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IN THE SUPREME COURT OF FLORIDA

CASE NO. 90, 976

CLARENCE JONES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

STEVEN L. SELIGER
GARCIA and SELIGER
16 North Adams Street
Post Office Box 324
Quincy, Florida 32353-0324
(850) 875-4668

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jones' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied some of Jones' claims without an evidentiary hearing, and denied the remaining claims following an evidentiary hearing.

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

"R" -- record on 3.850 appeal to this Court

"DR" -- record on direct appeal to this Court;

"Ex." -- exhibits submitted at the evidentiary hearing;

REQUEST FOR ORAL ARGUMENT

Mr. Jones 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 gravity of the penalty. Mr. Jones through counsel urges that the Court permit oral argument.

STATEMENT OF THE CASE

Mr. Jones was initially charged by indictment on July 28, 1988 for first-degree murder; attempted first-degree murder; robbery with a firearm; burglary of a dwelling while armed; and kidnapping while armed. He pled not guilty. A jury convicted him as charged. The case then went to penalty phase on the murder conviction. The conviction involved the shooting death of a Tallahassee Police Department officer, Ernie Ponce de Leon.

The penalty phase ended with a jury recommendation of 11-1 for death and the trial judge imposing death. On direct appeal, this Court affirmed Mr. Jones' convictions and his sentence of death. Jones v. State, 580 So. 2d 143 (Fla. 1991) The United States Supreme Court declined to review this decision. Jones v. Florida, 112 S. Ct. 221 (1991) (Case No. 5)

Mr. Jones then filed a motion for post-conviction relief, challenging his conviction for first degree murder and resulting sentence of death. Concurrent with this motion pursuant to Rule 3.850, Mr. Jones filed a number of public records requests from a variety of agencies. An evidentiary hearing was held on both the public records requests and on the motion for post-conviction relief. The trial court denied relief. (R2-223-233) Included in this finding was a determination that the

public records requested by Mr. Jones had been disclosed. (R2-224) Mr. Jones filed a motion for rehearing of the Order Denying Post Conviction Relief. (R2-234-237) The trial court denied this motion for rehearing. (R2-239)

From this final order, Mr. Jones filed a timely notice of appeal. (R2-240) This brief is written in accordance with this Court's order of December 5, 1997.

STATEMENT OF THE FACTS

Clarence Jones was arrested and ultimately charged for the murder of a Tallahassee Police officer, Ernie Ponce de Leon. (R4-21) Cliff Davis was appointed to represent Mr. Jones in this case. (R4-19) Mr. Davis has been admitted to the Florida Bar since 1971 and specialized in criminal defense work. (R4-18-19) Prior to his appointment in Mr. Jones case, Davis testified that he had tried between 12-15 capital murder cases and had experience in the investigation, preparation and presentation of evidence in the penalty phase of a capital murder trial. (R4-19-20)

Mr. Davis recalled that he was selected to represent one "of the major players" in this murder case because it was clear that the State was going to seek the death penalty. (R4-22) In fact, Mr. Davis' client, Clarence Jones, was alleged to have been the person who shot and killed the police officer. (R4-22) In addition, Mr. Davis knew right from the beginning of his representation that Mr. Jones was an eligible candidate to be sentenced to death. (R4-22) Therefore, Mr. Davis knew he had to be prepared to present evidence in mitigation. (R4-23)

To prepare for the penalty phase of the case, Mr. Davis testified that he spoke to three people in Baltimore some time before trial. He recalled that two of them were women and one was a man who was related to Mr. Jones. Davis says he got the information about how to contact these people from his client. (R4-24) After review

of his time records through the guilt phase, Mr. Davis could find no specific reference to any of these contacts. (R4-24) In addition, he had no record of any long distance calls that he submitted for reimbursement. (R4-24)

Mr. Davis conceded that although he learned early on that all of Mr. Jones' family lived in Maryland, he never traveled there. Although he had authorization for an investigator, that person worked exclusively on guilt-phase issues. (R4-26) Mr. Davis believed that his total contact with the three individuals was two or three telephone calls. (R4-27) From these calls, Mr. Davis discovered that Jones had been in prison a long time and that Jones had "lost his immediate family early on." (R4-27) Mr. Davis also received "the records" of Mr. Jones incarceration. (R4-27) These "records" were provided to Mr. Davis as part of the discovery request he made to the State. (R4-28) Mr. Davis characterized these records as "a very complete file". (R4-28) He did not attempt to get any other records. (R4-38)

Based on this information, Mr. Davis believed that Mr. Jones had "spent most of his life in some kind of institution and his life was well documented and the family members I was able to find did not have enough time or interest, which was demonstrated by their lack of contact with him in prison, to be of any assistance." (R4-29) Mr. Davis did not travel to Baltimore because "it would have been a waste of my time and the resources available." (R4-29) Davis never requested the financial or

personnel resources to travel to Baltimore. Davis recalled that the people he spoke to could not afford to travel to Florida and when he offered financial assistance, was told that the person was "too ill". (R4-30) Mr. Davis ultimately had a "feeling" that Mr. Jones family "did not have enough interest . . . to be terribly concerned about Mr. Jones."

According to Mr. Davis, compelling any family member to testify was unnecessary "[b]ecause of Mr. Jones substantial history of incarceration, there were substantial records relating to his background and substantial information that Dr. Annis was able to obtain without subpoenaing somebody that didn't really want to come to get it." (R4-65)

However, Clarence's sister, Audrey Sullivan, said she was never contacted by anyone representing Clarence. She testified she "would have done for him I could. Of course." (R4-129)

The other work Mr. Davis did to prepare for the sentencing phase of the trial was to hire a mental health expert. (R4-30) Mr. Davis received court authorization to do this on the same day the jury announced its verdict in the guilt-phase portion of the trial. (R4-31)* Although the request for the use of a mental health expert was couched

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*This was September 22, 1989.

in terms of having that person do a competency evaluation, Mr. Davis never intended the expert to be so used. Mr. Davis was clear that he had no doubt about Mr. Jones competency to stand trial or sanity at the time of the offense. (R4-31-32)

What Mr. Davis really wanted was someone "to assist me in presenting nonstatutory and/or statutory mitigators at sentencing." (R4-32) However, Davis never talked to the mental health expert, Dr. Larry Annis, until he was hired. (R4-32) When the verdict in the guilt-phase was announced, it was a Friday. Mr. Davis asked for a continuance through the weekend because he was not prepared to go ahead. (R4-33) Mr. Davis denied that he began to prepare for the penalty phase only after the competition of the guilt phase.

> A. No, sir. I began to prepare the part of the penalty phase that dealt with his family history -- because I was unable to get it directly from any family members -- his prison history, his mental health history for which I had records from other authorities that Dr. Annis was able to review and present to the fact finder.

(R4-33)

Davis' initial contact with Dr. Annis recognized that "we're here on fairly short notice. I would like to have more time. The Court's given us until Monday morning to do what we're going to do." Davis told Annis "This is what I have to work with. Do the best you can. Help. And then I gave him the benefit of any information I had

that was not in the record." (R4-66)

Mr. Davis agreed that to adequately prepare for the penalty phase of a capital case, a lawyer needed to do complete life history of the client that would include information of family generations. In addition, a lawyer should get pertinent records, such as school and medical. The lawyer should also talk to friends, school teachers, neighbors, medical personnel. (R4-40) Mr. Davis did not do any of this. (R4-39-40)

To prepare his mental health expert, Mr. Davis provided Dr. Annis with the records he had received about Mr. Jones from the Maryland Department of Corrections. (R4-43) Mr. Davis talked with Dr. Annis to tell him "what I knew." (R4-43) Mr. Davis did not recall whether he asked Dr. Annis to speak to family members but he would have told Dr. Annis that he "had no luck with them." (R4-44)

Mr. Davis' recollection was that he never asked at trial Dr. Annis his opinion about the presence of any statutory mental health mitigators. (R4-45) He remembered asking Dr. Annis to address the possibility of mental retardation. (R4-46) Mr. Davis did not recall addressing the issue of substance abuse, either historically or at the time of the offense. (R4-47) Finally, Mr. Davis never inquired as to the possibility of Mr. Jones HIV positive status as possible mitigation. (R4-47)

Davis explained that he tried "to minimize Mr. Jones either being under the influence of using drugs in the guilt phase . . . There was no showing that anybody

was terribly under the influence at the time of the day [early morning]." (R4-66)

He also made "a conscious decision" to minimize Mr. Jones HIV positive status. Davis did not believe he "needed anybody that knew anything about HIV. If it had an impact on his mental functioning or on the mitigation aspect, the Dr. Annis was qualified to do that." (R4-67)

Mr. Davis testified that he made a strategic decision not to ask Dr. Annis about the statutory mental health mitigators because Annis told Davis that the reported 67 I. Q. "was excessively low, that he felt like he was -- had a higher I. Q., at least a street level I. Q., that he functioned at a lot higher level than that and that he didn't feel that he was under the influence of anybody else." (R4-68)

Mr. Davis testified that he knew Mr. Jones relevant family history to be

> Child Abuse. I think either his family had separated early or his mother died earlier and then his father died in a fire. He ended up with his grandmother at a fairly early age. He started having a juvenile history at a very early age and was incarcerated at a very early age for the first.

(R4-50)

The source of this information was primarily Mr. Jones along with the records from the Maryland Department of Corrections. (R4-50)

When asked what his theme for the penalty was, Mr. Davis responded that Mr. Jones "had a desperate, wasted life full of tragedy; had not been dealt a good hand by

life; . . . And that he had a life of no traditional values, had never been presented with any traditional choices and that the road to this murder was not one that he undertook on his own volition. It's just like something that drifts in a stream. That's just where he ended up." (R4-53)

Davis believed the only way he could explain the murder "was to show that [Jones] had a totally wasted life that had no positive impact whatsoever and why kill a person for killing somebody else when in his culture and his entire mind-set it really wasn't a big deal to him; not that he was not remorseful, but that killing an officer did not hold the level of negativity with a person of his background than it would from a normal middle class background." (R4-69)

As part of the post-conviction process, Mr. Jones defense hired a licensed clinical social worker to prepare the case for mitigation. Cecilia Alfonso had testified in approximately ten penalty phase trial in capital cases. (R4-79) To do this work, she reviewed information from several sources and went to Baltimore to interview Audrey Sullivan and Rachel (sister), Carolyn Felton, and the mother of his son, Jessie and Mr. Jones' son, Antawan. (R4-83)

From this work, Mr. Alfonso learned that three months after he was born, his mother, Audrey Jones was incarcerated for neglect. She stayed in jail for 6-8 months. (R4-133) This separation had a profound effect on the mother-child bonding process.

(R4-87) Mr. Jones mother was also a major alcoholic, interfering with her ability to be a parent.* (R4-89) So the role of parent was attempted to be played by Mr. Jones' father, Wesley Jones. He was a lot older that his wife, by almost 30 years. (R4-88) He had eight children to raise alone, while working to try and support the family. (R4-89)

In addition to her alcoholism, Mr. Jones mother had a long term affair with another man from the neighborhood. This relationship resulted in both physical and emotional fighting between Mr. Jones parents, that was often acted out in front of the children. (R4-90) One illustration was the time the father shot at the other man during a party Mrs. Jones was throwing her husband. The children were frightened and horrified by this conduct. (R4-91) When Clarence was no older than five, his mother left to go live with the man she was having an extra marital affair, Floyd Richardson. (R4-96)

Another example of the pervasive family violence and neglect was the mother's routine of leaving the children every Friday for the weekend, returning Sunday night or Monday. This behavior would result in violence between the mother and father

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*His mother would frequently serve beer to Clarence when he was little because she believed the beer would fatten him up. (R4-126) Clarence started drinking beer at age three or four. (R4-127)

upon her return, (R4-91) witnessed by the children. This included one time when the father beat his wife with brass knuckles. (R4-118) The wife took his gun and ran outside the house. Wesley Jones got the gun away from her and shot her. (R4-118) He got arrested; the wife was taken to the hospital. (R4-92) These were incidents witnessed by Clarence Jones (R4-93) and consistent with a family environment "filled with violence, abuse, irresponsibility and substance abuse." (R4-93)

The family violence followed Clarence Jones after his father died and his mother moved in with her long time lover. (R4-94) During this time, his older sister Audrey got into an argument with their brother Theodore and stabbed him to death. (R4-94) The social worker believed that Audrey's response to having the argument was indicative of the lessons this family had learned. (R4-95) These children had seen violence regularly and incorporated that technique to resolve conflicts. (R4-95)

When Clarence Jones was 11 years old, his father died in a fire at his house. (R4-98) The fire was deliberately set by a homeless woman who had been allowed to stay in the house for awhile but then been asked to leave. In retaliation, the woman poured gasoline in the house and started the fire. (R4-98) The father died when, while he was standing on the porch trying to determine whether someone was in the house, the porch collapsed. His skull was fractured and he subsequently died. (R4-97)

Clarence Jones was greatly affected by his dad's death. He ultimately became

more quiet, more withdrawn from the world. (R4-98) The loss was very traumatic, especially given Clarence's age and that it was his father, the only person who had provided stability in Clarence's life. (R4-98) The rest of Clarence's family was not able to replace his father. (R4-99) His mother provided no guidance because of her problems and the other children were not physically present or incapable of being a parent. (R4-99) The brother Clarence was closest to - Michael was shot to death in a craps game. (R4-100)

Clarence responded to Michael's death by using drugs and misbehaving. (R4-100, 142-143) This was to be expected. As Ms. Alphonso testified, Mr. Jones was "affect as [an adult] by environment and the dynamics and the values and in which [he was] raised." (R4-101) Ms. Alphonso described Clarence's family as one "where there was so much instability that there was no way to insulate that family from the outside forces in society meaning the crime, violence, the drugs, the substance abuse." (R4-103) While other people lived in families with similar troubles, Clarence had no one (after his father died) to advocate for him. There was no community support system. (R4-104) Any attempt by an outside force to intervene, failed. There was a police officer, Viola White, who tried without success to get Clarence's mother to pay attention to her children. (R4-105)

The childhood endured by Clarence Jones had consequences far beyond those

years. Ms. Alphonso reported that "Mr. Jones was and continues to be, if not physically, but intra physically affected by his childhood and the environment and the traumas that he was subjected to." (R4-96) Members of the Jones' family talked about how Clarence would suffer from significant mood changes in response to stress; how he would make bad decisions when confronted with everyday life decisions. (R5-188)

The effects of being raised this way as a child are lifelong "unless there is some significant and pronounced intervention." (R5-188)

> Without that, we can predict that if you expose an individual to early onset trauma, dysfunction, a lack of predictability, stability, safety and the like, that you will produce an individual who will engage in maladaptive behavior and who himself or herself will be dysfunctional later on in life. The early experiences are critical in terms of their influence on later development. (R5-189) The earlier the child suffers from these deprivations, the more severe the effects. (R5-189)

The defense also called Audrey Sullivan, Clarence Jones' sister. (R4-113) She was one of eight children - Charles, Rachel, Herbert, Michael, Theodore, Jessie and Clarence. (R4-114) Clarence Jones was the youngest child. (R4-115) Their parents got along some of the time but often did not. The conflict between the two was a consequence of the mother's involvement with another man. (R4-115) Mrs. Jones and the other man would stay together away from the Jones' household all weekend.

(R4-116) Her father, Wesley Jones, did not believe his wife's story that she was at her girlfriend's house playing cards. (R4-116) This led them to fight, including physical altercations. Clarence was present when these fights happened and he certainly knew his parents were fighting (R4-117)

Ms. Sullivan was the sister of Clarence who killed their brother Theodore after she and Theodore got into a fight. Theodore had scratched and bit her face; she responded by stabbing him and ultimately Theodore bled to death. (R4-123) Two other brothers also died, one violently. From a total of five brothers, three died early on. (R4-125) The other brother, Herbert, was regularly in trouble with the law and constantly being locked up in jail. (R4-138)

Clarence Jones had two children by Carolyn Felton. One is deceased. The other Antawan, was born on August 16, 1979. (R4-145) Their son had been labeled "as disabled, mentally disturbed." Although he was in the tenth grade, he was reading only at a fourth grade level. Ms. Felton testified that Antawan had mental and emotional problems. (R4-148) These problems have existed since the child was born but she did not have any explanation for their cause. She was told that Antawan's problems could have been genetic. (R4-148) Her last contact with Clarence was when their daughter died in February of 1983. (R4-150) Ms. Felton would have been glad to testify on Mr. Jones behalf at his trial. (R4-149-150)

The defense hired Jethro Toomer, a psychologist whose area of specialization is criminal and forensic psychology. (R5-159) He was deemed to be an expert in the field of clinical and forensic psychology. (R5-162) Dr. Toomer explained the process necessary to conduct an evaluation to determine if evidence regarding mitigation of a capital defendant is available. Essentially, there are three necessary components: (1) meeting the defendant and conducting a clinical interview; (2) giving psychological tests and reviewing documents to determine a defendant's functioning development; and (3) talking with people to learn as much about the person's history as possible. (R5-163) Each one of these elements is necessary for it is important to corroborate the information received from a variety of sources. (R5-164)

Dr. Toomer met with Clarence Jones two times over the span of two years. (R5-164) His task was "to evaluate Mr. Jones with regard to his overall mental status functioning and also with regard to facts relating to mitigation." (R5-164) To assist him in performing this task, Dr. Toomer also reviewed the material found in defense Exhibits 7 and 8 and interviewed Audrey Sullivan and Carolyn Felton. (R5-177) In addition, he "administered a screening instrument that is called a Bender Gestalt Design"; gave the Wide Ranges Achievement Test which assesses a person's academic functioning in three areas; gave the Revised Beta examination, an I.Q. test measuring nonverbal intelligence; and administered the Carlson Psychological Survey,

designed to assess a person's degree of personality functioning. (R5-178)

The Revised Beta test revealed a nonverbal I.Q. in the 67-71 range. This put Clarence in the lower portion of the general population and was consistent with his level of assessed I.Q. functioning during most of his lifetime. (R5-179) The WART found that Jones' reading skills were at a second grade level, spelling at a fourth grade level and math skills at a fifth grade level. (R5-179) The Carlson Psychological Survey profiled a person who was depressed, had significant deficits in self-concept, a history of substance abuse and poor social adjustment. (R5-179) The Bender Gestalt Design test "contained numerous indicators that were suggestive of some underlying organicity or some underlying brain damage." (R5-180) When there is an indication of neurological impairment, the next step is to do neuropsychological testing. (R5-180)

Dr. Toomer concluded that there "was a significant history of functioning in what could best be described as a dysfunctional family and community environment." The environment was characterized by violence and a lack of traditional social norms. The family dysfunction included the inability to provide the necessary physical, emotional and psychological resources to raise a healthy child. (R5-186) Jones suffered early onset trauma as a result of being abandoned by his mother. He was a constant witness to violence as he grew up and a lack of a caring and physically present family resulted in head trauma and abuse. (R5-181) These factors all have

behavioral consequences because they can effect decision making and problem-solving abilities. (R5-181) The community that Mr. Jones was raised in was not helpful in compensating for these family deficits. There was no support from other sources, such as school or church. Jones was left to "basically develop on his own". (R5-183) Mr. Jones dropped out of school and was easily influenced by negative peers. (R5-187) He became a chronic user of alcohol and drugs - marijuana and cocaine. (R5-185) It was not surprising that once he escaped from prison, Jones reverted to using drugs. (R5-185)

There was a history in Jones family of mental problems. One of his grandfathers actually died in a mental institution. (R5-185) His older sister, Audrey was placed in special education classes. (R5-185) Mr. Jones "behavior was characterized by some significant cognitive and intellectual deficits as manifested by his special placement in school . . ." (R5-187)

Dr. Toomer found that Clarence Jones has a personality disorder and probably suffers from neurological impairment of organicity. (R5-189) These impairments have a long history (R5-191) and existed in July, 1988. This means that Jones would lack the capacity to weigh the consequences or figure out an alternative to particular acts. His behavior would be impulsive, "basically here and now without any consideration of long-term consequences." (R5-190)

From all of the data he reviewed or produced himself, Dr. Toomer, concluded that at the time of the offense, Clarence Jones suffered from an extreme mental or emotional disturbance. (R5-192) He also determined that Jones capacity to conform his conduct to the requirements of law at the time of the offense was substantially impaired. (R5-195)

After it was determined that Mr. Jones likely suffered from brain damage, he was examined Dr. Barry Crown, a psychologist. Dr. Crown is also a diploma of the American Board of Professional Neuropsychology. (R5-206) Dr. Crown was offered as an expert witness. (R5-208)

Dr. Crown's evaluation consisted of (1) a brief clinical interview and (2) administering a number of neuropsychological tests to "assess the relationship between brain function and behavior." (R5-209) These tests included the Wechsler Adult Intelligence Scale Revised; the Shipley Institute of Living Scale; the Reitan-Indiana Aphasia Screening Test; the category tests from the Reitan series; the Kaufman Neuropsychological Assessment Procedure; the trail making test, form A and B; the Ruff Figural Fluency Test; the third version of the Wide Ranges Achievement Test; the Rey-Osterrieth Complex Figure Test; selected figure tests; and the Finger Oscillation Test, that measures fine motor dexterity. (R5-211) Dr. Crown has been trained to give these tests and to evaluate the results. (R5-211) In addition, Dr. Crown reviewed the

same two volumes of information that Dr. Toomer examined. (R5-209)

Based on the review of information and test results, Dr. Crown concluded that Mr. Jones has a "significant" neuropsychological impairment. "By neuropsychological impairment, I am referring specifically to organic brain damage and the relationship between his brain function and behavior." (R5-211-212)

Dr. Crown testified that he could not have reached his conclusion simply by observing Mr. Jones or by doing a clinical intake interview and a couple of tests. (R5-212) The existence of brain damage can be measured only by giving a person a variety of neuropsychological tests. Other tests, such as the CAT scan and MRI or EEG only provide limited information. (R5-213) Doing these tests likely means that "longstanding, nonspecific, trauma-induced brain damage" would go undetected. (R5-213)

In addition to performing the tests, Dr. Crown consulted with Dr. Toomer and the social worker. He interviewed some family members, including Mr. Jones' child, Antawan Jones. (R5-214) The information he received from these sources was consistent with the conclusions he drew from the neuropsychological testing. (R5-214)

Mr. Jones brain disfunction affected his daily life activities. Jones is more easily distracted by occurrences that others could ignore. He has "a great deal of difficulty moving from the concrete to the abstract." Jones was functioning like an 8 ½ year old

in this capacity. (R5-215) This data was consistent with findings that go back to the age of twelve when Mr. Jones I.Q. test yielded a score of 67. (R5-216) It was also consistent with Mr. Jones having these defects in 1988. (R5-216)

Like Dr. Toomer, Dr. Crown rendered an opinion that Mr. Jones was under the influence of an extreme mental or emotional disturbance at the time the crime was committed (R5-217); and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R5-218)

Scott Folk is a medical doctor who practice is limited to treating adult infectious diseases, including HIV infection and AIDS. (R5-248) He is board certified in infectious diseases, including the management of people with HIV infections and AIDS. (R5-248) In the course of his work, he is managing about 150 people infected with the HIV virus. He also is under contract with corporate owner of Gadsden Correctional Institution to provide services to women prisoners with the HIV virus or AIDS. (R5-249)

Dr. Folk was provided medical records from Mr. Jones' file kept with the Department of Corrections stating that Jones has an HIV infection. (R5-254) Dr. Folk did not examine Mr. Jones. (R5-253) The records indicate that on July 14, 1988 and August 9, 1988, tests were performed that established Mr. Jones was HIV positive in

1988. (R5-255)

According to Dr. Folk, "given enough time [Mr. Jones] will sooner or later develop AIDS." The HIV will eventually cause AIDS, AIDS being the final stage of the HIV infection. (R5-256) There was not in 1989 nor presently a cure for the virus or AIDS. (R5-257)

AIDS kills people because the person becomes "increasingly vulnerable or susceptible to certain types of infections and cancers. Those infections and cancers in turn can be fatal." (R5-257) Dr. Folk believed that Mr. Jones could suffer this fate and die from AIDS. (R5-271)

SUMMARY OF THE ARGUMENT

Mr. Jones was convicted of killing Ernie Ponce de Leon, the first Tallahassee police officer ever murdered in the line of duty. Cliff Davis, a veteran criminal defense lawyer, was appointed to represent Mr. Jones. There was no question right from the beginning that the State would seek a sentence of death should Mr. Jones be convicted of first-degree murder. The State's theory of the case was that of the four culprits, Mr. J ones was the person who actually shot Ponce de Leon.

Against this backdrop, Mr. Davis did little or nothing to investigate and later to prepare, mitigation evidence. The transcript of the penalty phase shows the spartan amount of information that was communicated to the jury. All of it was told through a clinical psychologist, whose major resource of information was Mr. Jones. There was no independent effort to corroborate or supplement Mr. Jones family tales, although a wealth of information existed. Mr. Davis did not even seek help in the form of a mental health expert until the day the jury returned a jury verdict of guilt. This performance was unacceptable and prejudiced Mr. Jones opportunity to get a life sentence recommendation and a fair weighing of the aggravator and mitigators by the trial judge.

In addition, the State did not disclose a three page memorandum taken during

the pendency of the case where a cellmate of Jones' co-defendant, Irvin Griffin, related a statement made by Griffin that he (not Jones) shot Ponce de Leon. Although this statement was known to the State Attorney's office, it was never disclosed to Jones' lawyer. This information was material to Jones moral culpability and could have resulted in a lesser sentence.

ARGUMENT

I.

MR. JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL

The Sixth Amendment to the United States Constitution guarantees that a person charged with a crime should receive effective assistance from his lawyer. Strickland v. Washington, 466 U.S. 668 (1984). In this client's challenge to the lawyer's work, Mr. Jones must show (1) that Cliff Davis "committed serious errors in light of 'prevailing professional norms' "such that his legal representation fell below an objective standard of reasonableness and (2) this constitutionally deficient performance resulted in a "reasonable probability" that the outcome would have been different had those errors not occurred. Strickland, 466 U. S. at 688, 694.

Where the alleged ineffectiveness occurs during the penalty phase of a capital murder trial, the second part of the test asks whether there is a "reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently weights the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U. S. at 695.

Above all, a lawyer has a constitutional duty to investigate available mitigation information. This duty derives from a lawyer's basic function, which is "to make the adversarial testing process work in a particular case." Strickland, 466 U. S. at 690.

> Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, [the Supreme Court has] noted that 'counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.'

Kimmelman v. Morrison, 477 U. S. 365, 384 (1986) quoting Strickland, 466 U. S. at 691.

There was nothing about Cliff Davis' investigation that could be deemed reasonable. Basically, Mr. Davis got some records as a part of the discovery process that set out Mr. Jones life in the Maryland Department of Corrections. The only other thing Mr. Davis testified to doing was speak "to three different people in the Baltimore area". He could not recall their names. In his billing records submitted to the court for payment, there is neither a reference to any contact with Mr. Jones' family nor any billing for long distance phone calls that would verify contact. (R4-24-25) Mr. Davis billed for long distance phone calls. (R4-24-25) Although Mr. Davis learned early on in his representation of Jones that the family lived in Baltimore, Mr. Davis never traveled there nor asked the trial court for someone to do it in his stead. (R4-26) In

fact, Mr. Davis got the trial court to authorize the use of an investigator but Mr. Davis used that service exclusively for guilt phase investigation. (R4-26)

Of course, Mr. Davis retained the clinical psychologist, Larry Annis, the Friday that the jury determined Mr. Jones was guilty of first-degree murder. Mr. Davis did not request a confidential expert, although one would have been available under Florida law. Mr. Davis knew that. (R4-30) Instead, Mr. Davis filed a request for a mental health person to perform a competency evaluation. (R4-31) Mr. Davis testified that what he really needed was an expert to "assist [him] in preparing what was available for the penalty phase, part of which was competency . . ." (R4-31) Mr. Davis conceded he had no question about Jones' competency (R4-30) nor about his sanity. (R4-32)

Mr. Davis never spoke with Dr. Annis until he got him appointed on September 22, 1989. (R4-32) Mr. Davis admitted that he was not prepared to go forward with the penalty phase at that time. He stated "I've had no chance to confer with the individual that was involved and act on any kind of information that he can make available to me since I haven't been able to talk to him". (DR-3336) In addition, Mr. Davis told the judge that "there are some family members in Maryland that I would like to compel the attendance, and we can't do it today or tomorrow." (DR-3336)

Of course this latter statement directly contradicts his testimony at the post-

conviction hearing. According to Mr. Davis, these persons, (three at the most) were contacted early on and could not be helpful. (R4-27) There is nothing that corroborates Mr. Davis efforts to get any members of Mr. Jones family to Florida to testify; in fact, the evidence it to the contrary. Mr. Davis told Dr. Annis "that there was no family at least available to me to present the information [on Mr. Jones'] behalf. (R4-42-43)

Dr. Annis' direct testimony is 12 ½ pages long. (DR-3412-3424) He was qualified as an expert in forensic clinical psychology for two of those pages. Dr. Annis listed those items he had available - documents from prison record files of Maryland. The only other sources of information is Mr. Jones himself and his I.Q. testing. As Dr. Annis' testimony bears out, he is repeatedly telling the jury what Mr. Jones told him. (See DR-3415; 3416; 3417; 3418; 3419; 3420)

On cross-examination, the prosecutor started out by pointing out to the jury that Dr. Annis first met Mr. Jones on Friday morning. (DR-3424) It was now Monday. The prosecutor next went to verify that Dr. Annis' opinions were based on "three-hour and 40 minutes of interview" and what Dr. Annis characterized as "the record". (DR-3425) Dr. Annis testified that

> A. As the report indicated here, I used a lot of statements that Mr. Jones stated. I was advised by the defendant. He

told me.

The prosecutor confirmed that Dr. Annis never spoke to Mr. Jones' mother or anyone that knew Mr. Jones' father. (DR-3425) In fact, Dr. Annis did not talk with anyone except Clarence Jones and Cliff Davis.

Mr. Jones experts at the post-conviction hearing demonstrate that shortcomings of this approach to learning about a person. The tests performed by Dr. Annis were the Wechsler Adult Intelligence Scale Revised and achievement testing. While these tests may suggest brain damage, it cannot confirm it. (R5-219) Of course, Dr. Annis never even mentioned the possibility of brain damage. His testing was not complete enough to do so. (R5-226)

In addition, it is critical to talk to other experts, family members and to have a complete social history. (R5-220) Mr. Davis acknowledged as much. (R4-38-40) These other contacts are necessary because the information helps to identify the source of brain damage and causation factors for specific events. (R5-220) Dr. Crown testified that relying upon the patient (defendant) to report information in a forensic setting is inappropriate. A forensic evaluation "has to rely on collateral information in order to understand the client and address forensic issues rather than just the pure clinical issues." (R5-224)

This dearth of information had profound consequences in Mr. Jones case. Mr.

Davis knew from the beginning of his representation that the State wanted a death sentence, in large measure because the victim, Ernie Ponce de Leon, was a Tallahassee police officer killed in the line of duty. The trial judge found five aggravating factors; this Court ultimately approved four of these. This Court found that the aggravating factor of taking the police officer's gun, although "technically an armed robbery, was only incidental to the killing, not the reason for it." Jones v. State, 580 So. 2d 143, 146 (Fla. 1991)

Defense counsel, Dr. Annis and Mr. Jones' jury failed to consider the following mitigating evidence: mother's alcoholism, mother's alcohol intake during pregnancy, mother's abandonment of Mr. Jones and repeated incarcerations for child neglect, extreme violence between parents, genetic predisposition to mental illness (e.g. maternal grandfather, mother, Mr. Jones' son Antwan), brother Michael shot in gambling dispute, brother Theodore stabbed to death in house by sister Audrey, effects of AIDS, organic brain damage, impulsivity, poor school performance, dysfunctional family, lack of role models, mental retardation, difficulty in higher order thought processes, early onset of alcoholism, drug abuse and addiction, intoxication at the time of the offense, and impoverished childhood. In this case, counsel could have done a great deal to sway the jury's recommendation from death to life. The evidence presented at the post-conviction hearing established numerous recognized mitigating

circumstances, both statutory and nonstatutory. This evidence was entirely unrebutted by the State.

The testimony of Doctors Crown and Toomer established the existence of two statutory mitigating circumstances. Both doctors testified that Mr. Jones' offense was committed while Mr. Jones was under the influence of extreme mental or emotional disturbance. See section 921.141(6)(b), Fla. Stat. Further, both doctors testified that Mr. Jones' capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of law were substantially impaired. See section 921.141(6)(f), Fla. Stat. This evidence was not rebutted by the State at the evidentiary hearing. Yet Mr. Davis failed to even ask Dr. Annis whether these or other statutory mitigating circumstances existed. Mr. Jones was clearly prejudiced because confidence in his death sentence is undermined.

The expert's testimony also established that Mr. Jones suffers from organic brain damage, a recognized nonstatutory mitigating factor, See State v. Sireci, 536 So. 2d 231 (Fla. 1988), and was abused as a child, another recognized nonstatutory mitigating factor. See Campbell v. State, 571 So. 2d 415, 419 n. 4 (Fla. 1990). The experts also provided a mental health explanation for the tragic turn Mr. Jones' life took because of his dysfunctional home life. As the experts explained, Mr. Jones' impairments -- his organic brain damage, his mental retardation, his dysfunctional

family, his lack of role models, lack of a support network, his drug abuse, mother's abandonment and neglect, multiple violent deaths of close family members -- meant Mr. Jones was particularly susceptible to succumbing to stressors resulting in his inability to appreciate the long term consequences of his actions. Clearly, this explanation, too, establishes valid nonstatutory mitigation: "[e]vents that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

In the context of Mr. Jones' penalty phase, this unrefuted mitigating evidence would have made all the difference. Because Mr. Davis failed to conduct his own independent investigation, he relied exclusively upon the incomplete picture presented by Dr. Annis. For example, Davis informed the jury that Mr. Jones had AIDS but failed to explain in any way the inherent mitigating quality of this disease. As Dr. Scott Folk testified at the evidentiary hearing, AIDS is a disease that attacks the immune systems and is always fatal. The jury was never provided any evidence to show that Mr. Jones already had a death sentence because of this fatal disease. Further, it was never explained to the jury that Mr. Jones would likely contract a variety of opportunistic infections as a result of AIDS. As the expert testified, these infections cause extreme pain and suffering. Yet Mr. Davis failed to present evidence

or argue to the jury that AIDS should be considered a mitigating circumstance like any other tragic disease. Instead, Mr. Davis simply elicited from Dr. Annis the fact that Jones had AIDS. Thus, the horror of this disease was never explained. In fact, Davis' counsel's failure to explain AIDS and the tragic course of this disease may have caused more harm than good. Standing alone, the statement that Mr. Jones has AIDS may have stigmatized him in the minds of the jury. An explanation of AIDS and its tragic effects, however, would have established mitigation.

Unquestionably, a review of the trial court's sentencing order leaves no doubt that Mr. Jones was prejudiced by trial counsel's deficient performance. The judge did not find any statutory mitigating circumstances. Yet the unrefuted testimony of Mr. Jones' experts established the existence of two statutory mitigating circumstances, section 921.141(6)(b) and (f), Fla. Stat. With respect to the mitigating circumstances Section 921.141(6)(b), the trial court stated:

> 2. The defendant contends that the capital felony was committed while he was under the influence of extreme mental or emotional disturbance, but his mitigating circumstance was not established in the evidence, by any standard of proof . . . Dr. Annis did not testify, however, that the defendant Jones suffered from any form of mental or emotional illness at any time during his life, much less at the time of the commission of the capital felony in this case. Therefore the Court has concluded that the mitigating circumstance set out in section 921.141(6)(b) had not been established by the evidence.

(Def. Comp. Exh. 7, item 2, Sentencing Order). Notably, Mr. Davis failed to ask Dr. Annis whether this mitigating circumstance existed. The unrefuted testimony of Mr. Jones' experts during the evidentiary hearing clearly established the existence of the mitigating circumstance. With respect to the mitigator at section 921.141(6)(f), this Court stated:

> 6. There is no evidence to support a finding under Fla. Stat. section 921.141(g)(f) that the defendant Jones' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(Id.). Once again, Mr. Davis failed to even ask Dr. Annis whether this circumstance existed. In contrast, two experts at Mr. Jones' evidentiary hearing not only testified to the existence of this mitigating circumstance, but also explained why this mitigating circumstance existed. Clearly, confidence is undermined in Mr. Jones' sentence of death.

Prejudice also is demonstrated by the trial court's not finding the existence of numerous nonstatutory mitigating circumstances. The trial court was not presented with the tragic circumstances of Mr. Jones' upbringing, his organic brain damage, his history of mental illness, his familial violence, and the effects of AIDS. As a result, this the trial court stated:

> The Court has carefully considered these facts, but the

> defendant's deprived childhood, given its remoteness to the event in question, is hereby rejected as a nonstatutory mitigating circumstance.

(Id.). Significantly, the unrefuted testimony of defense experts established that the events of Mr. Jones childhood had a longstanding and dramatic effect upon him which resulted in adult mental illness, difficulty in higher order thought process, organic brain damage, and lack of impulse control. These experts testified that the events of Mr. Jones' childhood had a substantial impact upon his actions during the time of the offense. As the experts explained, the passage of time in no way diminished the devastating effects of Mr. Jones' deprived childhood. Instead, the passage of time only worsened Mr. Jones' psychological condition.

Dr. Crown detailed at length how the experience of Clarence Jones' childhood affected his development into an adult human being. The developmental process begans in the mother's womb. Maternal nutrition is a key factor. (R5-221) The mother's regular consumption of alcohol during the pregnancy was an inauspicious start to the life of Mr. Jones. (R5-222)

The first two to seven years of a child's life require constant exposure to stimulation and nuturing. (R5-221) Any trauma can derail a child's emotional well-being at this stage. Jones' mother's obvious neglect could have been easily documented by trial counsel, but was not. (R5-222) Without adult supervision, Jones

was dropped on his head a number of times by the other children in the family who had to care for him in the absence of his mother and father. (R5-222)

By the time Jones reaches school age, he is documented as learning impaired. Frustrated, he quits school because he has a problem concentrating and paying attention. (R5-222) Jones turns to drinking and using illegal drugs at an early age, some of it as a result of an odd form of maternal care. These substances had a toxic effect on his brain and is one reason his brain never fully developed. (R5-225)

Because trial counsel failed to do any investigation into Mr. Jones' character, background, and circumstances of the offense, this Court did not have the benefit of all the nonstatutory mitigating circumstances that were established at the evidentiary hearing. As a result, this Court's sentencing order states:

> The facts relating to the defendant's upbringing and family life are relevant in that they provide some explanation for the defendant's conduct in light of his background. However, the Court does not find that these factors rise to the level of a nonstatutory mitigating circumstance.

(Id.). Because this Court failed to find any nonstatutory mitigating circumstances due to trial counsel's failure to investigate, Mr. Jones was clearly prejudiced. As the Rule 3.850 hearing established, testimony from the mental health experts would have irrefutably established the two statutory mental health mitigating circumstances, in addition to numerous nonstatutory mitigators.

Defense counsel's deficient performance undermines confidence in the outcome of Mr. Jones' penalty phase. The testimony of the defense experts would have established substantial statutory and nonstatutory mitigation, which undeniably would have tipped the scale in favor of a life recommendation. See Rose v. State, 675 So. 2d 567 (Fla. 1996) (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented [at the penalty phase]); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unerbutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").

As the Ninth Circuit has noted, a defense attorney has a professional obligation to "1) discover all relevant mitigating evidence; 2) develop a social history based on all available records; or 3) provide [a] mental health expert with all available social

history records." McClain v. Calderon, 134 F. 2d 1383, 1388 (9th Cir. 1998). For instance, McClain's lawyer did not find evidence of "childhood sexual abuse, diagnosed brain damage, multiple head injuries, physical abuse, abject poverty, attempted suicide and lack of treatment . . ." The lawyer for McClain used McClain and two family members to provide family history information. McClain's mental health expert failed to get this information. The lawyer's failure to investigate and thus present important mitigating evidence was found to be prejudicial.

Mr. Davis' trial theory for the penalty phase was not supported by any credible evidence. This was true because Mr. Davis did not make a reasonable effort to discover powerful mitigation. This is not to say this was an easy case to argue in support of saving Mr. Jones' life. The effort expended by Mr. Davis was insufficient to uncover the family history that would help explain Mr. Jones life in a more compelling manner than Mr. Davis' closing argument. In his concluding remarks to the jury, Mr. Davis told them.

> "You know, the next time you talk to a right-to-lifer about probably an early death penalty, think about that. Listen. This probably is a life that never should have been to begin with. But once he's here, we can't weigh him by standard that he has absolutely no concept of." (DR-3510)

A life without value is a life easily extinguished. There was evidence available to explain why Clarence Jones' life had value and how his life ended up as it did. Mr. Davis was ineffective in not digging deep enough to discover the wealth of favorable information lying just beneath the surface.

In Holsomback v. White, _____ F. 3d _____, 11 Fla. L. Weekly Fed. C1001 (11th Cir. January 26, 1998), Holsonback was charged and convicted by an Alabama state court of sodomy. The evidence against Holsomback consisted entirely of the testimony from his ten year old that Holsomback had regularly subjected him to anal intercourse for about five years. The state prosecution offered no medical evidence corroborating this testimony and Holsomback's attorney had been told, prior to trial, there was "no medical evidence of sexual abuse."

At a federal habeas proceeding, Holsomback alleged that his trial counsel had been ineffective for failing to investigate and present to the jury this lack of medical evidence. The district court rejected this claim, determining that all of the trial lawyer's decisions were "tactical" ones. The Eleventh Circuit reversed finding "the decision by Holsomback's trial not to conduct any investigation into the conceded lack of medical evidence of sexual abuse" was unreasonable.

The trial lawyer explained "his decisions not to contact the physicians and not to subpoena the medical records based on his view that there was nothing to be gained

from this line of investigation in light of the prosecutor's concession that there was no medical evidence to substantiate the allegations of sexual abuse." The lawyer testified that he did not interview the medical doctor because

> [i]f I put him on the stand, I'm bound by what he says. On cross examination, if . . .whoever was cross-examining him got him to weasel even a small bit on that element, I would have had to live with it. Since we already had as a matter of fact that there was no medical evidence the child was abused, I did not-it was a judgment call-I didn't feel it would be advisable to run that risk for what potential benefit might come from it.

The lawyer also said he did not try to get records because he figured the prosecutor would have produced anything harmful; in the absence of anything harmful, there was nothing to see. Ultimately, the lawyer thought it was reasonable to simply rely on the lack of evidence.

The Eleventh Ciurcuit characterized the trial lawyer's reasoning as "unpersuasive".

> We find counsel's justification unpersuasive under the circumstances of this case. Had counsel interviewed the doctors, a subsequent tactical decision not to call them might have fallen well within "the wide range of reasonable professional assistance." Strickland, 466 U. S. at 689. Having conducted no investigation into the significance of the lack of medical evidence that Jeffrey had been sexually abused, however, Holsomback's counsel could not have made an informed tactical decision that the risk that the doctors might equivocate on the stand outweighed "what

potential benefit might come from [their testimony]." Because counsel never actually spoke with the physicians, he remained entirely unaware-apart from his speculation that, at best, Dr. Williams would merely corroborate the lack of medical evidence-of whether and to what extent their testimony might have helped Holsomback's case. In these circumstances, we cannot say that counsel's decision not even to contact the physicians as part of his pre-trial investigation ws professionally reasonable. Nor can we say that counsel's tactical decision not to pursue the medical report from Dr. Williams's examination was reasonable. Counsel justified his failure to subpoena the report based on his fear that the report might contain material harmful to Holsomback's defense which the state would be able to use against him were counsel to obtain the report. Because the report was already in the state's possession, however, an effort by counsel to obtain the report could have had no effect on the state's ability to use it against Holsomback. Counsel's asserted fear was thus plainly unreasonable.

Moreover, based on Dr. Molen's testimony at the evidentiary hearings held on Holsomback's first two state post-conviction petitioners, we are also persuaded that counsel's failure to conduct an adequate pre-trial investigation satisfies the prejudice prong of Strickland. Holsomback's own attoney characterized the proceeding as a "one-on-one case" in which the verdict would turn on whose account the jury belived. Noting our agreement with counsel's characterization, we cannot say that medical testimony or other medical evidence calling into question Jeffrey's account of the abuse would not have made a difference in the outcome at trial.

Failure to investigate available mitigation constitutes deficient performance. Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994); Heiney v. State, 620 So. 2d 171

(Fla. 1993); Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989).

Despite the u ncontroverted evidence that Jones counsel did littlr or no penalty phase investigation, the lower court found his performance was not deficient (R2-4). The lower court credited Davis with hiring a mental health expert and offering the testimony of the expert at trial. The lower court excused Davis' failure to ask about statutory mitigating factors by finding that "the expert had told him before hand that he could not testify that those factors existed in the defendant's case." (R2-5)

The trial court missed the point; the reason Dr. Annis could not offer an opinion was because he did not have enough information. It was not that "postconviction counsel [was] subsequently able to locate expert who are willing to say that the statutory mitigators do exist in the present case." Drs. Crown and Toomer did not reach these conclusions in a vacuum. They each explained in detail the steps necessary to reach this conclusion, none of which were done by Mr. Davis and Dr. Annis.

The trial court also confused evidence with argument. Mr. Davis surely did make some of the arguments from which evidence was presented at the post-conviction hearing. The significant distinction was that Mr. Davis had presented no evidence (or

evidence whose only source was Mr. Jones) to support those arguments. In any event, there was a substantial amount of evidence available from collateral sources that would have made the case to save Mr. Jones' life infinately more credible. The trial court did not address the failure of Davis to investigate and present this evidence.

Finally the trial court found that Jones failed to prove that the "additional evidence of mitigation . . . would have made a difference in the outcome of the penalty phase proceeding. ' (R2-7) To this end, the trial court cited five "objective" aggravating circumstances:

> (1) the murder was committed while the defendant was under sentence of imprisonment, (2) the defendant whild the defendant has a prior conviction of a violent felony, (3) the murder was committed during a robbery, (4) the murder was committed to avoid or prevent arrest, and (5) the victim was a law enforcement officer.[2] The sentence was based on an eleven-to-one jury recommendation for death and it was upheld on direct appeal by a unanimous court. See Jones v. State, 580 So. 2d 143 (Fla. 1991).

[2]The supreme court found that the third factor could not be applied because the taking of the officer's service

> revolver was only incidental to the murder. However, the court concluded that reversal was not warranted because the third aggravating factor had been considered collectively with another aggravating factor and because the trial court did not accord the third aggravating factor any independent weight. Jones v. State, 580 So. 2d 143, 146 (Fla. 1991).

(R2-229)

Of course, the subjective aggravators such a cold, calculated and premeditated or heinous, atrocious or cruel, are generally considered the more deadly aggravators. Neither was present in this case. The fact that there is a strong case in aggravation does not mean that there result might not have been different. See Rose v. State, 461 So. 2d 84, 85 (Fla. 1984) (three aggravators) Mitchell v. State, 527 So. 2d 179, 182 (three aggravators). Phillips v. State, 476 So. 2d 194, 196 (Fla. 1985) (four aggravators); Michael v. State, 437 So. 2d 138, 141-142 (Fla. 1983) (three aggravators).

The evidence in mitigation offered during the post-conviction were unrebutted and would have to have been considered by the jury and the sentencing judge. It is surprising that Mr. Jones got even one vote for life; given the mountain of mitigation that the jury could have heard, getting five more votes for life was a real possibility.

II.

THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE FOR USE IN THE PENALTY PHASE

During the post-conviction discovery process, Mr. Jones discovered a three page memorandum written by Gary Bevis of the Leon County Sheriff's Department. In June and July of 1989, Detective Bevis learned of a plan for certain people to escape from the Leon County Jail. (R5-320) One of the people who was going to try to escape was Mr. Jones co-defendant, Irvin Griffin. (R5-320) As part of Bevis' investigation, he spoke with Kevin Eason ,who was a cellmate of Irvin Griffin's at the time. (R5-320)

Detective Bevis' interview with Kevin Eason was reduced to writing in the form of the three page memo. (R5-322) According to the memo, Eason said that first, Griffin admitted to him that Griffin shot and killed officer Ponce de Leon. (R5-322) Later in that same interview, Eason apparently told Bevis that Griffin also said that Jones shot officer Ponce de Leon. (R5-323)

Also contained in this memo was a statement that Griffin wanted the phone number of officer Ponce de Leon's son so that Griffin could tell the son that he (Griffin) killed Ponce de Leon. (R5-328) Mr. Jones name was mentioned only in

passing; Bevis could only "assume" that Griffin was communicating with Jones. (R5-330)

Mr. Eason testified that Griffin said Jones was the shooter. (R5-312) Eason did not remember that Griffin said Griffin was the shooter. (R5-313) In fact, Eason said Griffin never said that (R5-314) and that he never told Bevis that this statement was made. (R5-314) He later said that he did not recall the statement made. (R5-315) Eason never talked with Mr. Jones. (R5-318) Yet, Detective Bevis followed good police procedure by taking notes of the interview with Eason and then reducing the notes to the memorandum. (R5-327) Bevis testified he accurately reported everything Eason told him. (R5-327)

It is not clear whether this information would have been admissible at the guilt phase of the trial. It definitely would be admissible at the penalty phase where hearsay can be admitted. Section 921-141(1), Florida Statutes. Mr. Davis was clear that he had never seen the memorandum authored by Mr. Bevis before. (R5-55) Mr. Davis stated that he would have put the witness "on the stand regardless of what [he] said and use the author of that document to impeach [him]." (R4-57-58)

This evidence is obviously exculpatory as to Mr. Jones sentencing culpability, because the jury recommended death only for the person who actually shot Officer Ponce de Leon. The State presented no explanation as to why this information was not

turned over to Mr. Davis. The State presented no evidence that the memorandum was not suppressed. Bevis' recollection is that the information from Eason was shared with the State Attorney's office. (R5-326-327)

A 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. Bagley, 473 U. S. 667, 674 (1985), quoting Brady v. Maryland, 373 U. S. 83, 87 (1963) See Garcia v. State, 622 So. 2d 1325, 1330 (Fla. 1993)

In Garcia, a co-defendant of Garcia's had told a jailhouse cellmate that the co-defendant had "shot one woman and that the minor, the '17 year old kid,' shot the other two persons." The seventeen year old was a third co-defendant. There were four co-defendants in all and only Garcia was sentenced to death. The central question in Garcia's case was who was the shooter. This scenario was identical to Mr. Jones case; four people arrested for murder, only one gets a death sentence. The determining factor was the identification of the person who fired the shot that killed Ponce de Leon.

In Garcia, the trial lawyer knew about the statement but failed to use them. This Court found that the "failure to seek admission of Yancey's statement during the penalty phase constitutes ineffectiveness . . ." In Mr. Jones case, the error is the failure of the State to disclose the statement. The result should be the same.

CONCLUSION

For the reasons argued in this initial brief, Mr. Jones requests this Court to reverse the lower court's denial of the motion for post-conviction relief and remand with instructions to order a new penalty phase proceeding, including empaneling a new jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this 3rd day of April, 1998 to **Richard Martell**, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

STEVEN SELIGER

CJONESBF.WPD