OF THE ARGUMENT

There are two issues on appeal: effectiveness of counsel at the penalty phase, and a Brady claim. Judge Padavano correctly determined that trial counsel was not ineffective at the penalty phase. The two main contentions by Jones are that trial counsel did not present testimony from his family, and failed to obtain an adequate mental health examination. Trial counsel had contacted Jones' family, however, and they were unwilling to attend trial. Because Jones, who was 28 at the time of the crime, had spent most of his life in custody, trial counsel was able to obtain prison records which covered most of his life, and supplied ample life history. Through Dr. Annis, who had reviewed these records and interviewed Jones, trial counsel presented considerable background information in mitigation. This background information essentially is the same as that presented through family witnesses at the postconviction.

Trial counsel retained Dr. Annis, a clinical psychologist, to evaluate Jones and to testify on Jones' behalf at the penalty phase. Jones' own expert acknowledged that Dr. Annis conducted a competent clinical psychological evaluation. Although Dr. Annis did not believe that any statutory mitigators were indicated, he testified about Jones' deprived childhood, his psychological problems, and his low intelligence. Trial counsel made a reasonable effort to obtain and present evidence in mitigation, and

he is not ineffective simply because postconviction counsel has now found mental health experts who are willing to give more favorable testimony.

Judge Padavano found Jones' Brady claim to be procedurally barred for failure to raise it in a timely manner. Jones ignores this finding of procedural bar, and argues only the merits. However, Jones cannot get to the merits unless he first overcomes the procedural bar, which he does not even attempt to do. Therefore, this issue should be summarily affirmed.

In any event, this issue is meritless. Jones has a memo containing hearsay within hearsay indicating that co-defendant Griffin at one point admitted being the triggerman and at another point accused Jones of being the triggerman. This hearsay document is not only internally inconsistent on the issue of who the triggerman was, but, to the extent that it indicates that Griffin was the triggerman, it is inconsistent with the testimony of the author of the memo, the person quoted in the memo, the trial testimony of Beverly Harris, and, most importantly, the trial testimony of Jones himself that Griffin was asleep at the time officer Ponce de Leon was shot. In light of all this, even if this hearsay memo could have been admitted in evidence at the penalty phase, Jones' trial attorney would have been foolish to attempt to use this memo to prove that Griffin was the triggerman.

ARGUMENT

ISSUE I

JONES HAS FAILED TO PROVE THAT HIS TRIAL ATTORNEY WAS INEFFECTIVE AT THE PENALTY PHASE OF THE TRIAL

The test for judging ineffectiveness claims is set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The defendant must make both showings, i.e., both deficient performance and prejudice. Ibid;, Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). This standard is, and is supposed to be, "highly demanding." Kimmelman, 477 U.S. at 382. Only those defendants who can prove "that they have been denied a fair trial by the gross incompetence of their attorneys will be granted" relief. Ibid. The test is not "how present counsel would have proceeded" to represent the defendant, Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995), but whether any reasonable attorney could have proceeded as did trial counsel. Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) ("Even if many reasonable lawyers would

not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.") (emphasis supplied). Trial counsel is presumptively competent, and second-guessing counsel's performance through the filter of hindsight should be avoided. Strickland v. Washington, supra, White v. State, 664 So.2d 242 (Fla. 1995); Phillips v. State, 608 So.2d 778 (Fla. 1992).

Jones' trial counsel was an experienced criminal-law attorney with significant capital-murder trial experience. See Gates v. Zant, 863 F.2d 1492, 1498 (11th Cri. 1989) (the more experienced the attorney, the more deference is owed to his judgment about how much investigation is sufficient and what defenses to pursue). It is the State's contention that Jones has done no more than to second-guess his trial counsel's decisions through the filter of hindsight, after having "the luxury of time and the opportunity to focus resources on specific parts of a made record." Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995). Jones has failed to meet the "highly demanding" burden of proving deficient attorney performance or prejudice.

Jones' primary assertion as to deficient attorney performance is that his trial counsel failed adequately to investigate and present available mitigation, including testimony from family

members and mental health testimony about Jones' alleged brain damage.[5]

Trial counsel testified at the postconviction hearing that he had contacted those family members whose names he had been given by Jones and had learned that these family members had little contact with Jones in recent years, knew little about his activities since he was incarcerated at a young age, and were unable or unwilling to come to Florida to testify at Jones' trial. Trial counsel testified that, except for some curiosity about the outcome, Jones' family had no interest in the trial or in Jones.

Jones argues that there is nothing in the record to corroborate this testimony. However, he does not contend that Jones' family were unaware of the trial; in fact, the testimony presented below demonstrates that Jones had written to a sister and told her about the trial. However, notwithstanding his family's knowledge about a Florida trial in which his life was at stake, not a single member of his family attended Jones' trial. Their absence corroborates trial counsel's testimony about their lack of

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[5] Jones also contends that trial counsel should have made a bigger issue of the fact that Jones is HIV positive. Other than quoting Dr. Folk's testimony about the progress of the AIDS disease, however, Jones does not address this aspect of trial counsel's performance, or offer any basis for rejecting Judge Padavano's finding that presenting testimony regarding the nature of AIDS could have been more harmful than helpful. Therefore, the State will simply rely on Judge Padavano's findings and will not further address this aspect of alleged attorney ineffectiveness.

interest. In any event, trial counsel's testimony alone was sufficient to establish the facts to which he testified, and Judge Padavano credited counsel's testimony that he had contacted Jones' relatives, but that they were not willing to come to Florida to attend the trial (2R 227-28). This factual determination is supported by competent evidence and must be accepted on appeal. Jones v. State, 709 So.2d 512, 514-15 (Fla. 1998).

In any event, Jones cannot demonstrate prejudice from the absence of additional testimony about his childhood. This was a highly aggravated crime, committed by a 28-year-old escaped prisoner who had spent a good portion of his life incarcerated. Given his age and criminal background, his allegedly "deprived and abusive childhood is entitled to little, if any, mitigating weight." Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990) (defendant 31 at time of crime); Bolender v. Singletary, 16 F.3d 1547, 1561 (11th Cir. 1994) (defendant 27 at time of crime). Moreover, Dr. Annis was well aware of, and presented to the jury, testimony about Jones' family history. Through Dr. Annis, the jury learned about Jones' poor childhood, his emotional abuse at the hands of his mother's boyfriend, the death of his father, his mother, his brothers and his daughter, his attempt to escape by using drugs, his low intelligence, and his emotional problems. The family history presented at trial through Dr. Annis is wholly

consistent with that presented at the postconviction.[6] Thus, as Judge Padavano found, the additional evidence would have added little of significance to the mitigation picture; "the arguments Davis actually made in mitigation with the evidence available to the jury are generally the same as those the defendant would have made with the testimony of the additional witnesses" (2R 227-28).[7]

As for the mental health evidence, trial counsel obtained a mental health evaluation by an indisputably qualified mental health expert and presented that expert's testimony at the penalty phase. Although Jones contends that his trial counsel gave this expert insufficient information to do an adequate evaluation, this argument is refuted by the testimony of his own expert, Dr. Barry Crown, who testified at the postconviction hearing that Dr. Annis

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[6] The State would note that only two family members attended even the postconviction hearing: his sister Audrey Sullivan, and Carolyn Felton, the mother of Jones' child. Both of these witnesses admitted that neither Jones nor his family knew where they were or how to get in touch with them at the time of the trial. Thus, Jones' own evidence shows that these two witnesses were not available to testify at the time of the trial.

[7] In some respects, trial counsel's argument might have been diminished by some of the testimony presented at the postconviction hearing. Audrey Sullivan testified that she and her brother had grown up in a good neighborhood with no drugs, and that she did not know how Jones had responded to his brother Michael's death because he had been locked up at the time (4R 126-27). Thus, her testimony would not only have undercut any claim that Jones had grown up in a bad neighborhood, as well as any claim that he had been upset by Michael's death, but would also have emphasized Jones' criminal history. It is also doubtful that the jury would have been favorably impressed by Carolyn Felton's testimony that Jones had been in jail before, after and between the births of his two children (4R 145).

had done a "good clinical evaluation" (5R 225-26). Except for Dr. Crown's opinion of brain damage, the mental health testimony presented at the postconviction hearing was consistent with that presented by Dr. Annis.[8] Clearly, Dr. Annis had enough background information to perform an adequate mental health evaluation. That Dr. Toomer would have testified that two statutory mitigators existed, while Dr. Annis would not fails to demonstrate deficient attorney performance.[9] A defendant is not entitled to a battery of experts, and is not entitled to shop around until he finds an expert who will give him the most favorable result. Martin v. Wainwright, 770 F.2d 918, 934-35 (11th Cir. 1985) (defendant not entitled to expert who will testify favorably, or to battery of experts). Thus, merely producing favorable testimony by Dr. Toomer

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[8] Dr. Toomer testified that his testing of Jones indicated depression, deficits in self-concept, a history of substance abuse and poor social adjustment (5R 179). His testimony is consistent with Dr. Annis' testimony that Jones felt helpless and hopeless, has low self-esteem, has abused drugs and has been arrested numerous times for thefts as a result of his drug habit (21DR 3442-44). In addition, the IQ and achievement test scores obtained by Dr. Toomer were fully consistent with those obtained by Dr. Annis.

[9] Jones implies in his brief that we do not know whether or Dr. Annis believed that any statutory mitigators existed, because "Mr. Davis failed to even ask Dr. Annis whether these or other statutory mitigating circumstances existed." Initial brief of appellant at 30. However, Davis testified that he did not ask Dr. Annis specific questions about statutory mitigators because the answers would not have been favorable (4R 68-69). Judge Padavano, noting this testimony, concluded that "[t]rial counsel cannot be faulted for refraining from asking a question when he knew the answer would be harmful to his client" (2R 227).

many years after trial is not sufficient to prove that trial counsel performed deficiently. Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir. 1987) ("Merely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort.").

In this case, not only has Jones failed to demonstrate any basis for trial counsel to have sought additional psychological evaluation, it is apparent that Dr. Toomer's opinion today is based to at least some extent on information that simply did not exist at the time of trial, and therefore could not have been presented at the original trial no matter how "effective" trial counsel might have been.[10]

The only significant "new" mental health evidence presented by Jones at the postconviction is Dr. Crown's testimony that Jones has brain damage. However, Jones can demonstrate no deficient attorney

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[10] As noted in the Statement of Facts, Dr. Toomer reviewed Florida DOC material that obviously was not available to Dr. Annis at the time of the original trial, and also spoke with Audrey Sullivan and Carolyn Felton--family members who Judge Padavano found as a fact were not available at the time of the original trial. In addition, Dr. Toomer's conclusions concerning the existence of statutory mitigation was based on Dr. Crown's testimony about brain damage (5R 193-94). Thus, Jones' own evidence indicates that Dr. Toomer's conclusions (to the extent that they could be said to differ significantly from Dr. Annis') could not have been available to Jones at his trial.

performance in this regard. Trial counsel did not himself see any indication that Jones might be brain damaged, and neither did the mental health expert trial counsel retained to evaluate Jones. Moreover, there is no suggestion in this record that either trial counsel or Dr. Annis ignored "clear indications" of brain damage. On the contrary, Jones' own expert acknowledged that Jones displayed no indications of brain damage: Dr. Crown testified that Jones' brain damage is not detectable by the most competent clinical psychological evaluation or by any "technology" we now have, including MRI, CT scan, or EEG examination. Trial counsel could not have been ineffective for not pursuing a mental mitigator undetectable by him or by a competent psychologist or psychiatrist. See Rose v. State, 617 So.2d 291, 295 (Fla. 1993) (defendant is not entitled to postconviction relief simply because new expert concludes that defendant had brain damage when there was no indication that original expert ignored "clear indications" of mental health problems); Mills v. State, 603 So.2d 482, 483-86 (Fla. 1992) (trial counsel was not ineffective for failing to seek mental health examination when counsel had no reason to suspect that mental health mitigation could have been developed); Correll v. Dugger, 588 So.2d 422, 426 (Fla. 1990) (despite presentation of new psychiatric opinions at the postconviction hearing seriously questioning defendant's mental capacity, defendant not entitled to new penalty hearing where mental-health expert used at trial had

been alerted to defendant's drug and alcohol use and found no indication of mental impairment).

Jones merely has produced a favorable mental health witness years after trial; he has not demonstrated either that Dr. Crown was available in 1989, or, more importantly, that every reasonable attorney in 1989 would have retained Dr. Crown or some other neuropsychologist to evaluate Jones for brain damage despite the lack of indication of such either to the trial attorney or to the qualified mental health expert retained by that attorney. The test is not "how present counsel would have proceeded" to represent the defendant, but whether any reasonable attorney could have proceeded as did trial counsel. Cherry v. State, supra, 659 So.2d at 1073. At most, Jones has shown only that his present counsel would have obtained a neuropsychological evaluation, "a showing that misses the target by a wide mark." Spaziano v. Singletary, 36 F.3d 1028, 1041 (11th Cir. 1994).

Furthermore, Jones cannot demonstrate prejudice. It is highly unlikely that either the jury or the trial judge would have found particularly credible Dr. Crown's testimony that the defendant has "metabolic" brain damage (whatever that is), which cannot be detected by the most sophisticated technology available (including MRI's, CT scans, and EEG's), or by analysis of brain tissue in an autopsy (except perhaps, someday, by use of an electron microscope), or by observation by the most competent psychiatrist

or clinical psychologist (let alone by a lay person). Not only is such testimony likely to be perceived as arrogant by the sentencer, the very invisibility of this alleged brain damage, and the lack of any observable manifestations of it, only diminish its mitigating value.[11]

As Judge Padavano noted, this case involved a highly aggravated murder of a police officer, committed to avoid arrest by an escaped prisoner with a lengthy record of committing crimes of violence (2R 229-30). The jury voted 11-1 for a death sentence. Judge Padavano did not err in finding that the additional mitigating evidence presented at the postconviction would not in reasonable likelihood have resulted in a different sentence.

Jones has failed to demonstrate either deficient attorney performance or prejudice. Therefore, he has failed to show that he received ineffective assistance of counsel at sentencing. Judge Padavano correctly denied relief on this issue.

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[11] As noted previously, Dr. Crown is not a medical doctor. Nevertheless, he claims to be more competent to diagnose brain damage than psychiatrists, who are medical doctors. This is so, Dr. Crown claims, because he is focused on the "brain," while psychiatrists are focused on the "mind." This, notwithstanding that Dr. Crown may not lawfully prescribe even an aspirin for a headache, much less any psychotropic drugs. The State doubts that Dr. Crown has better training in, or understanding of, the anatomical, electrical or "metabolic" structure of the brain than a medical doctor who has specialized in the study of the "mind."

ISSUE II

JONES BRADY CLAIM IS PROCEDURALLY BARRED; MOREOVER, JONES HAS FAILED TO ESTABLISH THAT THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE

Here, Jones contends that the State withheld a three-page pre-trial memorandum written by detective Bevis of the Leon County Sheriff's Department.[12] This memorandum, Jones argues, was material on the issue of sentence, and should have been disclosed at trial, pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Judge Padavano found that Jones had sought leave to amend on October 7, 1993, but failed to raise any Brady claim until October 25, 1996, more than two years later (2R 330). Noting that Jones had not included any sworn allegation in his 3.850 motion explaining why the claim had not been raised in a timely manner, as required by Rule 3.850 (b), Judge Padavano found that the Brady claim was untimely, and would be denied on the basis of this procedural default (2R 230-31).

A defendant seeking postconviction relief after a death sentence must present his Brady claim in a timely manner. Jones v. State, supra, 709 So.2d at 519; Mills v. State, 684 So.2d 801, 805 n. 7 (Fla. 1996). Jones has failed even to argue, much less demonstrate, that Judge Padavano's finding of procedural bar was

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[12] Judge Padavano noted that, at the postconviction hearing, Jones introduced only the first page of the memorandum. The State introduced the remainder (2R 232).

erroneous, and therefore Judge Padavano must be affirmed on this basis alone.

Moreover, even if Jones' Brady claim is not procedurally barred, it is meritless. The memorandum was not generated in any investigation of the murder of officer Ponce de Leon; instead, detective Bevis was investigating a possible escape attempt. Detective Bevis was not involved in the investigation or prosecution of the murder trial. Although he discussed his investigation with the State Attorney's office, there is no evidence that the memo at issue here was ever disclosed to them. But even assuming "that this undisclosed information held by an individual police officer who is not involved in the investigation [of the murder] could constitute Brady material," Id. at 20, the memorandum is still not exculpatory or material. The memorandum itself, which purports to state what Kevin Eason heard Ervin Griffin say, is hearsay within hearsay, admissible at best only to impeach the testimony of Kevin Eason. Eason surely would not have been called as a witness by the defense, however, because it is his testimony that Griffin identified Jones as the triggerman. But even if the memo could have been admitted at the penalty phase, it would have been extremely foolish for the defense to have done so. Although Bevis relates on the first page of his memorandum that Eason said that Griffin admitted being the triggerman, in subsequent pages of the memorandum Eason states that Griffin

identified Jones as the triggerman. Thus, the memo alone would have been at least as hurtful as helpful. Furthermore, detective Bevis testified that it was his understanding from talking to Eason that any reference to Griffin being the triggerman was simply part of their escape plan; it was something that Jones would testify to if Griffin escaped successfully; otherwise, he would not. Detective Bevis testified that Griffin never actually meant for Eason to believe that Griffin was the triggerman; in fact, Griffin told Eason that Jones was the triggerman.

Moreover, Eason testified at the postconviction hearing that Griffin had told him that Jones had killed officer Ponce de Leon, and Eason does not remember telling Bevis anything to the contrary. This direct testimony would surely have been offered by the State in rebuttal to any defense attempt to use the memo to establish that Griffin was the triggerman. In fact, the State would surely have relished the idea of being able to offer Eason as one more witness to establish that Jones was the triggerman, and any attempt by the defense to use the memo would simply have opened wide that door.

Finally, and most importantly, any attempt by the defense at the penalty phase to identify Griffin as the triggerman would have been directly contrary to Jones' own trial testimony in which he identified the triggerman as Sindey Earle, an alleged drug dealer, and would have been directly contrary to Jones' own trial testimony

that Griffin was asleep when the shooting started. Thus, any attempt to present the memo in an attempt to portray Griffin as the triggerman would have run up against not only the inconsistent statements in the memo itself, and not only against the direct testimony of Eason (and, as well, guilt phase witnesses Beverly Harris and the two persons heard Jones' jailhouse admission that he had killed the officer), but also against the guilt-phase testimony of Jones himself. Jones would have had no credibility with the jury if he had contended in the guilt phase that Sindey Earle shot the police officer while Griffin slept, but contended at the penalty phase that Griffin was the triggerman. It is unlikely that Jones' trial attorney would have used the memo if given the chance, and even more unlikely that the memo would have resulted in a different sentence.

In the circumstances of this case, there is no reasonable probability that, if the memo had been disclosed, the outcome would have been different. Robinson v. State, 707 So.2d 688, 693 (Fla. 1998). Put another way, this memo does not "put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

CONCLUSION

For all of the foregoing reasons, Judge Padavano's denial of postconviction relief should be affirmed.

Respectfully submitted,

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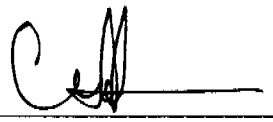
ATTORNEY GENERAL



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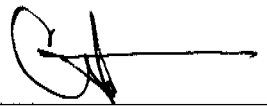
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven Seliger, Garcia and Seliger, 16 North Adams Street, P.O. Box 324, Quincy, Florida 32353-1324, this 7th day of July, 1998.



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