IN THE SUPREME COURT OF THE STATE OF FLORIDA

RONNIE LEE JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

Case No. 91,014

On Appeal from the Circuit Court of Dade County, Florida
Case No. 80-12103

INITIAL BRIEF OF APPELLANT RONNIE LEE JONES (CORRECTED)

Alan F. Wagner
Florida Bar No. 374105
WAGNER, VAUGHN & McLAUGHLIN
601 Bayshore Boulevard
Suite 910
Tampa, FL 33606
Phone: (813) 223-7000

Sylvia H. Walbolt
Florida Bar No. 033604
Chris C. Coutroulis
Florida Bar No. 300705
Robert L. Ciotti
Florida Bar No. 333141
Darren R. Latham
Florida Bar No. 961280
CARLTON FIELDS
Post Office Box 2861
St. Petersburg, FL 33701
Phone: (813) 821-7000

Attorneys for Appellant
Ronnie Lee Jones

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

OTHER AUTHORITIES **PAGE NO**

PRELIMINARY STATEMENT

In this appeal, the following abbreviations of special terms will be used:

"R." refers to the current record on appeal.

"R-1." refers to the transcript of the record on appeal of the direct appeal of this cause in the Supreme Court, Case No. 64,424, in 1983. Each R-1. designation is followed by the volume and page number.

"R-1 Supplemental Record" refers to the supplement to the record on appeal of the direct appeal of this case, filed on March 14, 1983.

"R-2." refers to the transcript of the record on appeal of the 1985 summary denial of the defendant's 3.850 motion in the Supreme Court, Case No. 80-12103.

"T." refers to the trial transcript (volumes I-IX) from the underlying trial and sentencing proceedings (dated October 20-23, 27-30 and November 1-2, 1981). The trial transcript begins at page 739 of R-1. The court reporter's page designations, instead of the R-1 page number, will follow each T. designation.

"H." refers to the transcript of the Evidentiary Hearing of February 18, 1997.

"A." refers to the volume, document (by number), subpart of the document, where necessary (by tab number), and pinpoint page numbers, where appropriate, of the Appendix to this brief where designated items can be found. (E.g., A. III-28 at 2; A. I-1).

Appendix Vol. VI (A. VI) contains all of the filings that are subject to the defendant's pending motion to supplement the record, which motion is not opposed by the State.

All emphasis is supplied unless otherwise indicated.

INTRODUCTION

Jones was indicted for first degree murder.[1/] He represented himself during critical pretrial proceedings, during trial, and during sentencing. He was convicted and sentenced to death, although one member of the jury recommended a life sentence. (T. 1104-05, 1235-36; A. III-27). The conviction and sentence were affirmed by this Court. Jones v. State, 449 So. 2d 253 (Fla. 1984), cert. denied, 105 S.Ct. 269 (1984) ("Jones I").

Thereafter, newly-appointed counsel for Jones filed a 92 page motion under Florida Rule of Criminal Procedure 3.850, raising a number of different issues, including competency to stand trial and prosecutorial misconduct at trial. (A. II-1). Circuit Judge Maria Korvick summarily denied that motion the day after it was filed, without holding any evidentiary hearing. (A. I-2-84; R-2 393). This Court reversed and directed the circuit court to hold an evidentiary hearing. Jones v. State, 478 So. 2d 346 (Fla. 1985) ("Jones II").

Before any response was filed by the State to his 3.850 motion and before any hearing was held, Jones, now represented by the undersigned, newly-appointed counsel on a pro bono basis, amended his 3.850 motion, primarily to update the authorities relied on and expand upon the claims asserted in the original motion. (A. II-2). The amended motion also asserted additional

---

[1/] Jones was indicted and convicted of other charges stemming from the same incident. While this brief speaks of the homicide convictions and death sentence, the other charges are challenged for the same reasons set forth in this brief.

grounds for relief. Judge Korvick subsequently held an evidentiary hearing, which she limited to the competency issue only. She specifically refused to consider any of the other issues presented by either the original 3.850 motion or the motion as amended, and she refused to allow any proffer by the defendant's counsel on those issues. (H. 425-26, 429-31).

Thereafter, Judge Korvick denied the 3.850 motion, without making any findings of fact or conclusions of law. (A. I-5; R. 552). She did so despite a record establishing that:

- no medical professional examined Jones in 1981 for competency to stand trial;
- the only doctor who examined Jones in 1981 made only a very narrow evaluation as to a single mitigating factor, not an evaluation of the competency of Jones to stand trial;
- there was no retrospective medical examination that resulted in a finding that Jones was competent to stand trial in 1981;
- instead, the only expert testimony on the issue of the competency of Jones at the time of trial in 1981 was, unequivocally, that he was not competent to stand trial; and
- the State's sole expert witness concluded that a retrospective determination of competency could not be done in his field and hence gave no opinion whether Jones was competent to stand trial in 1981.

Ignoring all this, Judge Korvick orally stated her belief that if there were any reason for concerns about the defendant's competency, the lay people at the trial would have brought this to her attention. (H. 394-400). This ignored, however, that the only lay people who were involved in the 1981 trial and testified at the hearing directed by this Court frankly acknowledged that

they did have concerns about his competency in 1981. (H. 55-60, 185-86, 290).

The facts pertinent to this appeal are as follows.

STATEMENT OF THE CASE AND FACTS

1. The State's improper conduct at trial.

During jury selection at the 1981 trial, the State informed Judge Korvick that Criminalist Robert Hart had submitted his ballistics report approximately one year before--in August or September of 1980. (T. 63-64). In that report, Hart concluded that "[d]ue to a lack of similar individual characteristics, . . . it is the opinion of this examiner that the identifiable evidence projectiles were probably not fired in either of the submitted revolvers." (A. III-28). One of those submitted revolvers was the gun found with Jones when he was arrested. (A. III-28).

In spite of the State's knowledge that all eight of the bullets found at the crime scene that could be tested did not have similar characteristics to those test-fired from the gun found with Jones at the time of his arrest and were "probably not" fired from that gun (A. III-28), the State nevertheless made that gun a centerpiece of its case. First, the State proceeded to elicit repetitive testimony from witnesses who had seen Jones on the day of the murders with a gun like the one found with him after his arrest and from witnesses who found that gun under his pillow after his arrest. (See, e.g., T. 145, 215-17, 275-78, 280, 430-41, 521-22, 546-50, 745-46). To convince the jury that

this gun was the murder weapon, the State also called two police officers to testify about its uniqueness. (T. 521-22, 802-03).

Then, the gun found with Jones when he was arrested became the focus of the State's closing argument. The State told the jury that every witness who could testify was called (T. 1013) and that the witnesses had described that gun as rare (T. 1011-12). The State further declared that "[a]ll of the witnesses have come in and testified and told you this is the gun that was used." (T. 1011, 1024). The State asked the jury "was there anybody else in this case who was found with a six inch .357 magnum the very next day exactly fitting the description of every witness"? (T. 1050).

In fact, all of the witnesses had not told the jury that the gun found with Jones at the time of his arrest was "the gun that was used" in the murders. Moreover, every witness who could testify on this question was not called, as the State well knew. Indeed, the witness with the greatest expertise and the most significant information on the question--ballistics expert Hart--was never called to testify at trial. Nonetheless, the State made that argument to the jury, even though the State knew that its own ballistics expert (i) had specifically concluded the gun found with Jones at the time of his arrest was "probably not" the murder weapon because it did not have similar characteristics to the murder weapon, and (ii) had not been able to conclude whether the bullets recovered from the crime scene were fired from a .38 caliber or .357 caliber weapon and could not determine outwardly

visible characteristics of the weapon such as its color or barrel length. (T. 1011-12, 1024; A. III-28).

Jones pointed out the hole in the State's gun evidence theory in his closing argument, noting that the State had presented no ballistics evidence tying his gun to the recovered bullets. (T. 1026-27, 1032, 1035). In rebuttal, the State responded to that argument by simply lying to the jury; Assistant State Attorney Laeser affirmatively declared that the reason a ballistics expert was not called to testify whether the bullets recovered from the crime scene matched the defendant's gun was because whether, "hit by a hammer, run over by a truck, fired out of a gun, a cannon, sat on by five heavy people... the bullets in this case are just flattened pieces of nothing." (T. 1038). This statement was false and directly belied by the ballistics report that the identifiable bullets recovered in this case had been tested but did not have "similar characteristics" to the defendant's gun and "were probably not fired" from his gun. (A. III-28).

Despite its knowledge of its own ballistics expert's findings and despite the absence of any evidence that "the bullets in this case [were] just flattened pieces of nothing," the State made the arguments described above in its closing arguments at trial. The State again focused on the gun found with Jones in its arguments at the penalty phase, asserting that "logic tells you that the defendant's acts were acts of cold, calculated premeditation; that after he decided what he was going

to do, he just went ahead with that .357 magnum firearm and did it." (T. 1226). In his 3.850 motion, Jones asserted that, by advancing these arguments to the jury, the State was able to improperly influence the jury by an argument that was false and not supported by the evidence. (A. II-1-90-93).

In the amended 3.850 motion, Jones also raised the egregious prosecutorial misconduct regarding the fingerprint evidence. Argument Point Two below details the gross distortions and complete mischaracterizations of that evidence to the court and jury about that evidence.

2. The defendant's lack of competency.

Judge Korvick allowed Jones to go to trial in October, 1981, without counsel, after Jones insisted that he would have no attorney other than Ellis Rubin and that he was "ready to go to trial by myself." (R-1 IV-652). No competency evaluation was made by a medical professional, and no evidentiary hearing was held to determine if Jones was competent to proceed to trial and to waive his right to counsel in this capital case. This was so even though just a few months earlier, in June, 1981, the State had requested Judge Orr, the then-assigned trial judge, to appoint a psychologist to conduct a competency evaluation (R-1 IV-624) and had on numerous other occasions voiced its concerns about the defendant's competency to represent himself at trial. (R-1 III-607, R-1 IV-622, 624, 662, 665, 670-71).

Nevertheless, after Judge Korvick was assigned to the case, the State failed to inform her of its pending request for a

competency evaluation. Instead, in a complete reversal from its previously stated position and without the benefit of any competency evaluation, the State told Judge Korvick there was nothing to indicate that Jones was incapable of representing himself. (R-1 IV-732). Further, in urging that Jones was capable of proceeding to trial, the State represented to Judge Korvick that Jones had personally filed a number of pleadings. (R-1 IV-732). By this argument, the State erroneously implied to the court that Jones was himself the author of those motions.

The assertion that Jones was the author of his motions was contrary to the facts known by the State and contrary to what the State had previously represented. Almost four months before that hearing before Judge Korvick, the State had responded to an inquiry from Judge Orr by advising him that an inmate at the Dade County jail was writing all of the motions filed by Jones, thereby making it clear that the court could not rely on these motions as an indication of the defendant's competency to represent himself. (R-1 Supplemental Record-B-7).

Less than five months after the State had asked the court to order a competency evaluation for Jones, the trial proceeded with Jones representing himself. At trial, "advisory" counsel James Wilson (now a circuit judge) sat in the back of the courtroom; he did not render any legal advice to Jones during the trial since he had no information about the case and had done no work on the case. (H. 287-88). Instead, Wilson "read two novels" during the trial. (H. 290). He did observe that Jones acted in a "bizarre

manner" during trial and seemed to experience "mood swings," although he does not now remember what caused him to believe that. (H. 289-90).

At the post-trial and pre-sentencing, Jones asked for a psychiatric evaluation before the penalty phase began, and he specifically asked that his records from his psychiatrist at the Lantana Correctional Institute be sent to the court to allow her to determine his competency to stand trial. (T. 1125-28). Judge Korvick directed Jones to make a proffer as to what whose records would prove, a proffer Jones could not make because he did not know what was in them. (T. 1125-26). Then, without receiving any expert evidence and without holding a competency hearing, Judge Korvick declared Jones was "competent to stand trial . . . ," observing he had "appear[ed] to be well oriented and in full capacity of [his] mental faculties' and had engaged in "some very able trial tactics." (T. 1118).

In making that observation, Judge Korvick was unaware that Jones had not himself prepared the motions he had filed in the case. Nor was she aware that Jones was neglecting to introduce significant exculpatory evidence--such as that contained in the ballistics report[2/]--that any competent attorney would have introduced in defense of Jones, or that Jones was neglecting to impeach the State's witnesses with the strikingly inconsistent

---

[2/] Judge Korvick told Jones at trial that he could not use the ballistics report in closing if it was not in evidence, but there is no indication that she had read the report herself. (T. 936, 940).

statements they had given to the police, as any reasonable lawyer would have done. See infra 37.

On the basis of her observation of Jones, Judge Korvick refused to order a competency evaluation, except for a limited examination regarding a single mitigating circumstance (the capacity of the defendant to appreciate the criminality of his conduct or a finding that his ability to conform his conduct to the requirements of law was substantially impaired) and "nothing more." (T. 1158-61).

Consistent with Judge Korvick's order, the appointed psychiatrist, Dr. Albert Jaslow, did not perform a competency evaluation in 1981. Instead, he merely conducted a clinical interview to consider the single mitigating factor specified by Judge Korvick. (H. 26-28, 31-32, 43). In doing that interview, he did not perform any specific neurological or psychiatric testing and did not review any of the medical records of Jones. (H. 31-32). Further, he did not consider any of the factors he would have been required to consider were he conducting an evaluation of competence to proceed under Florida Rule of Criminal Procedure 3.211. Id.

This Court affirmed the conviction and sentence. Jones I. In doing so, it specifically held that the waiver by Jones of his right to counsel was knowing, intelligent, and competent. However, no issue had been raised as to his competency to stand trial, and that issue was not addressed by this Court. Nor was

the evidence that was subsequently presented with his 3.850 motion presented to the Court on direct appeal.

In preparation for clemency in 1985, a comprehensive mental health evaluation of Jones was requested. The court granted the request to provide costs to A.T. Stillman, M.D., a psychiatrist, and Jacqueline Orlando, Ph.D., a licensed psychologist, finding the requested evaluations to be "necessary for the effective representation of Defendant Ronnie L. Jones in his application for Executive Clemency." (A. III-1). Both of these professionals evaluated Jones, as did Barry M. Crown, Ph.D., in 1985. The results of their evaluations were starkly consistent: Jones suffered from organic brain damage. The repeated blows to the head he suffered during boxing, the hematoma after a head gunshot wound, and the heavy and continual substance abuse such as freebasing cocaine all worsened his condition. (A. III-4 at 8 ¶1; see also, A. III-5-at 4 ¶3; A. III-6 at 5 ¶4). Stillman and Crown specifically concluded that Jones was insane and incompetent at the time of the offense and the subsequent trial. (A. III-3 at 5; see also, A. V-1-C at 233, line 8, A. V-1-C at 234 line 4).

On October 30, 1985, then-appointed counsel for Jones filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. The motion raised a number of different grounds, including prosecutorial misconduct and lack of competency to stand trial in 1981. (A. II-1). The voluminous evidence filed in support of the competency ground of that motion

included the reports of Doctors Stillman, Orlando, and Crown setting forth their conclusions based on their 1985 evaluations of Jones regarding his organic brain damage, as well as the affidavits of three attorneys, who were appointed to, but ultimately did not, represent Jones, setting forth their concerns about his mental competency at the time of trial. (A. III-2-10).

In addition, the motion included the defendant's childhood hospital records evidencing the diagnosis of "battered child syndrome" and a later gunshot wound to the head. (A. III-13, 15, 16). It also included evidence of his chronic addiction to a variety of drugs and his experience as an amateur boxer with the inevitable blows to the head. (A. III-4, 5, 6, 20). Finally, it included the affidavits of two of his sisters setting forth the physical and psychological abuse Jones suffered in the home and the fact that Jones had been mentally slow as a child. (A. III-17, 18).

The State opposed the 3.850 motion filed by Jones by simply asserting that Judge Korvick could ignore all the new evidence of incompetence submitted with the motion and could rely instead on her own lay recollection of Jones at trial. (A. I-2-30-32, 69, 72-75). On October 31, 1985, after a five minute on-the-bench review of the 92-page motion and 28-exhibit appendix--filings which had just been presented to her--she summarily denied the motion, without holding an evidentiary hearing and without making any findings of fact or conclusions of law. (A. I-2-84; R-2. 393). Following an expedited review, this Court reversed Judge

Korvick's denial of the motion and remanded for an evidentiary hearing. Jones II.

On February 18, 1997, at this Court's direction, Judge Korvick commenced a collateral, Rule 3.850 evidentiary hearing. Although this Court had reversed her order denying the defendant's 3.850 motion entirely,[3/] Judge Korvick limited the hearing, as well as her consideration of that motion, solely to the issue of the defendant's competency to stand trial in 1981. (H. 425-26, 429-31).

At this hearing, Dr. Jaslow testified regarding his limited examination of Jones in 1981 with respect to a single mitigating factor. (H. 24-25). Dr. Jaslow had no recollection of his interview with Jones but declared he had "put down everything that I felt is important" in his report. (H. 26-28). Although he did not note "any type of major mental disorder" in his report (H. 36), he candidly acknowledged that he did not do a "competency to stand trial evaluation" because that is not what he was asked by the court to do. (H. 30-31). He further acknowledged that an examination for competency to stand trial generally is broader, more detailed than an examination as to a particular mitigation factor such as he had done. (H. 30).

[3/] While this Court's decision noted that the "gist" of defendant's 3.850 motion was his competency claim, the Court did not affirm Judge Korvick's summary denial on the other grounds of the motion or in any other way indicate that denial was proper. Jones II. Nor could this Court have done so, since Judge Korvick did not to attach any portions of the file or record that would support such a summary denial, as required by Rule 3.850.

Jaslow's report did not reveal that any psychiatric or neurological tests, which would have disclosed organic brain damage were given by him; instead, he merely had a "clinical type interview" with Jones. (R. 98-101; H. 26-28, 31-32, 43). Nor does it reflect any review of the defendant's medical history. Although Jaslow acknowledged that physical abuse as a child, a gunshot wound to the head, and a boxing background (all of which were true for Jones) could all play a role in determining competency, none of these matters are discussed in his report. (H. 28-31). Importantly, Jaslow gave no opinion as to the competency of Jones in 1981 to stand trial. (H. 30-31).

Martin Nathan testified regarding the trial court's request that he represent Jones in this case. After meeting with Jones personally, Nathan concluded that Jones would not be able to help in his defense because of his "paranoia" about "the system and everybody being out to get him," and Nathan accordingly refused the representation. (H. 55-56, 58-60). Had Nathan accepted the representation, he would have requested a competency evaluation. (H. 57-58). Attorney Joe Kershaw, who also interviewed Jones before declining to represent him, similarly testified that he would have requested a competency evaluation had he represented Jones and seen the same pattern of behavior. (H. 185-86). Like Wilson, however, who observed the defendant's "bizarre" behavior at trial, neither Nathan nor Kershaw raised their concerns with Judge Korvick at the time. (H. 57, 185-87; A. III-9, 10).

Samuel Fuller was a cell mate of Jones. (H. 210). He testified that, from the "first day [Fuller] met [Jones] he acted strange." (H. 212). Jones did not know "what was going on" and was not "in touch with reality." (H. 213). When asked if Jones had an understanding of the legal process and what was going on in his capital trial, Fuller responded "Ronnie Jones is brain dead." (H. 217). Jones "doesn't understand anything about the legal system," and he could not "deal with reality or what was going on in this case." (H. 217). Fuller and other inmates prepared the pre-trial motions filed by Jones and helped him attempt to deal with the legal system. (H. 213-17, 221-23).

Dorothy Haynes, the older sister of Jones, testified about the abuse and physical violence that pervaded their childhood. (H. 190-92). Their mother would beat them with a knotted water hose, electrical extension cords, and the like, while dressed only in her panties and bra. (H. 190). Their father likewise used to beat Jones and also sexually molested Jones as well as his sisters. (H. 193-194). Haynes further explained that Jones was "very slow" as a child. (H. 199-200). As he grew older, he began to use drugs, which he was using at the time of trial, even though he was in jail. (H. 204-205, 207). Finally, she recounted that Jones told her that attorney Eugene Zenobi "was out to hurt him, to get him." (H. 206). Jones refused her advice to have Zenobi represent him at trial, declaring Zenobi was "going to try to railroad" him. (H. 207).

Dr. Dudley is an M.D. psychiatrist who divides his private practice between "standard psychiatric practice" and "forensic work." (H. 61). He is Board Certified in Psychiatry by the American Board of Psychiatry and Neurology; he is an examiner on the Psychiatry Board; and he is an Assistant Professor of Psychiatry at New York University School of Law. (H. 62). He has testified as an expert in the field of psychiatry for both the prosecution and the defense, and he has been appointed by courts to testify. (H. 62-63).

Dudley testified at length concerning his examination of Jones in December 1996 and January 1997. (H. 66, 68-70). The focus of his psychiatric evaluation was "what could be said if anything about [the defendant's] status in 1981." (H. 66-67). He reviewed the Rule 3.850 motion and the materials filed with it. (H. 67, 81, 90). Among other things, he reviewed medical records, school records, prison records, trial records, and affidavits of family members and others who knew Jones. (H. 67-68). He also interviewed some family members. (H. 67). He met twice with Jones himself, to conduct a mental status examination. (H. 69).

Dudley further reviewed the 1985 reports of Doctors Stillman, Orlando, and Crown, and the 1991 report of Dr. Weinstein, a psychologist retained by the State in 1991, when it appeared the 3.850 hearing might be held at that time. (H. 67-68). Dudley also considered Jaslow's notation in his 1981 report that there was nothing to suggest Jones had a major mental

disorder; however, Dudley emphasized that Jaslow did not conduct a mental status examination by which he could have uncovered the "cognitive defects" disclosed by the examinations given by Dudley. (H. 141-42).

Although noting the difficulties of a retrospective competency evaluation, Dudley concluded that Jones had cognitive deficit in 1981 as a result of organic brain damage and was suffering from a delusional disorder as well as from the effects of chronic and acute poly-substance abuse. (H. 70, 102-03, 135-36). In his opinion, Jones suffered at that time from "a delusional disorder paranoid type which is a major psychiatric disorder and therefore paranoia in the clinical sense." (H. 84). This "compelled his behavior in a variety of ways, including not communicating with his attorney and ultimately discharging his attorney." (H. 85, 148-49, 157-59). Continued use of drugs throughout the course of trial would exacerbate the problem.[4/] (H. 91-92).

In Dudley's opinion, it is "highly probable," within the degree of medical certainty, that Jones was not competent at the time of trial in 1981. (H. 95-96). In rendering that opinion, he considered all of the factors specified in Florida Rule of Criminal Procedure 3.211(a)(2)(A) as it existed in 1981 for determining competency to proceed to trial. (H. 95-102). His

---

[4/] The uncontradicted evidence established that Jones was using a variety of drugs at the time of trial, notwithstanding his incarceration. (H. 204-05, 207-08).

opinion would not be affected if he limited his consideration to the six factors currently specified. (H. 101-02).

Dudley further testified that the 1985 reports of Doctors Stillman and Orlando were "confirmatory" of his conclusions, since the findings of both were consistent with organic brain damage. (H. 90, 121). In particular, Stillman, who was the only medical doctor to have examined Jones for competency in this case besides Dudley and who did so in January, 1985, just over three years after the trial, found organic brain damage and incompetency to stand trial in 1981, just as Dudley found. (H. 90, 119). Thus, there is an uncontradicted and unbroken chain of medical testimony, spanning the post-conviction era of this case, that Jones had organic brain damage and was not competent when he stood trial.

Without objection by the State, Dudley also addressed the competency of Jones to waive counsel in 1981. (H. 148-49). In his opinion, Jones had a "delusional . . . belief that lawyers selected by the court would be part of this plot against him." (H. 149). The very fact Jones thought that his insistence on his right to select the counsel to be appointed to represent him "would eventually result in the appointment [of that attorney] was part of his inability to really understand and grasp fully the process despite the judge saying whatever the judge was saying at the time." (H. 149).

Neither Dr. Stillman, now deceased, nor Dr. Orlando testified at the competency hearing regarding their respective

evaluations of Jones in 1985.[5/] However, Dr. Crown testified regarding his 1985 evaluation of Jones. (H. 231-61). Crown is a psychologist who is a diplomate of the American Board of Neuropsychology, the highest level of recognition that a neuropsychologist can obtain. (H. 225, 227). He is also a Certified Forensic Evaluator. (H. 228). He evaluated Jones in April 1985 to determine whether Jones had brain damage. (H. 230).

Based on Crown's examination, which included the administration of a group of neuropsychological tests in order to assess the relationship between brain function and behavior, he concluded within a "reasonable degree of certainty" that Jones was not competent in 1985 to stand trial, had the trial occurred then. (H. 231-33). As Crown explained, Jones understood the charges and potential penalties but he had "only a limited" appreciation of "the adversary nature of the legal process" (H. 233); among other things:

> He did not have the capacity to disclose to an attorney the pertinent facts surrounding the offense. He did not have an ability to relate to an attorney. He did not have an ability to assist an attorney in planning a defense, and he did not have a capacity to realistically challenge prosecution witnesses. He didn't have the capacity to testify relevantly.

[5/] Portions of Dr. Stillman's deposition were relied upon by the State. (H. 126-27, 319). Nevertheless, Judge Korvick denied the defendant's request that she consider this deposition in its entirety. (H. 319)

(H. 233). Crown also opined that Jones did not have the ability to consult with counsel with a degree of rational understanding. (H. 233-34).

Finally, Crown concluded that Jones did not have "a rational as well as a factual understanding of the pending proceedings in 1981." (H. 233-34). In Crown's opinion, Jones had chronic brain damage as a result of a gunshot wound to his head, his years as a Golden Gloves boxer, and his years as a poly-substance abuser. (H. 234-35, 240-42). It is "more likely than not that he was impaired and did have organic brain damage in 1981" and "was not competent in 1981." (H. 242-43). Use of drugs at the time of trial would have "exacerbated" his condition. (H. 243).

Dr. Weinstein, a psychologist, was the only mental health professional called by the State. In anticipation of the evidentiary hearing ordered by this Court, he had conducted tests on July 2nd and 3rd of 1991 to determine if Jones had brain damage. (H. 266). He took no personal or family history from Jones, and all of his information at the time of his examination came from the State. (H. 321). While Weinstein speculated, over the defendant's strong objection (H. 312-13), that Jones was attempting to manipulate the testing,[6/] he acknowledged that the IQ test showed Jones was "borderline" "mentally retarded." (H. 324). However, based "exclusively" on Weinstein's examination, he found no "evidence of brain damage of a

---

[6/] Although Judge Korvick allowed Weinstein to offer this view, she repeatedly refused to allow the defendant to inquire of his witness--Dr. Crown--on the same point. (H. 236-37, 258-60).

significant degree" in 1991. (H. 315-16, 321). At the same time, he admitted that he was not saying there is "no possibility there is any form of diffuse brain damage whatsoever." (H. 315, 327).

Weinstein further testified that after the initial two years following a trauma causing diffuse organic brain damage, he "would not expect any further decline or any further significant improvement." (H. 310). But he admitted that "to some extent" "brain damage get[s] better over the years" and one "recover[s] from brain damage, physical brain trauma. (H. 316). Thereby, he admitted that whatever conclusions he drew from his non-medical, non-physiological testing in 1991 regarding possible diffuse organic brain damage, they would not necessarily reflect the severity of brain damage existing ten years earlier in 1981.

Most importantly, Weinstein candidly acknowledged that he had made no findings as to the competency of Jones to stand trial in 1981. (H. 326). Indeed, he opined that "it's . . . outside of the skill of experts in [his] field" to go back retrospectively to 1981 and determine competency. (H. 311). Hence, his examination in 1991 could not give him a "true answer" as to the defendant's competency at the time of trial in 1981. Id.

Moreover, even as to 1991, when he did examine Jones, Weinstein admittedly did not consider whether Jones had the ability to appreciate the charges against him and the range of possible penalties against him, the ability to disclose facts

pertinent to his defense, the ability to manifest appropriate courtroom behavior, or even had an understanding of the adversarial nature of the legal process. (H. 326-27). Nor did he consider the competency of Jones to stand trial in 1991. (H. 327).

The only other witness called by the State was Detective Blocker, who interrogated Jones after his arrest. (H. 329-55). Blocker knew Jones had used drugs just four hours before his arrest. (H. 351; R-1 III-537). He testified he nevertheless saw no unusual behavior that led him to question whether Jones had any "brain damage or mental dysfunction," (H. 334, 336, 340-41), and he made no suggestion that Jones should be evaluated as to competency (H. 355). However, Blocker admittedly had no training on mental health issues, and he could not identify what factors would have led him to suggest a competency evaluation for any prisoner. (H. 349, 353-54).

In argument to the court, Assistant State Attorney Laeser asserted that there was no way to go back now and determine the defendant's competency to stand trial in 1981. (H. 382). He argued that, instead, the "best evidence" in that regard was the recollection of the lay people who were present at the trial. (H. 383). However, there was no <u>testimony</u> by <u>anyone</u> present at the 1981 trial that Jones was competent to stand trial; in fact, all of the evidence that was adduced from such persons was exactly to the contrary. Hence, Laeser was left to argue that Judge Korvick had an "absolute right" to disregard "all" of the

evidence presented at the competency hearing ordered by this Court, including the expert testimony of the defendant's lack of competency in 1981, if that evidence was not consistent with her own 16 year old, lay recollection of what happened during the 1981 trial. (H. 388-89).

Consistent with the State's argument, Judge Korvick repeatedly voiced her belief that someone would have raised the competency issue at the time of trial if there truly were any concern in that regard. (H. 394-400). She specifically referred to attorneys Wilson (now judge) and Kershaw, exclaiming that "they certainly would have spoken up" at the time had they believed Jones might be incompetent to stand trial. (H. 394-97). She also declared that the clerk or other lay employees in the courtroom or Laeser himself would have raised this issue at the time if Jones were truly incompetent. (H. 394, 398).

Of course, Wilson and Kershaw specifically testified that they did have concerns, even though they did not raise them with the court at the time. (H. 185-86, 290). Judge Korvick specially credited these witnesses as responsible, professional attorneys (H. 393-96), but then inexplicably disregarded their uncontradicted testimony at the hearing. Laeser did not testify at all, appearing only as an advocate for the State at the hearing; the record showed, however, that he had specifically asked Judge Orr in 1981 to order a competency evaluation (R-1 IV-624), although he then failed to raise his concerns with Judge

Korvick after she was assigned to the case. None of the other lay people Judge Korvick referred to testified at all.

After repeatedly expressing her doubt that Jones could have been incompetent in 1981 since no one raised any competency issue with her then, Judge Korvick deferred ruling on the issue of competency. (H. 429). However, she orally granted the State's motion to dismiss the amended 3.850 motion. (H. 426). In addition, she refused to consider any of the issues raised in the original motion, other than competency. (H. 425-26, 429-31). She refused even to allow a proffer by Jones on those issues. (H. 430-31).

On May 16, 1997, despite the absence of any testimony, much less any medical professional testimony, that Jones was competent to stand trial in 1981, Judge Korvick entered a one sentence order stating that his Rule 3.850 motion was "denied." (A. I-5; R. 552). She made no findings of fact, nor did she address any of the legal issues raised in that motion with respect to his competency to stand trial in 1981. Id.

SUMMARY OF ARGUMENT

POINT ONE

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). The State deliberately destroyed the fairness of the trial of Ronnie Lee Jones, in clear violation of his constitutional rights, when its prosecutor first egregiously misled the jury throughout the trial with a theory of guilt he knew from the physical evidence to be false and then--not only argued "facts" nowhere in evidence--but blatantly lied to the jury and the court to cover his deceit.

The State knew its own ballistics expert had determined that bullets found at the crime scene "probably" did not come from the unique gun belonging to Jones. Nevertheless, the prosecutor flagrantly continued to mislead the jury--from opening statement to closing argument--by repeatedly referring to the defendant's unique gun as the murder weapon. Then when Jones--who had clearly been unequal to the task of defending himself pro se throughout the trial--used his very last words to the jury to expose the charade with the simple observation of the absence of a ballistics expert; the prosecutor struck his foulest blow. Knowing he would not be corrected since his words would be the last, he sealed the defendant's fate with a sweeping, blatant lie--the bullets from the crime scene could not be analyzed because they were "flattened pieces of nothing."

This egregious conduct by the State destroyed the fundamental fairness of the trial. The misconduct was so severe and so pervasive that the prejudice suffered by Jones was far beyond any harmless error threshold.

POINT TWO

The trial court erred in failing to consider the additional claims asserted in the amendment by Jones to his pending motion for postconviction relief. At the time Jones filed his initial motion, Rule 3.850 provided that no other motion was permitted more than two years after a conviction and sentencing become final. However, this limitation applied to new motions, not to amendments made to pending motions which had not yet been responded to by the State or ruled on by the court.

The trial court erred in refusing to consider an amendment by Jones to his postconviction motion that expanded his existing claim of prosecutorial misconduct with the additional argument that the State sorely misrepresented the fingerprint evidence presented at trial, repeatedly distorting the straightforward evidence and record. This amendment to the original prosecutorial conduct claim was meritorious, should have been considered by the trial court, and on its merits requires vacation of the conviction and sentence.

POINT THREE

A defendant's right to due process strictly limits the use of retrospective competency determinations. Because the record contained no contemporaneous psychiatric evaluation of Jones, the

court was precluded from making a nunc pro tunc determination that Jones was competent to stand trial in 1981. The only constitutional nunc pro tunc finding that could be made based on the evidence presented at the 3.850 hearing was that Jones was not competent in 1981 to stand trial. All of the uncontested evidence in the record before the trial court demonstrated that Jones lacked the competency to stand trial in 1981, and required that the court vacate his conviction and sentence. The State's only medical expert acknowledged that he could not opine as to the competency of Jones in 1981.

Recognizing the absence of any evidence demonstrating that Jones was competent 1981, the State simply argued--in error and just as it had before--that the trial court could ignore all the evidence adduced at the hearing ordered by this Court, in favor of her own 16 year old lay recollection of the defendant's skill in handling his defense of this capital case. That was not a proper basis for a retrospective determination of competency, and the conviction and sentence must be reversed.

POINT FOUR

Four separate attorneys represented or counseled Jones at various times during the guilt or penalty phases of his trial. Each violated his Federal and Florida Constitutional rights by failing to raise their concerns about his competency with the trial court. All counsel who represented, were appointed to represent, discussed representation with, or were assigned to advise the defendant questioned his mental capacity.

Each of these attorneys was ineffective in failing to raise their concerns with the Court and request that a psychiatric evaluation be made. These attorneys had an obligation under the law to both their client and to our criminal justice system to make sure that Jones was not standing trial for first degree murder while incompetent.

This claim of ineffective assistance of counsel was properly before the postconviction court and was erroneously denied without the consideration required by rule 3.850 and this Court's mandate.

ARGUMENT

POINT ONE

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT TO A FAIR TRIAL AS A RESULT OF SERIOUS PROSECUTORIAL MISCONDUCT

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Estelle v. Williams, 425 U.S. 501, 503 (1975). As such, "the Due Process Clause of the Fourteenth Amendment must be held to safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Taylor v. Kentucky, 436 U.S. 478, 485 (1978)(quotation omitted). Simply put:

> one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of that evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

Id.

In applying that principle, this Court has repeatedly recognized that prosecutorial misconduct--whether improper cross-examination or improper closing argument--that attempts to persuade a jury to consider factors not in evidence violates the defendant's due process right to a fair trial as well as his Sixth Amendment right to confront his accusers. E.g., Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). Further, the prosecutor has a duty not to argue to the jury something he or she knows to be false. Id. See also United States v. Universita, 298 F.2d 365 (2d Cir. 1962) (the prosecutor has a special duty not to mislead

and should never make statements he or she knows to be contrary to the truth). The State's improper closing argument here, by which the prosecution not only argued matters not in evidence but affirmatively advanced a devastating falsehood, eviscerated the fundamental fairness of this trial.

1. The State egregiously misled the jury on a critical issue in this case.

During both the trial as to guilt and the penalty phase of this murder trial, the State engaged in patently improper conduct. The State well knew before trial ever began that its own ballistics expert had determined from his examination of the bullets recovered from the crime scene that the defendant's gun was "probably not" the murder weapon. Nevertheless, in a patent effort to suggest to the jury that this gun was the murder weapon, the State proceeded to argue from the outset and to elicit cumulative testimony that Jones had his unique gun with him the day of the murder and the day after the murder. The State repeatedly characterized this gun as the murder weapon.

Then, addressing the defendant's argument that the State had not presented any ballistics evidence connecting that gun to the recovered bullets, the State proceeded in rebuttal closing argument to tell the jury that the State had not presented ballistics evidence because the bullets were "flattened pieces of nothing" and hence no ballistics analysis could be performed. That was a lie.

Reversals based on prosecutorial argument occur even where the argument was simply "improper." E.g., Pait v. State, 112 So.

2d 380 (Fla. 1959); Knight v. State, 672 So. 2d 590 (Fla. 4th DCA 1996). That a blatant falsehood was affirmatively advanced here elevates the impropriety in this case to a level of egregiousness that appears unsurpassed in Florida decisional law. It was of course, a violation of an explicit ethical rule: a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal." Florida Rule of Professional Conduct 4-3.3(a)(1). The Rules also set forth the broader prohibition that a lawyer "shall not . . . in trial, allude to any matter . . . that will not be supported by admissible evidence . . . ." Rule 4-3.4(e). The reason for this proscription is discussed extensively in the case law:

> The rights of parties are to be determined from the evidence. If [counsel] can be permitted to make assertions of facts or insinuations of the existence of facts, not supported by the proof, there is danger that the jury will lose sight of the issue or be influenced by misstatements to the prejudice of the other party.

Watkins v. Sims, 88 So. 764, 767 (1921); see also Silva v. Theresa Knight Nightingale, 619 So. 2d 4, 5 (Fla. 5th DCA 1993); Norman v. Gloria Farms, Inc., 668 So. 2d 1016 (Fla. 4th DCA), rev. denied, 680 So. 2d 422 (Fla. 1996).

Although these prohibitions apply in any case--criminal or civil--they are especially significant in a capital case like this. As this Court emphasized in Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), citing ABA Standards for Criminal Justice 3-5.8 (1980), the injection of improper considerations

before a jury "violates the prosecutor's duty to seek justice, not merely 'win' a death recommendation."

The State plainly violated these proscriptions here. On rebuttal--the last thing the jury heard--the State told an incontestable lie to the jurors about the State's own ballistics analysis, and it told that lie in an effort to persuade them that the defendant's gun was the murder weapon. That lie allowed the jury to reject the defendant's argument that the State had failed to present any ballistics evidence to support its contention that this gun was the murder weapon. Thus, the State's wrongful conduct in this case directly affected the jury's determination of guilt as well as its recommendation of death. Reversal of the conviction and sentence of guilt is therefore required under this Court's controlling precedents.

Emphasizing the ethical obligations of prosecutors, this Court has not hesitated to reverse the defendant's conviction where he "was denied a fair trial by the prosecutorial misconduct that permeated [the] case." Nowitzke v. State. The prosecutorial misconduct there arose from the State's questioning of witnesses in connection with the defendant's insanity defense. That questioning was intended to discredit the notion of the insanity defense as a general matter, and thus improperly focused the jury on an issue that was not before them.

The prosecutorial misconduct was even more egregious here, where the State persistently elicited testimony and made arguments focusing the jury on the defendant's unique gun in an

effort to suggest it was the murder weapon, despite knowing the ballistics analysis was to the contrary, and then falsely told the jury in rebuttal closing argument that there was no ballistics analysis of the bullets recovered from the crime scene. This was not a case of misdirection alone. This was a case where the State deliberately advanced an argument it knew was not supported by the evidence or by the facts.

This Court's decision in Garcia v. State, 622 So. 2d 1325 (Fla. 1993) is particularly instructive. The defendant Garcia was convicted and sentenced to death, and his conviction and sentence were affirmed by this Court on direct appeal. Thereafter, Garcia's 3.850 motion was denied. On the appeal of that denial, this Court reversed, vacated the death sentence, and remanded for resentencing before a new jury.

In Garcia, the prosecutors there told the jury that, in his initial statement to police, Garcia had created a fictitious person, Joe Perez, in order to cover up for his own actions and that, in fact, Joe Perez and Garcia were one and the same. The prosecutors made that argument even though the same evening that Garcia gave his statement, another source (Smith) had given them a statement that one of the other defendants, Urbano Ribas, had told police that his name was Joe Perez and had false identification bearing that alias.

This Court concluded that, in light of the extensive evidence showing Garcia's complicity in the crime, Smith's

statement was immaterial to Garcia's guilt. It was, however, prejudicial to the penalty phase of the case:

> [W]hile the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts. In the present case, there is simply insufficient evidence in the record to sustain the State's argument that Joe Perez was a nonexistent person created by Garcia during questioning. The available evidence shows otherwise--that Perez was a common alias for Urbano Ribas.

The Court went on to declare:

> The case was prosecuted by a team of three state attorneys against Garcia's single appointed counsel. For [that team] to argue on this record that Joe Perez was a nonexistent person created by Garcia during questioning constitutes an impropriety sufficiently egregious to taint the jury recommendation. Once again we are compelled to reiterate the need for propriety, particularly when the death penalty is involved. [citing Bertolotti and Nowitzke].[7/]

Here, Jones had no legal counsel at all at trial, in contrast to the two lawyer team for the State. For the State to argue to the jury on this record that it could not present ballistics evidence because the recovered bullets were "flattened pieces of nothing"--when in truth and fact the State had

---

7/ The State improperly failed to disclose the Smith statement to Garcia. In reversing, however, this Court focused on the improper argument the prosecutors made to the jury, recognizing that the State cannot present improper argument to the jury, even if it has disclosed evidence to the defendant that would reveal the falsity of the argument. The issue is whether the jury was likely misled by the State's false argument.

conducted ballistics analysis on those very bullets--was beyond the pale for a prosecutor who is obligated "to seek justice, not merely 'win' a death recommendation." Bertolotti at 133. While the State was "free to argue to the jury any theory of the crime that is reasonably supported by the evidence," Garcia at 1331, there was no evidence here that the bullets were "flattened pieces of nothing" and thus could not be analyzed by ballistics. The State improperly "subvert[ed] the truth-seeking function of the trial by obtaining a conviction [and a] sentence [of death] based on deliberate obfuscation of relevant facts." Id.

The prosecutor's role is not simply to obtain a conviction, but to obtain a fair conviction. Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) (citing Brady v. Maryland, 373 U.S. 83 (1963)); Berger v. United States, 295 U.S. 78, 88 (1935) (interest of United States attorney is not to win cases, but to see that justice is done; to that end, "while he may strike hard blows, he is not at liberty to strike foul ones."). "Little time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods." Davis v. Zant, 36 F.3d 1538, 1548 (11th Cir. 1994). "Such conduct perverts the adversarial system and endangers its ability to produce just results." Brown v. Borg, 951 F.2d at 1015. As the United States Supreme court observed in Berger, the average juror has confidence that these obligations which plainly rest on prosecuting attorneys are faithfully observed. Thus, "improper suggestions, insinuations, and, especially, assertions of

personal knowledge are apt to carry much weight against the accused when they should properly carry none." 295 U.S. at 88. That is exactly what occurred here.

2. The State's egregious acts prejudiced Jones far beyond the harmless error threshold.

Jones was convicted and sentenced to death, even though the State's evidence was, at best, sparse with regard to who actually killed the victims in this case. The Court's 1984 affirmance on direct appeal noted the evidence that had been offered to link Jones to the crime scene and shootings. That evidence was based in large part on the State's false "distinctive" gun theory:

- "On the late night of July 1, and the early morning of July 2, 1980, seven men were at the home of John Uptgrow." 449 So. 2d at 255.
- Witnesses Anthony McDonald and David Lynch testified that around midnight, two additional men--one identified at trial by McDonald and Lynch as Jones and one unidentified man--were admitted to the home by Uptgrow.
- Lynch and McDonald testified that the man they identified as Jones "removed a concealed firearm from under his shirt." Id.
- Lynch and McDonald testified that the man identified as Jones went into a bedroom with Uptgrow and "within seconds," a shot was heard.
- Uptgrow was found dead in this bedroom.
- Lynch and McDonald testified that after the initial shot was fired they saw the unidentified man--"with no visible weapon"--head toward the bedroom. Id.
- Raymond Fleming testified that he had been in the bathroom when the men arrived, and that as he was attempting to leave the bathroom he saw a man whose shirt color matched the color McDonald identified the gunman was wearing.

- Lynch and McDonald testified that they then fled the apartment and that they did not see anyone fire the shots that killed the other two victims. Id.

- Police witnesses testified that the "distinctive" handgun in evidence had been found with Jones when he was arrested. Id. at 256.

- Lynch and McDonald testified at trial that the "distinctive" gun in evidence that was found with Jones at the time of his arrest "looked like the gun" that the man they identified as Jones had on the night of the murder. Id.

- Lynch and McDonald testified that Uptgrow had a "distinctive" black pouch with money and jewelry. A similar "distinctive" black pouch was found several weeks later in the room that had been occupied by Jones.

- "A fingerprint expert testified that four of defendant's fingerprints were found in the Uptgrow home."[8/]

It is plain from the foregoing that, in the absence of the State's false gun argument, there was no direct evidence that Jones shot any of the victims. Although the testimony of Lynch and McDonald may suggest that the unidentified man did not fire the first shot, the jury (and this Court on review) did not know that the first shot--or any of the other identifiable bullets--was "probably not" fired from the "distinctive" gun found with Jones. Rather, they were led to believe exactly the opposite by (i) the State's reliance on cumulative testimony that the gun in evidence looked like the gun Jones had on the night of the murders and (ii) its blatant lie to the jury on closing regarding the State's supposed inability to perform any ballistics analysis.

[8/] As we will demonstrate in Point Two of this brief, the State grossly misrepresented the fingerprint evidence to both the jury and the court.

The State's desperate attempt to fabricate a physical-evidence connection between Jones and the shootings through its false gun argument (and its false fingerprint argument) may have been motivated by the unreliability of its non-physical evidence placing Jones even at the scene. The various descriptions of the clothing the gunman was alleged to have worn by the three witnesses from the scene were inconsistent in significant ways in their statements to police, depositions, and trial testimony. (A.VI-4, 5, 6, 7, 8, 9; T. 278, 305).[9/] Given those and other serious discrepancies apparent from the face of the witnesses' statements and testimony, the State's false argument regarding the defendant's "distinctive" gun was an obvious tool employed to gloss over any doubts regarding the validity of their identifications of Jones.

Even the most cursory review of the trial transcript makes clear that the State's false gun argument was no mere passing reference. It was a primary theme of the State's case from the start to the end. The gun was prominently on display in the courtroom and was the subject of considerable argument and considerable testimony, including testimony of law enforcement officers "generally regarded by the jury as disinterested and

---

[9/] On August 8, 1996, the State filed a motion to dismiss the 3.850 motion which contained the following statement: "According to Mr. Lynch and Mr. McDonald, the defendant was wearing a white shirt, while the man who came with him was not. (T. 958, 1020)." The Court will not find such a statement from Lynch on either of those pages or anywhere in the transcript. Thus, the State's argument to Judge Korvick that the witnesses who identified Jones all gave consistent testimony is not true.

objective and therefore highly credible. . . ." Perez v. State, 371 So. 2d 714, 717 (Fla. 2d DCA 1979).

In the opening statement, Laeser said:

> when the police went to arrest Jones, they found him asleep at his friend's apartment, spread out on the bed, and right underneath his pillow was a long-barreled, silver revolver; just like the gun that was used the day before in the triple murder at 2139 N.W. 99th Terrace. (T. 145)

Then, during witness testimony, Laeser again and again, with witness after witness, raised the issue of the defendant's gun. (See, e.g., T. 215-17, 275-78, 430-31, 440-41, 521, 522, 547, 745-46, 922, 922, 922, 922, 929-30, 929-30).

In his closing argument, Laeser repeatedly stressed the defendant's gun to the jury. (See, e.g., T. 1011, 1011-12, 1016-17, 1018). Laeser went so far as to tell the jury:

> what I do know is that every single piece of evidence points to the fact that this Defendant fired that firearm. (T. 1019).
>
> Where do we find that firearm? The police didn't drain some lake to find it, like the Defendant told him he might be able to tell them where it was. The very next night after the arrest warrant was issued, the Defendant is lying on a bed on a pillow with his hand under the pillow and this gun in his hand." (T. 1019).
>
> All the witnesses have come in and testified and told you this is the gun that was used. There is in fact no piece of evidence in this case presented in any fashion that indicates to you or should indicate to you that any other person on this earth other than this Defendant committed those crimes . . . . (T. 1024).

Then, in rebuttal, the State responded with an outright lie to the argument by Jones in his closing that the State had failed to present any ballistics evidence. He did so while creating a very colorful--but false--image of the bullet fragments which the jury was sure to remember:

> I don't know if you have any familiarity with firearms or not-- that's one of the things that was left, marks on evaluation about what a ballistics expert is going to be able to tell you, but whether it was hit by a hammer, run over by a truck, fired out of a gun, a cannon, sat on by five heavy people -- I am not trying to be facetious, but the bullets in this case are just flattened pieces of nothing. (T. 1038).

And, he then went on with his gun theme:

> Was there anybody else in this case who was found with a six inch .357 magnum the very next day, exactly fitting the description of every witness? (T. 1050).

Having obtained a verdict of guilty by its false and highly misleading argument to the jury, the State continued to stress the gun in its penalty phase argument:

> Logic tells you that the defendant's acts were acts of cold, calculated premeditation; that after he decided what he was going to do, he just went ahead with the .357 magnum firearm and did it. He went from one to the next and executed them all. (T. 1226).

But the State's "logic" was false and wholly belied by the actual facts established by the ballistics analysis performed by the State's own expert.

The State's pernicious and pervasive false gun argument destroyed the reliability of the verdict. Such prosecutorial misconduct cannot be excused as merely "harmless error" with

respect to the defendant's conviction. Unlike Garcia, where there was "extensive evidence showing Garcia's complicity in the crime," here the defendant's gun was a critical piece of evidence, as the State itself acknowledged by its focus on the gun throughout the trial. Jones attempted in his closing to dispel the erroneous implications of the prosecution's gun theory by noting the absence of any ballistics evidence. At that point, of course, the prosecution had already taken full advantage of the "gift" of the defendant's not introducing the ballistics report. However, the State had no right to take further advantage of this prose litigant by telling a blatant lie in its last words to the jury. The harm and prejudice of that is manifest.

Had the jurors not been falsely told by the State that no ballistics analysis was possible, that certainly would have cast more than a "reasonable doubt" as to guilt. As this Court recognized in State v. Marshall, 476 So. 2d 150, 152 (Fla. 1985), under a harmless error analysis, the court must ask the question posed in United States v. Hasting, 461 U.S. 499, 510-11 (1983): "absent the prosecutor's [misconduct], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" See also United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995) (prosecutorial misconduct that subverts the truthfinding function of a trial is material "if there is any reasonable likelihood that the false testimony could have affected the judgment;" this is equivalent to a "harmless beyond a reasonable doubt" standard).

The answer to that question here is emphatically no. Indeed, the court should not even need to ask that harmless error question here because the rights trampled by the prosecution's egregious misconduct are "so basic to a fair trial that they [should] never be treated as harmless." Smith v. State, 500 So. 2d 125, 128 (Fla. 1986).

Though the misconduct here is so extreme and the harm so pervasive as to mandate reversal, one additional point must be emphasized. Even were the Court to (i) find the State's blatant misconduct did not eviscerate the fairness of the trial under Smith, (ii) reach a harmless error analysis, and further (iii) conclude the misconduct to be harmless on the question of guilt since the jury was charged on a felony murder as well as a premeditated murder theory, the death sentence here would still have to be reversed.

Under the teachings of this Court, there must be evidence of sufficient "culpability to warrant the death penalty." As this Court held in Jackson v. State, 575 So. 2d 181, 190-93 (Fla. 1991):

> [P]articipation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because 'the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen.' Although the evidence against Jackson shows that he was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction

> rests solely upon the theory of felony murder.

See also Hazen v. State, 700 So. 2d 1207 (Fla. 1997) (vacating death sentence on felony murder conviction despite evidence that defendant was armed during commission of robbery and rape).

Consistent with Jackson, this Court, just this month, vacated a death sentence because there was insufficient evidence that the defendant was the actual shooter or that his "state of mind was sufficiently culpable to rise to the level of reckless indifference to human life warranting a death sentence for felony murder." Benedith v. State, 23 Fla. L.W. S303-A (Fla. 1998). The Court made this ruling even though the evidence linked the defendant to a plan to rob the victim of his car, the defendant was with the victim beside the victim's car within five minutes of the victim's murder, the victim's car was seen leaving the parking lot where the victim's body was left, the defendant was no longer seen in the parking lot after the car was driven away, the defendant's fingerprints were on the car, later the night of the murder the defendant was identified as having the victim's car, and within a month of the murder, the defendant was found with the murder weapon. Id. at S303-04.

Manifestly, since the facts in Benedith were insufficient to support a death sentence for felony murder, the facts here could not support a death sentence for Jones in the absence of the State's egregious misconduct. As in Benedith, the record evidence did not establish that Jones was the actual shooter, that he procured the murder weapon for use in the robbery or

possessed it during the robbery, or that he could have prevented the murder. Thus, there was insufficient evidence to support the culpable state of mind requirement and the death sentence would have to be reversed in all events.[10/] Of course, the Court should not reach the merits of the sentence in isolation because, as set forth above, the egregious misconduct of the prosecution compels the reversal of the underlying conviction and the resulting death sentence.

3. The prosecutorial misconduct claim was properly before the postconviction court and was erroneously denied without the consideration required under Rule 3.850.

In his October 1985 3.850 motion, Jones properly raised the State's overreaching and misrepresentations regarding the ballistics analysis. As shown above, this prosecutorial misconduct destroyed the fundamental fairness of the trial. Hence, even putting aside that Jones was not competent to be standing trial in the first place, much less conducting his own defense, his failure to object to the State's wrongful conduct at trial did not waive the issue.

Moveover, a waiver analysis does not even apply in this case. While Jones could have objected at trial to even a true statement by the prosecution about a ballistics report that was

---

[10/] Further, as in Benedith there were two persons who allegedly entered Uptgrow's house, one of whom may have been Jones. With the ballistics evidence showing that the bullets "probably were not fired" from his gun, and with the inconsistencies in the witnesses' identification of the two men, there is a serious question whether Jones--or the other person--was the one who entered with a gun and went to the back room where the shots were heard.

not in evidence, he could not by objection expose the State's actual lie during closing argument about the report's contents. Rather, he had to file the report, which he properly did for the first time with his 3.850 motion. See, e.g., Maharaj v. State, 684 So. 2d 726 (Fla. 1996); Callaway v. State, 642 So. 2d 636 (Fla. 2d DCA 1994), approved, 658 So. 2d 983 (Fla. 1995).

Nonetheless, should the Court even reach waiver, it must reject it because the affirmative misstatement by the State was the type of outrageous and unethical prosecutorial misconduct so "prejudicial to the rights of an accused" that it constitutes fundamental error. Pait v. State, 112 So. 2d at 385 (Fla. 1959); see also Knight v. State, 672 So. 2d 590, 590-91 (Fla. 4th DCA 1996) (finding prosecutorial misconduct when the prosecutor made several references to a witness who never testified, even though defense only objected once at end of state's closing); Aja v. State, 658 So. 2d 1168, 1168 (Fla. 5th DCA 1995) (it was "plain error for counsel to present facts to the jury in closing that have not been presented to the jury in the taking of evidence."); Tuff v. State, 509 So. 2d 953, 955 (Fla. 4th DCA 1987) (prosecutorial misconduct even though defense did not object when prosecution argued facts not in evidence); Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984) (prosecutor's comments during closing arguments on facts not in evidence is prosecutorial misconduct that rises to fundamental error).

Accordingly, this prosecutorial misconduct claim was properly asserted in a 3.850 motion by Jones. Collateral claims

founded on either non-record evidence or fundamental error each are cognizable in a 3.850 motion. See Willie v. State, 600 So. 2d 479, 482 (Fla. 1st DCA 1992) ("A fundamental error may be raised for the first time at any point, including in a post-conviction proceeding."). Because the October 1985 3.850 motion was the first collateral attack on the judgment and sentence, the claim of prosecutorial misconduct was properly raised at that time.[11/] There was therefore no basis for Judge Korvick's summary denial of the prosecutorial misconduct ground of the motion without considering its merits. It both violated the dictates of Florida Rule of Criminal Procedure 3.850 and evinced Judge Korvick's misapprehension of this Court's mandate. Rule 3.850 contemplates three levels of trial court review. In the first level, the court may summarily deny the motion if it is not legally sufficient on its face--that is, if it fails to identify (i) the court that rendered the judgment and sentence under attack, (ii) whether there was an appeal from the judgment or sentence and its disposition, and (iii) whether any previous postconviction motions had been filed, Mitchell v. State, 638 So.

[11/] The amendment to the 3.850 motion--filed after this Court's reversal, and hence nullification, of the trial court's first summary denial of the motion--highlighted the issue of prosecutorial misconduct by placing it under its own heading. However, the earlier-filed motion had explicitly raised that prosecutorial misconduct claim under the rubric of actions by the state and trial court that constituted "fundamental error of constitutional significance." (Original 3.850 Motion at Claim XI; A. II-1). The later amendment with respect to prosecutorial misconduct was, at most, a minor, permissible enhancement of a timely filed 3.850 motion. Brown v. State, 596 So.2d 1026, 1028 (Fla. 1992). See also, pages 49-52, infra.

2d 606 (Fla. 1st DCA 1994), or (iv) fails to allege factual or legal grounds in support of the requested relief. Bright v. State, 257 So. 2d 612, 613 (Fla. 3d DCA 1972).

The original 3.850 motion satisfied these requirements by identifying the trial court, appellate disposition, and the fact that this was his first postconviction motion, and by raising the unintroduced ballistics report, the false prosecutorial assertions to the jury, and their constitutional significance. Thus, the motion was legally sufficient on its face.

In the second level of review, the court may summarily deny a facially sufficient motion only if (1) the court file and records conclusively show that the defendant was entitled to no relief, and (2) the court attaches to the denial the portions of the files or records that conclusively show that lack of entitlement to relief. Otherwise, the court must conduct an evidentiary hearing on the motion. Fla.R.Crim.P. 3.850(d). Here, the trial court originally denied the defendant's motion in its entirety, summarily and without comment, but did not (and could not) attach any portions of the files or records supporting the denial. In fact, the trial court did not attach anything to the order of denial.

On appeal, this Court reversed the trial court's order in its entirety, Jones II, making the trial court's original order denying the 3.850 motion a nullity and leaving the motion pending in full force. See, e.g., Chitty & Co. v. Granthum, 1 So. 2d 725, 725 (Fla. 1941). In addition, this Court directed the trial

court to conduct an evidentiary hearing, the third level of review.

On remand for that hearing, the State contended, and the trial court agreed, that the hearing was limited to the competency issue. However, this Court's order does not contain such a limitation. In fact, this Court reversed the 1985 denial of the 3.850 motion unequivocally--not partially and not affirming any portion--which necessarily reversed that denial as to all grounds that were raised. That is not surprising because it is clear that, in 1985, Judge Korvick had not issued a proper ruling under Rule 3.850 on any of the claims in the motion. As a result of the reversal of that denial, the full 3.850 motion was still pending and had to be addressed by the trial court in the manner contemplated by the rules.

Thus, in addressing the prosecutorial misconduct ground of the motion on remand, the trial court was required under the rules to either (i) hold an evidentiary hearing or (ii) attach portions of the file or records conclusively showing Jones was not entitled to relief on that basis. The trial court erred in doing neither. It also erred in failing to allow Jones to make his proffer on this and other issues raised in his motion at the evidentiary hearing. See Fla. Evid. Code § 90.104(3); Porro v. State, 656 So. 2d 587 (Fla. 3d DCA 1995).

Finally, it bears emphasis that the trial court was compelled to grant a new trial due to prosecutorial misconduct unless the State introduced evidence to rebut its record of

misconduct--which it could not and did not do. The record before Judge Korvick contained the ballistics report, which was unchallenged on its face, and it establishes the falsity of the State's assertions to the jury. There is simply no evidence to support the State's argument to the jury that it did not present ballistics evidence because the bullets were so flattened they could not be tested. Hence, Jones is entitled to a new trial based on this prosecutorial misconduct.

POINT TWO

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE ADDITIONAL GROUND RAISED IN THE DEFENDANT'S AMENDED 3.850 MOTION

1. The trial court erred in refusing to consider the amendment asserting additional grounds for the pending, non-successive 3.850 motion, which amendment was filed when no answer had been filed by State.

When Jones filed his original motion, Rule 3.850 provided that "[n]o other motion" shall be permitted if filed more than two years after conviction and sentencing became final.[12/] By the plain language of the rule, the two-year time limit applies only to successive motions, not to amendments to a pending motion which has not been responded to by the State, much less resolved by the trial court. Generally, cases that involve successive motions arise from defendants who file a second Rule 3.850 motion, alleging grounds for relief previously raised in a prior Rule 3.850 motion, after the trial court had already considered and denied the earlier motion. See, e.g., Foster v. State, 614 So. 2d 455 (Fla. 1992). However, the amendments made by Jones to his pending Rule 3.850 motion were neither successive nor foreclosed by the trial court's prior consideration and ruling on the point.[13/]

[12/] In 1993, the Supreme Court modified Rule 3.850 and 3.851 to decrease the time limitation in which to file the first motion to one year after a conviction and sentencing become final.

[13/] In an abundance of caution, should the Court rule that these claims were not timely presented by the amended 3.850 motion, Jones has also asserted them in the accompanying petition for writ of habeas corpus based on ineffective assistance of appellate counsel, and that same counsel in the post-conviction phase, in failing to assert them earlier.

In Brown v. State, 596 So. 2d 1026, 1027 (Fla. 1992), this Court drew a clear distinction between "other motion[s]" and amendments, stating that "the two-year limitation does not preclude the enlargement of issues raised in a timely-filed motion for post-conviction relief." There, the trial court had summarily denied an amended Rule 3.850 motion that included both amendments to existing claims raised in an initial Rule 3.850 motion and new claims raised for the first time by an amended motion. This Court declined to address the new claims issue, because each of the new claims sought to be raised was procedurally barred for reasons other than the two-year limitation. See Brown, 596 So. 2d at 1027. On the other hand, even though the enlarged and expanded claims were amended after the expiration of the two-year limitation, the Court allowed them to go forward, remanding them to the trial court for an evidentiary hearing. See Id.

This clear distinction between "other motion[s]" and amendments to a pending motion is further demonstrated by the 1993 amendments to Rules 3.850 and 3.851, which permit amendments or supplements to existing motions but do not permit successive motions. Rule 3.851(b)(1) states that, in capital cases, "[a]ny rule 3.850 motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within one year after the judgment and sentence become final." Significantly, however, Rule 3.851(b)(3) states that "this time limitation shall not

preclude the right to amend or to supplement pending pleadings pursuant to these rules."

Florida courts have historically viewed postconviction collateral remedies as civil, not criminal, proceedings. See e.g. State v. White, 470 So. 2d 1377, 1378 (Fla. 1985) (describing Rule 3.850 as an "independent collateral civil action[] governed by the practice of appeals in civil actions"). The civil rules provide for liberal amendment of complaints when no prejudice will be suffered by the opposing party. See Fla.R.Civ.P. 1.190(a); Wilensky v. Perell, 72 So. 2d 278, 280 (Fla. 1954) (liberality in allowing amendments is to be indulged so that fundamental justice is not impaired because of a "technicality").

Because a proceeding pursuant to Rule 3.850 is essentially civil, not criminal, and because Rule 3.850 does not specifically prohibit the filing of amendments, amendments to Rule 3.850 motions should be liberally allowed. As the Third District observed, in relaxing the due diligence prerequisite for error coram nobis relief, "it is better to bend a rule of procedure than to use the rule to convict an innocent person." Malcolm v. State, 605 So. 2d 945, 984-49 (Fla. 3d DCA 1992).

That is especially true in death penalty cases. As the Supreme Court has emphasized, "death is different." Gregg v. Georgia, 428 U.S. 153, 188 (1976). As such, "[a] high degree of certainty in procedural fairness . . . must be maintained in order to insure that the death penalty is administered

evenhandedly." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Justice Kogan has pointedly observed that "we are talking about a man's life here." Spaziano v. State, 660 So. 2d 1363 (Fla. 1995) (Kogan, J., concurring in part and dissenting in part); cert. denied, 516 U.S. 1053 (1996). A defendant whose life is on the line should receive no less consideration than any other civil litigant.

The defendant's pending, non-successive, timely-filed original 3.850 motion had never been answered by the State. The amendment of that motion to assert additional grounds was entirely proper, and justice should not be allowed to be thwarted in this capital case based on a pleading "technicality."

2. The additional ground of prosecutorial misconduct regarding fingerprint evidence was meritorious and required vacation of the conviction and sentence.

As demonstrated in Point One, Judge Korvick erred in her refusal to consider the prosecutorial misconduct ground raised in the original 3.850 motion. As just shown in the foregoing section of Point Two, Judge Korvick further erred in refusing to consider the amended 3.850 motion's assertions of prosecutorial misconduct by the State's misrepresentation of other fingerprint evidence to the Court and to the jury. As we now show, this ground was meritorious and required vacation of the conviction and death sentence for Jones.

The record establishes that 237 "latent" fingerprint "lifts" were collected from the crime scene.[14] (T. 714). Of those, 59 were susceptible to comparison with sets of prints from known individuals, "standards." (T. 705-715). Police investigators compared those 59 valuable latents with known sets of prints for Jones; John Uptgrow and his roommate Anthony Williams (elimination prints); witnesses present at crime scene Anthony McDonald, David Lynch, and Raymond Fleming; and suspect Clyde Facen. (T. 705-715). Only seven of the 59 valuable latents matched the prints of any of the above individuals. (T. 701-707). That meant that the vast majority of the prints, 52 valuable latents, were left by unidentified individuals--not Jones, not Uptgrow or his roommate, not suspect Clyde Facen, and not the other witnesses. (T. 707).

Moreover, of the seven identified lifts, three lifts--containing a total of four fingerprints--belonged to Jones, two to Uptgrow, one to Anthony McDonald, and one to Clyde Facen. Clyde Facen's print was highly incriminating, since it was on the bloody identification card of John Uptgrow found on the back porch of the apartment after the murders. (T. 701-707, 796, 946; Item 15 attached to Motion to Supplement Record filed herewith.) In contrast, the evidence showed that Jones had touched an ashtray, a telephone, and a small ceramic figurine of a cat. (T.

---

[14] Some testimony refers to the number 238, the total number of lifts analyzed, which included one lift not from the scene (a cartridge from the gun found with Jones). Because of this, other references to numbers of prints in the transcript occasionally are off by one.

700-704). That was not surprising since the evidence was undisputed that Jones had been in the apartment the afternoon of the day before the murders.

Viewed objectively, then, the finding of fingerprints of Jones in the apartment was innocuous since he had been there the day before the murders. On closing, however, the State misrepresented and significantly distorted this straightforward evidence, declaring:

> There is only one absolute positive way of proof, that is the Defendant's fingerprints are in . . . John Uptgrow's room. . . . [H]is fingerprints are on the telephone, on the ashtray . . . on those little white cats.
>
> . . . .
>
> There isn't a single solitary fingerprint of anybody inside the apartment other than elimination prints. . . . Any of those other survivors that we have been talking about, we didn't find any of their fingerprints.

(T. 1020-21). That was false. First, there are 52 valuable latent fingerprints of other people besides Jones and the others tested for. Second, the police had found a print of survivor Anthony McDonald.

The State did not stop with this falsehood. It also told the jury:

> His fingerprints are found and <u>identified as much as every other single person who had contact with that apartment</u>. There are a total of nine prints identified. I don't know where the number 60 came from, other than the detective saying that there were 60; of that <u>only nine of those could be identified to a person</u>.

(T. 1043). Wrong again. The testimony established there were 59 valuable latents that could be identified if the standards for "every other single person who had contact with the apartment" had actually been submitted. In reality, only 7 of them were identified because the limited number of standards submitted by the police did not include standards for other, unidentified people--not Jones--who did have contact with the apartment and left the vast majority (52 of 59) of the fingerprints.

After Jones attempted to dispute the State's claims in his closing, the State elevated its misrepresentations on rebuttal:

> There were only eight identifiable prints found inside the house.

(T. 1043). Not true. There were 59 identifiable prints amongst the 216 latents found in the house, the one found on the porch, and the 20 found in the cars parked in the driveway. (T. 713-715; A. VI-2).

Telling the jury that "the fingerprints alone in this case should be enough to convince you that this Defendant was there and committed those homicides" (T. 1044), the State asserted, as if it were fact, that:

> There is no evidence in this case that anybody else's fingerprints who did not live or belong in that house were ever found.

Id. Exactly the opposite. The elimination standards for Jones and the people who lived or belonged in the house did not eliminate 52 of the valuable latent prints. That is evidence there were others in the house.

Finally, the State falsely stated to the jury that:

> There are only four fingerprints that were found of people who did not live in or belong in that house, and all four of those were of the Defendant.

(T. 1049). That argument is especially egregious. Even putting aside the 52 unidentified valuable latents, is the State really suggesting that Clyde Facen belonged in that house? He did not, and his bloody fingerprint on Uptgrow's identification card is critical evidence that the State falsely misrepresented to the jury.

Jones could not have predicted this level of deceit by the State. He (or the inmates assisting him with his motions) had, however, done the simple math: 237 latents - 7 latents = 230 latents unaccounted for. His pretrial request for "Authorization to Retain a Fingerprint Expert as an Expert Witness" in light of that calculation was prophetic:

> In order to adequately cross examine this group of experts of the State's case and develop his own theory of defense, the defendant requests adequate funds to retain a expert in fingerprint examination.
>
> . . . .
>
> The number of fingerprints involved in this incident and the story of each fingerprint may tell to an expert witness, may well be the keys to the defense in this case. At present the defendant is forced to rely on the testimony of the State's witnesses, and due to the nature of this case is unlikely to be unbiased.

(R-1. 155-156).

Judge Orr heard this motion on June 10, 1981, and asked "what is this fingerprint expert gonna show me"? (R-1. 640).

Jones reiterated his desire to "determine what fingerprints other than the defendant's was on the scene of the crime." The State's response was short but false:

> The defendant's fingerprints were at the house, and the report which I have submitted to the prior counsel, Mr. Zenobi . . . indicates that Mr. Jones and his friend's fingerprints were at the scene. <u>There were nobody else's that I am aware of</u>.

(R-1. 641). Nobody else that Assistant State Attorney Laeser was aware of--<u>except</u>, of course, for the 52 other people whose prints could have potentially been matched to the remaining unidentified valuable latents. Based on the State's misrepresentation to Judge Orr, the defendant's motion was denied and he went to trial without the aid of a fingerprint expert. Given the State's false portrayal to the jury of the fingerprint evidence, and its assertion that this alone should cause the jury to convict, the guilty verdict is irretrievably tainted and must be reversed.

Under the Constitutional standards and Florida decisional law set forth in the preceding section, the prosecution's misconduct with regard to the fingerprint evidence eviscerated fundamental fairness of the trial and is so egregious that a harmless error analysis need not even be reached. Further, the prosecution's misconduct regarding the fingerprint evidence could not in any event be dismissed as harmless, especially in light of the evidence not only linking Clyde Facen to the crime, but suggesting that he was the shooter: (i) Clyde Facen's fingerprint was discovered at the crime scene on John Uptgrow's bloody identification card; (ii) John Uptgrow's sister, Karen Burney,

had been told by a black male that Clyde Facen was involved in the shooting, (A. III-13 at 2); and (iii) Randal Willis stated that Facen always carried a stainless steel .357 magnum handgun (Report of Officers Toy and Gaylord, A. VI-14).

The prosecution's egregious misconduct violated the defendant's constitutional rights and materially affected the outcome of both the trial and sentencing. His conviction and sentence must accordingly be reversed.

POINT THREE

THE UNCONTESTED EVIDENCE OF THE DEFENDANT'S LACK OF COMPETENCY TO STAND TRIAL IN 1981 REQUIRED VACATION OF HIS CONVICTION AND SENTENCE.

The test of competency to stand trial is whether the defendant "[had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). By his postconviction Rule 3.850 motion, Jones presented substantial evidence of his incompetence-in-fact to stand trial in 1981, which evidence had not previously been before the trial court.[15/]

Based on that evidence, this Court directed the trial court to hold an evidentiary hearing. Indeed, this Court later emphasized that "the record discloses that Jones had a long psychiatric history and that he made a strong preliminary showing of incompetence." James v. State, 489 So. 2d 737, 739 (Fla.

[15/] On direct appeal, Jones argued that the trial court failed to conduct a proper inquiry regarding his waiver of counsel. This Court held that an appropriate inquiry was conducted and Jones was competent to waive counsel. Jones I. However, the issue of his competency to stand trial was not separately argued to this Court on direct appeal, nor was any record evidence of incompetence to stand trial argued to this Court. Moreover, in affirming the conviction and sentence, the Court did not have before it the extensive evidence of psychiatric history and organic brain damage that was uncovered in preparing the subsequently filed 3.850 motion. As this Court later recognized by its remand in the postconviction phase of this case, Jones II, and as it explicitly stated the following year in Mason v. State, 489 So.2d 734 (Fla. 1986), a lack of trial court error in the first instance does not preclude later consideration of evidence of a defendant's incompetency to stand trial that had not been before the trial court.

1986) (distinguishing Jones as a meritorious "organic brain damage" case); see also, Bush v. Wainwright, 505 So. 2d 409, 410 (Fla. 1987) (noting the "long psychiatric history indicating incompetence pointed to in (Jones II) and Hill v. State, 473 So. 2d 1253 (Fla. 1985)").

The medical and other evidence presented at the hearing ordered by this Court not only confirmed the assertions in the original 3.850 motion and affidavits that this Court had found so compelling, but exceeded them in the depth and scope of their description of the defendant's brain damage and mental impairment. Given that evidence, the constitutional right not to be tried while incompetent entitled Jones to a new trial under well settled principles of constitutional law.

Briefly, those principles derive from the mandate of the due process clause of the Fourteenth Amendment that no state shall "deprive any person of life, liberty, or property without due process of law." It has long been settled that trying a defendant who is mentally incompetent violates the defendant's due process rights. Drope v. Missouri, 420 U.S. 162, 171-72 (1975); Pate v. Robinson, 383 U.S. 375 (1966). Furthermore, the defendant cannot waive this constitutional right: "Although Appellant never requested a competency hearing before he proceeded to trial, this does not constitute a waiver of the trial court's duty to hold a hearing on competency if reasonable grounds exist." Holland v. State, 634 So. 2d 813, 815 (1st DCA 1994) (citing State v. Tait, 387 So. 2d 338, 341 (Fla. 1980)).

"Indeed, the right not to stand trial while incompetent is sufficiently important to permit protection even if the defendant has failed to make a timely request for a competency determination." Cooper v. Oklahoma, 517 U.S. 348, 354 n. 4 (1996); Pate v. Robinson, 383 U.S. at 384.

Because Jones proffered "additional and extensive psychological evidence which may not have been considered" at trial, Mason v. State, 489 So. 2d 734, 735 (Fla. 1986), the trial court was charged on remand with determining whether his "due process rights have been protected through valid evaluations of his competency." Id. However, Judge Korvick, at the urging of the State, ignored the uncontested psychiatric evidence demonstrating that Jones was not competent in 1981 to stand trial. Instead, she appears to have relied completely on her own recollection of the 1981 trial. But that is not a proper basis for a competency determination.

It bears emphasis that this had been the exact basis upon which the State originally urged Judge Korvick to deny this motion. In reversing, this Court rejected the State's characterizations of the record and recognized that the 3.850 motion and accompanying affidavits presented extensive psychiatric history and evidence of organic brain damage that, unless refuted, would establish that Jones had not been competent to stand trial. James v. State, 489 So. 2d at 739 (discussing the Court's seven-months-earlier remand in this case); Jones II. As we shall show, the State did not produce evidence that refused

this prima facie showing of incompetence-in-fact and, instead, relied--just as it had done originally--on its argument that Judge Korvick could disregard all the evidence presented to her if it was not consistent with her own lay recollection of the defendant's demeanor and handling of the trial. But that is not in itself a legally sufficient basis for a retrospective finding of competency.

Moreover, before reaching the substance of the competency issue, the trial court was required to--but did not--first determine whether it could even make a retrospective determination of competency that would be sufficiently reliable to protect the defendant's due process rights. Mason v. State, 489 So. 2d at 735; Hill v. State, 473 So. 2d 1253 (Fla. 1985). Because this Court held the 3.850 motion raised competency questions sufficient to require an evidentiary hearing, one of two results had to follow:

1) the court determines that a retrospective determination cannot be made and thus vacates the conviction and sentence, the State being able to retry the defendant upon the appropriate threshold determination of his present competency, or

2) the court determines that a retrospective determination of competency can be made consistent with the defendant's due process rights and then determines the competency question nunc pro tunc.

See Mason. See also Watts v. Singletary, 87 F.3d 1282, 1290 (11th Cir. 1996) (postconviction evidence raising "substantial doubt" of a defendant's competency-in-fact to stand trial at the time of trial triggers evidentiary competency inquiry).

The ensuing pages first set forth the decisions of this Court which govern the specific competency issues now on appeal. We next show that a retrospective finding that Jones had been competent at trial in 1981 would not be sufficiently reliable to satisfy his due process rights under the factual circumstances of this case. Of course, retrospective determination that Jones was not competent would not violate his due process rights. In fact, the record not only supports, but compels such a result: the undisputed retrospective evidence was that Jones did not have sufficient ability in 1981 to consult with counsel with a reasonable degree of rational understanding and he did not have a rational, as well as a factual, understanding of the proceedings.

1. Due process strictly limits the use of retrospective competency determinations against defendants.

In Mason v. State, 489 So. 2d at 735, the defendant's postconviction proffer included both (i) postconviction evaluations of mental impairment and (ii) psychiatric history information that had been available at the time of trial, but was not considered by the experts who found him to be competent, thus rendering inadequate their contemporaneous psychiatric examinations. Those examinations were, however, the basis of the trial court's finding of competency. The Court remanded for an evidentiary hearing to determine the defendant's competency nunc pro tunc. Mindful of the difficulty of making a constitutionally reliable retrospective determination, the Court specifically directed, as a precondition to such determination, that "[s]hould

the trial court find, for whatever reason, that an evaluation of Mason's competency at the time of the original trial cannot be conducted in such a manner as to assure Mason due process of law, the Court must so rule and grant a new trial."[16] Id. at 737.

Mason's analytical framework applies to this case, and the same determinations were required to be made here, because (i) there was significant evidence of the defendant's incompetence at the time of the 1981 trial, which evidence was not then before Judge Korvick and (ii) there is significant postconviction evidence of his incompetence in 1981. The evidence presented on both of those points at the 1997 evidentiary hearing is discussed in detail in section 3 below.

It is important to recognize that the paucity of evidence before Judge Korvick in 1981 on the competency issue was in large part due to the ineffective assistance of the various counsel who had been asked by the court to represent Jones. They wholly failed to raise with her their concerns about his competency and request a competency evaluation, which would have revealed his psychiatric history and brain damage. Thus, Judge Korvick was not presented with substantial evidence of the defendant's incompetence at the time of trial, including:

---

[16] By contrast to Mason, an error by the trial court itself in failing to conduct a proper competency evaluation based on evidence before it at the time of trial automatically requires a new trial without the need for this further due process inquiry. Hill v. State, 473 So.2d 1253 (Fla. 1985); Mason, 489 So.2d at 735; Tingle v. State, 536 So.2d 202 (Fla. 1988); Pridgen v. State, 531 So.2d 951 (Fla. 1988).

- his psychiatric history;
- neurological evidence of his organic brain damage;
- the State's earlier expressed concern that Jones was not competent to represent himself; and
- the perspective of the various one-time appointed attorneys that Jones was "paranoid," behaving in a "bizarre" manner, and incompetent mentally.

In addition, Judge Korvick was misled by the improper conduct of the State in (i) abandoning its request for a competency determination when the judge hearing the case changed and (ii) instead affirmatively misrepresenting to Judge Korvick, as the newly-assigned judge, that Jones had authored his pleadings and motions, thus evidencing his supposed competency to stand trial unrepresented by counsel.[17/] No such misconduct of the State was present in Mason, and its presence here militates even more strongly in favor of the need to redress the violation of defendant's due process rights. See, e.g., James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992) (while neither is necessary to factually prove a violation of the substantive due process right not to be tried while incompetent, "alleged state misconduct" or "alleged error on the part of [a] state actor" invokes the additional scrutiny of the procedural fairness

---

[17/] That Jones was not the author of the motions is established by the State's pretrial assertions to that effect as well as the 3.850 hearing testimony of Samuel Fuller. (R-1 Supplemental Record-B-7; H. 213-217, 221-223). Further, a cursory review of the stark variations in handwriting among many of these motions reveals that they were the products of multiple persons. (R-1. I-128-75; R-1. II-340-46).

of a trial competency determination established by Pate v. Robinson, 383 U.S. 375 (1966)).

Manifestly, then, the constitutionally mandated procedure of Mason applies even more strongly here, and Jones could not be determined competent nunc pro tunc without the trial court first deciding that such a determination would be constitutionally reliable. This point was emphasized to Judge Korvick, both in opening and closing arguments at the evidentiary hearing, but she nevertheless failed to make that determination. (H. 11-15, 369-378). As shown in the following section, the requisite factual basis upon which to make such a reliability determination clearly is not present here.

It is important as a foundational matter to note that this Court has consistently recognized that reliable retrospective competency determinations are extremely difficult and generally do not afford due process. E.g., Hill v. State. In fact, this Court has allowed such a retrospective determination only under one set of circumstances: where there had been contemporaneous competency evaluations by expert psychiatrists at the time of the defendant's trial. Mason, 489 So. 2d at 737 ("'court may find that there are a sufficient number of expert and lay witnesses who have examined or observed the defendant contemporaneous with trial available to offer pertinent evidence at a retrospective hearing.'"). That was exactly the situation in Mason; three psychiatrists had conducted competency evaluations at the time of trial. While their original psychiatric conclusions were

defective because they failed to take into account then-available psychiatric history, the doctors had at least conducted contemporaneous clinical competency examinations that were later available for their own retrospective reference in light of that psychiatric history.

Since Mason, no Florida appellate decision has identified any factor other than contemporaneous competency evaluations which could bring a retrospective competency determination within the requirements of due process. The two other reported Florida cases where a retrospective competency hearing was allowed both fit the Mason pattern: there were contemporaneous competency evaluations and the medical professionals performing them were available to testify at the retrospective hearing. State v. Williams, 447 So. 2d 356 (Fla. 1st DCA 1984); Brown v. State, 449 So. 2d 417 (Fla. 3d DCA 1984).

That incontestably is not this case. In this case, as discussed below, there were no competency evaluations at all at the time of trial. As such, no medical professional could review a contemporaneous evaluation of competency in light of the subsequently developed evidence establishing that the defendant was incompetent at the time of trial.

2. The lack of any contemporaneous psychiatric evaluation here precluded a nunc pro tunc determination that this defendant was competent in 1981 to stand trial.

The evidence adduced at the 3.850 hearing ordered by this Court established, without doubt, that a retrospective determination of competency would violate the defendant's

constitutional rights under the circumstances of this particular case. In stark contrast to Mason and the two other Florida decisions allowing a retrospective determination, here no medical professional made a competency determination contemporaneous with the 1981 trial of Jones. The only medical professional who examined Jones contemporaneous with the trial was Jaslow, a psychiatrist who interviewed Jones at the penalty phase of the trial, and it is undisputed that his examination was for the limited purpose of making an evaluation of a single mitigating factor for sentencing. He made no determination whatsoever as to competency to stand trial.

Moreover, even in the limited evaluation Jaslow did perform, he did not perform any neurological or the type of psychological tests, which can, if given, indicate organic brain damage. (H. 31-32). He simply had a "clinical type interview" with Jones. (H. 32). There is no indication he reviewed any medical or family history records, and he admittedly did not consider the fact Jones had suffered a gunshot wound to the head and had been an amateur boxer, which causes "trauma to the brain." Moreover, he did not "consider and include in [his] report . . . analysis of the mental condition of the defendant as it affects each of the . . . factors," experts appointed to evaluate the competency of a defendant are required to consider under the Florida Rule of Criminal Procedure 3.211(a)(2)(A) (1981). (H. 30-31).

As this Court recognized in Mason at 737, "[c]ommentators have pointed out the problems involved in basing psychiatric

evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved." "In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data." Id. But that was not done by Jaslow, even with respect to the limited purpose evaluation he made at Judge Korvick's direction. Plainly, Jaslow could not opine as to the defendant's competency to stand trial in 1981, and he quite properly did not attempt to do so.

As the record clearly shows, then, here--unlike Mason--there was no contemporaneous competency evaluation by a medical professional that could provide a basis for a constitutionally reliable retrospective determination that Jones had been competent. Indeed, Judge Korvick expressly denied his request for a competency evaluation at the penalty phase of the trial, commenting that Jones had handled his case well at trial. But, both the United States Supreme Court and this Court have made clear that this type of lay observation is an insufficient basis for a competency determination.

In Bishop v. United States, 350 U.S. 961 (1956), cited in Hill v. State, 473 So. 2d at 1256, the trial court had found that the defendant had "'testified coherently and was adroit in explaining eye-witness testimony; that he withstood severe and long cross-examination; and that approximately one month before the trial a psychiatric evaluation determined that [defendant]

had no mental disorder.'" The Supreme Court nevertheless vacated the judgment and reversed for a hearing as to competency of the defendant at the time of trial.

Notwithstanding the clear teachings of these decisions, and notwithstanding this Court's decision expressly ordering a competency hearing, the State urged Judge Korvick to disregard all of the medical and other evidence presented at that hearing and to rely instead on her own recollection of the trial. But, given this Court's decision that an evidentiary hearing was required, and given the constitutional imperatives controlling this issue, Judge Korvick could not determine retrospectively that Jones had been competent in 1981 based only on her own personal feeling on the issue, without regard for the uncontradicted evidence of the medical professionals. Pate v. Robinson, 383 U.S. 375, 385-65 (1966) ("mental alertness and understanding displayed in [the defendant's] 'colloquies' with the trial judge . . . offers no justification for ignoring the uncontradicted testimony of [the defendant's] history of pronounced irrational behavior").

As noted earlier, this Court has "'previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial.'" Hill v. State at 1258. Although retrospective competency determinations have been held constitutionally reliable in certain circumstances, those exceptional circumstances are not present here. Moreover, the trial court's own lay recollection of a trial 16 years earlier cannot, as a

matter of law, be the sole basis of a retrospective competency determination. But, as the State obviously recognized in advancing the argument that the trial court's recollection alone would suffice, the State presented no competent substantial evidence to support its contention that Jones should be found, retrospectively, to have been competent to stand trial in 1981. Indeed, the State's only expert witness candidly admitted he could not give a reliable retrospective opinion--"a true answer"--on the defendant's competency in 1981. (H. 311).

The record before this Court makes it clear this is not a case where due process is afforded by a retrospective determination that the defendant was competent at the time of trial. Accordingly, a new trial is constitutionally mandated.

3. The only constitutional nunc pro tunc finding that could be made on the evidence at the 3.850 hearing was that the defendant was not competent in 1981 to stand trial.

If a retrospective determination could be made at all, it could only be that Jones was incompetent in 1981; there could be no constitutionally reliable finding in 1997 that Jones was competent to stand trial in 1981. That is so because the uncontested evidence at the 3.850 hearing established that Jones was not competent to stand trial--much less represent himself--in 1981. His medical history and the expert testimony on this specific point are unequivocal in this regard. Indeed, not a single mental health professional offered an opinion that Jones was competent to stand trial in 1981. The State's only expert witness admittedly could offer no such opinion.

Ignoring this comprehensive and uncontradicted medical evidence, Judge Korvick denied the 3.850 motion, based apparently on nothing more than the same intuitive feeling upon which she had originally denied the defendant's request for a competency evaluation. Thus, having refused to order a competency evaluation in 1981 because of her lay belief that Jones had done a good job of representing himself at trial and having later erroneously denied his 3.850 motion after the State told her, incorrectly, that she could do so based upon her recollection of his demeanor at the trial, Judge Korvick nevertheless, in error, offered nothing more than her recollection at the events of the trial itself in denying the motion once again. She repeatedly stated at the hearing that, if Jones had not been competent to be tried, someone would have raised this issue at the trial. (H. 393-398). Referring to attorneys Wilson (now judge) and Kershaw, whom she specifically credited as responsible professionals, Judge Korvick was insistent that "they certainly would have spoken up" at the time had they thought Jones needed a competency evaluation. (H. 395, 400).

The record shows, however, that Wilson and Kershaw did believe Jones needed a competency evaluation but, for various reasons, failed to bring this to her attention at the time.[18/]

[18/] Kershaw did not feel he could ask for a competency evaluation because of his limited and ambiguous representation of Jones. (A. III-9). However, he emphasized he would have requested a competency evaluation if he had continued in the case and Jones had continued to behave as he did. (H. 185-86). Wilson simply refused to take any action on behalf of Jones and (continued...)

Their testimony on that point is uncontradicted. Judge Korvick's subjective feeling that they would have brought this to her attention at the time if they had truly had such concerns cannot overcome the record evidence of the attorneys themselves that they did in fact have exactly such concerns. Likewise, Laeser expressed concerns about the defendant's competency to earlier judges assigned to the case, although he inexplicably failed to raise these with Judge Korvick. Of course, he did not testify at the competency hearing, acting instead as an advocate for the State.[19/] See Fla. Bar Rule 4-3.7(a) (precluding attorney from acting as advocate and witness except under narrow, exceptional circumstances not present here).

Thus, Judge Korvick was simply wrong when she sarcastically said "we all missed it," referring to the lay people involved at the trial. They did not all miss it: indeed, the only ones who testified candidly acknowledged that they questioned the defendant's competency at the time. And, although Judge Korvick obviously persisted in her recollection that the manner in which Jones conducted his trial showed he was mentally competent, she had no medical training to make that judgment.

[18/](...continued)
was emphatic that he was not qualified to be representing him or advising him at trial since he was not familiar with the case. Zenobi did not push the issue because he was attempting to maintain a relationship with Jones. (A. III-8).

[19/] Judge Korvick's unidentified clerk and corrections officer were not witnesses under oath and, hence, there is no evidence of their views of the defendant's mental competence. Nor is there any evidence they would have been qualified to speak to that issue.

Simply put, Judge Korvick's lay, purely subjective belief that Jones was competent because no one (other than Jones) asked her at the time of trial to provide him with a competency evaluation, and because of her perception that Jones had defended himself well at trial, is not the type of probative evidence that will in itself allow a retrospective finding of competency to be affirmed. And it certainly will not allow such a finding in the face of all the affirmative record evidence here of lack of competency.

As the record makes clear, the only expert testimony as to the defendant's competency to stand trial in 1981 established, without equivocation, that Jones was not then competent. See pages 10-21, supra. To the contrary, Jones suffered from organic brain damage and "paranoia in the clinical sense." (H. 84). He had "only a limited" appreciation of "the adversary nature of the legal process," and he did not have "a rational as well as a factual understanding of the pending proceedings in 1981." (H. 233-34).

This expert testimony from the medical professionals was corroborated by the uncontradicted testimony of the lawyers who were asked to help Jones in this. To a person they agreed he was not able to assist them in the defense of this case. Indeed, Wilson, a witness whose credibility was specially credited by Judge Korvick, testified that he had questioned, at the time of trial, the defendant's competency. Although Judge Korvick declared at the end of the hearing that Wilson would have told

her if he had any question about the defendant's competency, she never asked Wilson, while he was under oath at the hearing, why he did not do that. And the incontestable fact is, as his testimony made clear, he did doubt the competence of Jones at the time, although he did not raise the issue with Judge Korvick because he was not taking any actions at all as an attorney for Jones. (H. 290).

The State wholly failed to contradict the evidence presented by Jones. Weinstein, the only expert sponsored by the State, candidly acknowledged that he could not speak to the defendant's competency in 1981 because he had made no evaluation in that regard at that time. He did not offer any expert opinion, much less any opinion based on a reasonable medical probability, that Jones was in fact competent to stand trial in 1981. Consequently, the medical expert testimony that Jones was not competent to stand trial in 1981 is completely uncontradicted.

It remains only to note that this case falls squarely within Nowitzke v. State at 1349-50, where this Court stressed that "the reasons [the defendant] gave for refusing the offer [of counsel] indicate a lack of rational thought process such that it is doubtful whether Nowitzke had the present ability to assist his attorneys or understand the proceedings against him." That is exactly the case here as well. Without offering any rational reason for his decision, Jones told the court he would represent himself unless the court would appoint Ellis Rubin as his lawyer; no other lawyer would be acceptable. But that is not a rational

basis for declining legal representation in a capital case such at this. As Kershaw accurately told the trial court at the time, Jones was "crazy not to want a lawyer in a death penalty case." (H. 185).

The fact of the matter is, the evidence was uncontradicted that Jones was "paranoid" about the court's offer of a lawyer to assist him. (H. 148-49). Indeed, declaring that Zenobi was "out to get him" and would "railroad" him, Jones rejected his older sister's advice to accept Zenobi as his lawyer.

Obviously recognizing the force of all this evidence that Jones was mentally incompetent to stand trial, much less to stand trial unrepresented, the State told Judge Korvick that, even though this Court had ordered her to hold a hearing in light of the newly presented evidence filed with the 3.850 motion, she nevertheless had an "absolute right" to disregard "all" of the evidence presented at that hearing--including the expert medical evidence--if it was not consistent with her own recollection of what had happened at the trial in 1981. (H. 388-89). In fact, the trial court's recollection is only one of many factors for determining whether competency can be established retrospectively. Pate v. Robinson, 383 U.S. 375 (1966). While that can be considered along with the other relevant factors, that cannot alone be the basis for a determination of competency retrospectively. A lay person, albeit a judge, simply lacks the expertise to make a competency determination based entirely on personal observation.

It is telling that the State cited no law in support of its contention that Judge Korvick could retroactively find Jones competent in 1981 to stand trial, based solely on her own personal, lay recollection of that trial. There is no such law. To the contrary, as this Court's controlling decision in Mason makes clear, absent the proper medical predicate, Judge Korvick could not disregard the expert testimony presented at the competency hearing and retrospectively declare Jones competent based solely on her own belief that was the case.

4. The trial court erred in refusing to consider all of the medical evidence offered as to the defendant's lack of competency in 1981.

Arthur T. Stillman, M.D., examined Jones in early 1985 and, along with Drs. Crown and Orlando, submitted a report finding that in 1981, Jones suffered from organic brain damage. With these reports in hand, Jones filed his 3.850 motion and requested an evidentiary hearing. Jones was fully prepared in 1985 to present live testimony from Dr. Stillman, corroborated by the testimony of two psychologists, that Jones was not competent to stand trial in 1981.

The State took Dr. Stillman's deposition in September 1985. The following month, the State argued against the request by Jones for an evidentiary hearing on his 3.850 motion, and Judge Korvick agreed. This Court reversed her denial of the 3.850 motion and directed the trial court to conduct the evidentiary hearing requested by Jones. However, because Dr. Stillman died before the evidentiary hearing was held, the State's deposition

of Dr. Stillman was the only source available for this important contemporary medical opinion evidence. Dr. Stillman had examined Jones in January 1985, just over three years after the trial.

Jones offered Dr. Stillman's deposition under the hearsay exception for former testimony codified in section 90.804(2)(a), Florida Statutes. Despite the fact that the State had already used discrete parts of Dr. Stillman's deposition as substantive evidence to contradict other medical opinion testimony offered by Jones (H. 126-27), the State opposed the introduction of the balance of Dr. Stillman's deposition (H. 292). Judge Korvick excluded Dr. Stillman's deposition from evidence on the authority of Rodriguez v. State, 609 So. 2d 493 (Fla. 1992) and Hernandez v. State, 608 So. 2d 916 (Fla.3d DCA 1992), which hold that a discovery deposition not satisfying all the requirements of Rule 3.190(j) for perpetuating testimony is inadmissible as substantive evidence in a criminal prosecution. The court erred in failing to consider Dr. Stillman's full deposition, because a postconviction evidentiary hearing is not a criminal prosecution, but is essentially a civil proceeding.

Florida courts have historically viewed postconviction collateral remedies as civil, not criminal, proceedings. In a civil trial, deposition testimony of an unavailable witness is admissible if the deposition had been taken in the same proceeding and the opposing party had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Section 90.804(1), Florida Statutes. The State

alleged it had "a different motive" in developing Dr. Stillman's deposition testimony than it would have had at trial. (H. 294). However, strategic decisions by the opposing party to forego certain questioning affords no legal basis for objecting to the use of a deposition that otherwise satisfies the statutory evidence rules. See Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242, 261 (Fla. 1st DCA 1984).

We are mindful of this Court's decisions regarding the use of depositions at criminal proceedings. Nevertheless, Dr. Stillman's deposition is not being used as substantive evidence of a component of criminal liability offered at trial. Rather, it bears on the factual assessment of the mental competency precondition to a criminal trial, offered in an essentially civil proceeding by a defendant under sentence of death. Because Dr. Stillman's 1985 testimony was plainly material to the determination of the defendant's competency, and because discrete parts of the deposition were relied upon as substantive evidence by the State itself, the balance of the deposition should have been considered by the trial court.

That is especially so because, at the hearing, the State attacked the psychiatrist who examined Jones in 1997, Robert Dudley, M.D., for offering an opinion as to the defendant's mental condition in 1981. Dr. Dudley's findings, however, were entirely consistent with the reports of Drs. Stillman, Crown, and Orlando, and strikingly similar to the observations and medical conclusions reached by Dr. Stillman twelve years earlier. The

particular value of Dr. Stillman's deposition, of course, is that he conducted his examination in closest proximity to the 1981 trial, and he is the only other medical doctor, as opposed to the four psychologists, to examine Jones for competency besides Dr. Dudley.

The State argued to Judge Korvick that Dr. Dudley's analysis came too late, ignoring that the analysis is entirely consistent with the 1985 reports of Drs. Stillman, Crown, and Orlando, and the 1997 testimony of Dr. Crown. In arguing that sixteen years later is "too long," the State effectively maintains that Jones must die in the electric chair because the only doctor who examined Jones much earlier has died--after the State improperly opposed the defendant's request for an evidentiary hearing while that doctor was alive and available to testify.

The defendant's prior pro bono counsel had completed their review of new evidence, including obtaining three expert evaluations of Jones's mental condition, and filed the 3.850 motion the year following this Court's affirmance of Jones's conviction and sentence. It cannot be said that Jones has unreasonably delayed raising the issue of his incompetence to stand trial.

Significantly, Dr. Stillman was a psychiatrist whose expertise was not unfamiliar to this Court. In Scott v. State, 420 So. 2d 595 (Fla. 1982), this Court set aside the defendant's conviction and sentence based on Dr. Stillman's finding that the defendant had not been competent to stand trial. The trial court

there had denied the defendant's 3.850 motion based on the testimony of the State's experts that the defendant had been competent. In reversing, this Court noted that only Dr. Stillman had evaluated the defendant at the time of trial. Even though Dr. Stillman had initially found the defendant to be competent when he examined him before trial, this Court credited Dr. Stillman's changed opinion after a more in-depth consultation in connection with the 3.850 proceeding.

While one of the problems in this case was that no doctor, not even Dr. Stillman, examined Jones for competency contemporaneously with trial, it is analogous to Scott in an important way. Just as in Scott, Dr. Stillman's evaluation of the defendant was conducted substantially closer in time to the trial than the State's expert's evaluation--three years versus nine-and-a-half years. Notably, and unlike Scott, the State's expert here did not even offer an opinion whether the defendant was competent at trial, let alone one adverse to Dr. Stillman's opinion.

Because Jones is under a sentence of death, he is entitled to a full consideration of all the evidence bearing on the question of his competence to stand trial. This is a civil, not criminal, proceeding. Therefore, this court's precedents limiting the use of depositions in criminal trials are not implicated here. The trial court erred by failing to consider Dr. Stillman's entire deposition testimony.

5. The trial court erred in failing to make findings of fact and conclusions of law, as required under Florida law.

Florida Rule of Criminal Procedure 3.850(d) requires the trial court to "determine the issues" considered at an evidentiary hearing "and make findings of fact and conclusions of law with respect thereto." Despite this express requirement of law, Judge Korvick--hearing the motion on remand from this Court after she had summarily denied the motion in 1985 without any findings and without attaching any portion of the record to support that denial--again failed to enter any findings or attach any record support for her denial. The language of the rule leaves no doubt as to the trial court's error in denying this motion without complying with the requirements of Florida law.

Given the circumstances of this case, we submit that, despite this clear error by the trial court, this Court can and should reverse the defendant's conviction and sentence on this record. It is apparent from the transcript of the evidentiary hearing that Judge Korvick's rationale was (1) the erroneous proposition urged by the State that she could ignore the uncontradicted expert testimony and instead rely on sixteen-year-old recollections of her own lay observations at trial, and (2) her belief that, if the attorneys who were appointed to assist or represent Jones had concerns about his competency, they would have raised them with her--a belief that was demonstrably false because they all attested that they did have such concerns. Since the only proffered reasons for her denial are legally

insufficient, this Court need not remand for finding of fact and conclusions of law in order to reverse.

POINT FOUR

IN VIOLATION OF THE DEFENDANT'S FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS, COUNSEL FAILED TO RAISE THEIR CONCERNS ABOUT HIS COMPETENCY WITH THE TRIAL COURT.

The right to counsel includes the right to effective representation by counsel. Anders v. State, 386 U.S. 738 (1967); Chalk v. Beto, 429 F.2d 225 (5th Cir. 1970). The effective attorney's duties include a reasonable investigation into the facts of the case, being or becoming knowledgeable of the pertinent law, and being free of any influence or prejudice that might impair or impede the attorney's ability to provide adequate legal advice. Nelson v. State, 274 So. 2d 256, 258 (Fla. 4th DCA 1973). See also Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992); Chestnut v. State, 578 So. 2d 27 (Fla. 5th DCA 1991).

More generally, counsel's assistance should be reasonable in light of all the surrounding circumstances. See Anderson v. State, 467 So. 2d 781, 785-86 (Fla. 3d DCA 1985). In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established two components a defendant must show to obtain reversal of a conviction or death sentence due to ineffective assistance of counsel: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense so as to "deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

As set forth below, the legal standards governing competency together with the Rules of Professional Conduct provisions

addressing mentally-impaired clients provide objective standards for determining the reasonableness of an attorney's handling of a potential competency problem. The performance of the defendant's several early counsel in this case, Zenobi, Nathan, Kershaw, and Wilson, cannot be reconciled with these basic standards. Jones was substantially prejudiced by these attorneys' substandard performances. At a minimum, Jones was entitled to an evidentiary hearing on his ineffective assistance of counsel claim.

Detailed below are those counsels observations of Jones, both during and outside pre-trial and trial proceedings. Their affidavits attached to the 3.850 motion and their hearing testimony set forth their beliefs that Jones was incompetent to proceed; that he suffered from disabilities that rendered him incompetent; that he adamantly refused to recognize obvious realities; that he exhibited confusion and illogical thinking; that he suffered poor judgment; and that he was out of touch with his environment and his present situation. In short, counsel were all aware that Jones did not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky v. United States, 362 U.S. 402, 402 (1960).

As a result of these matters, his attorneys and "advisory" attorneys:

- should have recognized that the defendant's competence to stand trial was very much in question;
- should have investigated his background and mental history; and

- should have requested the court obtain necessary psychiatric and psychological evaluations in order to properly address competency.

Since they failed to assure that these basic protections were provided to Jones, they ineffectively represented him and thereby deprived him of his constitutional right to effective counsel.

1. All counsel who represented, were appointed to represent, discussed representation with, or were assigned to advise the defendant questioned his mental capacity.

As set forth in subsection 3 below, Judge Korvick erroneously refused to address the ineffective assistance ground which had been raised in the defendant's original 3.850 motion. Indeed, she even refused, erroneously, to accept a proffer in that regard. See authorities cited at page 47, supra. Nevertheless, the evidence of record from the pre-trial and trial proceedings, the attorney affidavits on file with the 3.850 motion, and the evidentiary hearing testimony of those attorneys regarding their view of the defendant's competency-in-fact to stand trial establishes ineffective assistance by them.

a. Eugene Zenobi

Eugene Zenobi was the first attorney to represent Jones. He was appointed as counsel at the July 3, 1980, first appearance. (Zenobi Affidavit, A. III-8). Despite the fact that Zenobi became convinced over the course of his representation of Jones that Jones was insane or incompetent, Zenobi did nothing to protect Jones from his own mentally ill and destructive actions. Id. The ineffectiveness of Zenobi's representation is demonstrated by the following.

Zenobi represented Jones for 10 months, July 1980 through May 1981. (A. III-8). He was appointed to represent Jones with regard to the homicide charges in this case and also with regard to a separate robbery charge. Id. Zenobi found Jones acted in an irrational and unstable manner, and was difficult to handle. Id. Zenobi believed from the beginning of the attorney/client relationship that Jones should be evaluated by a mental health professional; however, Jones was "headstrong" in his resistance to an examination. Id. In an attempt to maintain the relationship he had with Jones, Zenobi did not push the issue of a psychiatric evaluation, despite the fact he was convinced one was required. Id.

Detective Blocker testified that Jones, who had been convicted of robbery, summoned him to the jail in February, 1981, expressed dissatisfaction with Zenobi and, in the absence of counsel, allegedly made several inculpatory statements, which were ultimately introduced against Jones at trial and sentencing in this case. According to Zenobi, after Jones spoke with Blocker, the attorney/client relationship between Zenobi and Jones became even more strained. (A. III-8 at 1). Nevertheless, Zenobi continued to represent Jones for three months after the February 1981 "confessions" and appeared at three pre-trial hearings: March 2, 1981; March 11, 1981; and May 26, 1981. (A. III-8 at 1). At the March 11, 1981 hearing, Zenobi sought to suppress the February 1981 uncounseled statements Jones had made.

At the May 26, 1981 hearing, Jones requested other counsel, and Zenobi asked to withdraw. (A. 111-8). Between the time of the February 1981 statements and the May 26, 1981 severance of the attorney/client relationship, the behavior of Jones grew increasingly erratic and Zenobi became convinced that a competency evaluation of Jones was essential. But, he took no action in that regard, and after he was fired, he took no further action in the case. (A. III-8).

Zenobi's failure to seek a psychiatric psychological evaluation and his failure to inform subsequent defense counsel of his significant doubts as to the competency of Jones to stand trial was unreasonable attorney conduct which resulted in substantial prejudice.

b. Martin Nathan

Martin Nathan was the next attorney appointed to represent Jones. Although Nathan had the case less than 24 hours before withdrawing and only met with Jones one time, he became convinced in that time that a competency evaluation would be necessary. (See H. at 56, 58-59).

c. Joseph Kershaw

Joseph Kershaw was appointed following Nathan's withdrawal and, through the course of his representation, had substantial contact with Jones. After Zenobi left the case, Jones appeared pro se at five subsequent hearings: May 28, 1981; June 8, 1981; June 10, 1981; June 15, 1981; and June 18, 1981. At a June 19, 1981 hearing, the court appointed Kershaw to represent Jones.

Kershaw attempted to represent Jones from June 19, 1981, in a blurred attorney/advisory counsel capacity, until he withdrew the day before the trial began, October 19, 1981. (H. 183, 186). Kershaw unreasonably failed to take proper action regarding the defendant's mental condition, despite the fact that Kershaw's out-of-court contacts with Jones revealed his mental defect and his in-court behavior was inconsistent and irrational. (H. 185-86). Kershaw's actions and inactions were unreasonable since, from the very beginning of the attorney/client relationship, he believed "something was wrong with Jones." (A. III-9). Jones frequently would not leave his cell to speak with Kershaw when Kershaw went to speak with him. (H. 184). When Jones would speak with Kershaw, "he explained that he didn't want or need Kershaw's services and threatened physical violence if Kershaw tried to do anything on his behalf." (H. 187).

Kershaw believed that Jones was not going to cooperate with him at all. (H. 186). Indeed, his paranoia was so strong that he refused to allow Kershaw to look at any of the materials he had in his possession. (H. 184; A. III-9). Kershaw testified that had he been more actively involved in the defense, he would have asked for a competency/sanity evaluation. (H. 185-87).

Kershaw ultimately refused to have anything to do with this case. The day of trial, Kershaw reported to the Court:

> Mr. Kershaw: I am refusing the appointment.
>
> The court: Not today, you are not.
>
> Mr. Kershaw: Yes, I am. Mr. Jones doesn't even want me to do that.

> Court: You are not allowed to refuse the appointment.
>
> Mr. Kershaw: I will resign from the bar before I sit here.

(R-1 Supplemental Record, Exhibit A.)

Having refused to act further for Jones, Kershaw did not ask for a competency evaluation. However, in light of all the circumstances known to Kershaw, it was an unreasonable omission for him to fail to address the precarious position his client was in as a result of his mental defects. Kershaw's unreasonable conduct obviously operated to the substantial disadvantage of Jones in this capital case.

d. James Wilson

James Wilson was the last defense attorney to have any significant contact with Jones at the time of trial. Wilson appeared before the court on October 20, 1981, the day after Kershaw had informed the trial court he would resign from the bar before he would represent Jones any further. Wilson and Kershaw were both assistants in the Public Defender's Office, and he appeared instead of Kershaw. The trial began the next day.

Although Wilson appeared at the trial, he did nothing more than sit in the back of the courtroom during trial. (H. 288). As the record reflects, Wilson did not want his name even mentioned, (R. 797); refused to advise Jones because he had not familiarized himself at all with the proceedings, (R. 899-901)("I cannot advise him how to handle his case. I don't know what his [court] file looks like . . . . I have no knowledge of his case, and I am

not going to advise him" (R. 1358-1359 (3 1/2 days into trial)); and was actually absent during portions of the trial, (R. 1692). During the course of trial, Wilson read and finished two novels while seated in the back of the courtroom. (H. 290).

Even then, Wilson observed that Jones evidenced significant and frequent mood swings at trial: one moment, he would be friendly, cordial, polite, and docile, and the next moment, he would become violent, aggressive, and hostile; other times, his mood would be completely flat. (A. III-10). At the evidentiary hearing directed by this Court, Wilson confirmed that Jones had acted in a bizarre, inappropriate and apparently irrational manner. (H. 289-90). Wilson saw mood swings in Jones during the court proceedings. (H. 290). Wilson also observed his apparent incoherence, his singing while shackled to a chair, and other irrational conduct. (H. 289-91).

While this Court decided on direct appeal that Jones could not challenge the lack of legal advice he received from Wilson, this Court was not presented with Wilson's opinion of the defendant's incompetence and Wilson's failure to act on that concern. A reasonable attorney's action would have been to advise the court of the observed aberrant behavior and request a psychiatric/psychological evaluation. Wilson unreasonably failed to take any action whatsoever to protect Jones from the disastrous consequences of his mental illness. And, as a result of Wilson's omissions, Jones suffered substantial prejudice.

2. Counsel were ineffective in failing to raise their concerns with the Court and request an evaluation.

a. Ineffectiveness of counsel's assistance under the law.

Defense counsel has a specific duty to investigate his or her client's competency to stand trial. Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994). If counsel has reason to believe that the client is unable to adequately cooperate or to participate in the defense, counsel cannot blindly follow the client's demand that no mental evaluation be conducted or that competency not be challenged. See Bundy v. Dugger, 816 F.2d 564, 567 (11th Cir. 1987), cert. denied, 484 U.S. 870 (1987); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).

In this case, every defense attorney who had any contact with Jones came to the same conclusion--Jones desperately needed a psychological evaluation to determine competency, and he was incapable of assisting in his own defense. In spite of this belief, each of these attorneys stood by and permitted an incompetent, psychiatrically ill and brain-damaged individual to waive his constitutional right to proper legal representation in a capital case and instead to act out his delusions and fantasies throughout the course of his self-representation.[20/]

[20/] While Judge Korvick erroneously refused to accept the undersigned counsel's proffer or hear argument on the ineffective assistance issue, the 3.850 motion was supported by the affidavit of W. John Wesley Hall, Jr., Esq. (R. 309). Hall's affidavit establishes the following. He is an author and expert on the subjects of attorney ethics and ineffective assistance of counsel. Hall has written, among other books, The Trial Handbook for Arkansas Lawyers; Arkansas Prosecutors Trial Manual; and (continued...)

Counsel's motions to withdraw and failure to raise their concerns with the court were at odds with their duty of effective representation and with the Florida Rules of Professional Conduct:

> If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

Comment to Florida Rule of Professional Conduct 4-1.16.

This case would have had a substantially different outcome had any one of the defense counsel (a) reported his belief that Jones was incompetent to proceed, (b) adequately investigated and

---

[20] (...continued)
Professional Responsibility of the Criminal Lawyer; and has conducted approximately two hundred jury trials and eight hundred bench trials in a professional career that started as a Deputy Prosecuting Attorney for the State of Arkansas and includes the prosecution of a capital murder case. Hall is recognized as an expert on ineffective assistance of counsel, ethics of the criminal defense lawyer, and other related areas.

Based upon his review of the record in this case, Hall would testify that a defense attorney has a professional obligation to investigate and pursue issues of legal competency, sanity, and diminished capacity when his or her client gives the attorney reason to question competency. Hall would explain that each attorney was ineffective for failing to pursue the issues of competency and diminished capacity, and for failing to advise the trial court of their doubt on those issues. Further, each attorney had an ethical obligation to protect his client's interests when he withdrew. This obligation could have been met by requesting a competency evaluation, notifying the court, seeking a conservator or next friend, or advising the replacement attorney of the concerns. But the withdrawing attorneys could not ethically shuffle this responsibility off to the next lawyer.

offered evidence of his incompetence to waive counsel, or (c) requested the appointment of a guardian ad litem or amicus. At the very least, counsel should have requested and stressed the need for a competency evaluation for Jones--exactly as Judge Korvick stated she would have expected them to do.

b. Prejudice arising from the ineffectiveness of counsel's assistance which resulted in the defendant's standing trial while incompetent.

The prejudice to Jones here is clear. No competency evaluation was conducted. If a competency evaluation had been conducted, it would have resulted in the October, 1981 trial not occurring since he was incompetent. Indeed, had the court or any of the defense attorneys associated with this case obtained an evaluation of Jones, overwhelming evidence of his incompetency would have been discovered. Between 1985 and 1997 Jones was seen, examined, and evaluated by four mental health professionals (Doctors Stillman, Crown, Orlando, and Dudley), who all concluded Jones is brain damaged and, as a result, has significant functional impairment.

The effects of Jones going to trial unrepresented and while incompetent were crushing: the trial record is rife with fundamental error which would or should have been corrected had an incompetent defendant not been in charge of his own defense. The prosecution's overreaching on its false gun theory and misrepresentation of the fingerprint evidence discussed above are the most egregious examples of how the defendant's incompetence was exploited by the State. Because of counsel's unreasonable

omissions, the defendant's rights protected by the Sixth, Eighth, and Fourteenth Amendments were violated. His convictions and sentences must therefore be set aside and the case remanded for a new trial, with directions to conduct a pretrial competency hearing.

c. Prejudice arising at sentencing.

> An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence. . . . The failure to do so may render counsel's assistance ineffective.

Rose v State, 675 So. 2d 567, 570-71 (Fla. 1996) (citations omitted). Because defense counsel failed to conduct any investigation whatsoever into the defendant's background and mental condition, substantial defenses to the charges were not discovered and Jones was denied both an effective defense and a reliable, meaningful, individualized sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments and Article I, sections 9, 16, 17, and 21 of the Florida Constitution.

Among other thing, insanity is a defense to criminal responsibility in the State of Florida. Voluntary intoxication arising from habitual drug abuse and alcohol consumption, rendering the defendant incapable of forming specific intent (for premeditation, as the underlying specific initial felony), is also a defense. Burch v. State, 478 So. 2d 1050 (Fla. 1985). Moreover, the defendant's general background and mental condition are mitigating circumstances at a capital sentencing hearing,

Lockett v. Ohio, 438 U.S. 586 (1978), and mental condition is specifically incorporated as a statutory mitigating factor in two sections of Florida's death penalty statute:

> Mitigating circumstances shall be the following:
> . . . .
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance
> . . . .
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Based upon the evaluations and examinations recently conducted, it is apparent that his mental condition supported, yet ironically prevented, Jones asserting:

- the defenses of insanity and voluntary intoxication at the time of the offense;
- mitigating evidence relating to mental defects, drug addition, and a life background of abject poverty; and
- the fact that he was incompetent pre-trial, at trial, and at sentencing.

For example, Dr. Stillman expounded in his 1985 report, which was attached to the 3.850 motion and specifically considered by Dr. Dudley, on the evidence related to these mitigating factors that would have been uncovered had counsel requested a psychological evaluation: "At the alleged time of the alleged offense, it would appear that [Jones] was under the influence of substances affecting a highly sensitive and allergic, brain damaged individual, at which time, it is doubtful that [Jones] could have handled the material with regard to his

trial, especially since he attempted to defend himself and now realizes that there were many things he didn't do. He, therefore, may well have been unable to forecast consequences at the alleged time of the alleged offense and may have, indeed, in keeping with the McNaughten Rule, been suffering from an organic brain syndrome and may have been insane." (A. III-4).

Similarly, Dr. Crown reported: "From history, it appears that Jones's brain behavior pattern is the result of (1) the gunshot wound to the right parietal occipital area; (2) blows received to the head while boxing; and (3) the freebase use of cocaine. The combination would lead him to have serious difficulties in planning and evaluating situations, especially when he was under stress and/or abusing drugs and alcohol . . . . There is the possibility that impulsive actions and hallucinations may be provided by this brain damage." (A. III-6).

But for the ineffective assistance of counsel and the failure of the trial court sua sponte to order psychiatric evaluation, the foregoing information would have been readily available to the court and sentencing jury. The constitutional rights of Jones were violated by the patently ineffective assistance of his various attorneys. This alone mandates a new trial, or at a minimum, a new sentence.

Notably, this Court very recently reversed a sentence due to ineffective assistance of counsel in failing to uncover mitigating evidence very similar to the mitigating evidence that

was not uncovered by the defendant's counsel in this case at the time of trial:

> (1) Rose grew up in poverty; (2) Rose was emotionally abused and neglected throughout his childhood; (3) Rose's mother locked him in a closet for extended periods of time as a child and tried to lose him and leave without him when they were out; (4) Rose was a slow learner and was retained in the fourth, fifth, and seventh grades; (5) Rose's I.Q. is 84; (6) Rose was severely injured in a 30-foot fall and suffered head trauma, chronic blackouts, dizziness, and blurred vision; (7) Rose is a chronic alcoholic; and (8) Rose had previously been characterized by a physician as a schizoid.
>
> . . .
>
> (1) Rose suffers from organic brain damage; (2) Rose has a longstanding personality disorder; (3) Rose is a chronic alcoholic; (4) Rose meets the criteria for the statutory mitigator of being under the influence of an extreme emotional or mental disturbance at the time of the offense . . .

Rose v. State, 675 So. 2d at 571.

In reversing, the Court quoted approvingly from the decision of the Eleventh Circuit in Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995):

> We hold that Baxter suffered prejudice from his attorneys' failure to conduct a reasonable investigation into his background. Psychiatric mitigating evidence has the potential to totally change the evidentiary picture.

Rose, 675 So. 2d at 573 (quoting Baxter, 45 F.3d at 1515). The same prejudice occurred here, requiring reversal just as in Rose.

3. This ineffective assistance claim was properly before the postconviction court and was erroneously denied without the consideration required under Rule 3.850.

The ineffective assistance of counsel claim was asserted in the original 3.850 motion filed in 1985. Accordingly, for the reasons set forth under section 2 of Point One, it was properly before the trial court on remand and Judge Korvick erred in failing to address it.

CONCLUSION

There were serious violations of the defendant's fundamental constitutional rights. His conviction and sentence of death must be reserved.

Respectfully submitted,

Alan F. Wagner
Florida Bar No. 374105
WAGNER, VAUGHN & McLAUGHLIN
601 Bayshore Boulevard
Suite 910
Tampa, FL 33606
Phone: (813) 223-7000

Sylvia H. Walbolt
Florida Bar No. 033604
Chris C. Coutroulis
Florida Bar No. 300705
Robert L. Ciotti
Florida Bar No. 333141
Darren R. Latham
Florida Bar No. 961280
CARLTON FIELDS
Post Office Box 2861
St. Petersburg, FL 33701
Phone: (813) 821-7000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I have served this Corrected Initial Brief by U. S. Mail to Randall Sutton, Esquire, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 and Jack Croocs, Esquire, Assistant CCR, Office of Capital Collateral Representative, 405 N. Reo Street, Suite 150, Tampa, Florida 33609 this 15th day of July, 1998.

Sylvia H. Walbolt

SYLVIA H. WALBOLT

S#113219.25