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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

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PRELIMINARY STATEMENT

In this reply, the following 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.

"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.

"In. Br." refers to Jones's Initial Brief.

"An. Br." refers to the State's Answer Brief.

All emphasis is supplied unless otherwise indicated.

TABLE OF AUTHORITIES

CASES **PAGE**

RULES **PAGE**

MISCELLANEOUS

Argument

POINT ONE

The Defendant Was Deprived of Due Process and His Right to a Fair Trial as a Result of Serious Prosecutorial Misconduct.

"When the regard for truth has been broken down or even slightly weakened, all things will remain doubtful."

St. Augustine, "On Lying"

Jones was denied due process and a fair trial as a result of serious prosecutorial misconduct. Throughout the trial, Assistant State Attorney Laeser affirmatively misled the jury by suggesting that the gun found with Jones when he was arrested was identified as the murder weapon. Then, in rebuttal closing argument--a time when Jones could not respond--Laeser out-and-out lied to the jury by representing that a ballistics expert was not called to testify because the bullets found at the crime scene were "flattened pieces of nothing" which could not be tested. Exactly the opposite was true. As Laeser was well aware, eight of the bullets had been tested, with ballistics expert Hart concluding that all eight were "probably not fired" from Jones's gun. (A. III-28).

The State acknowledges that Laeser's rebuttal argument was "undisputedly not an entirely accurate statement." (Ans. Br. 38-39). In fact, of course, it was undisputedly false. Despite its reluctant admission of the untruthfulness of Laeser's rebuttal argument, the State nevertheless contends that this falsehood did

not affect the outcome of the trial and only constitutes harmless error. (Ans. Br. 39).[1] Nothing could be further from the truth.

We start with the fundamental precept that the burden upon the State to prove harmless error is "most severe." Holland v. State, 503 So. 2d 1250 (Fla. 1987). The harmless error test, as set forth by this Court in DiGuilio v. State, 491 So. 2d 1129, 1138 (Fla. 1986) and its progeny, places the burden on the State, as the beneficiary of the error, to prove, beyond a reasonable doubt, that the error did not contribute to the verdict. In the Court's words, prosecutorial misconduct by the State requires reversal unless "there is no reasonable possibility that the error contributed to the conviction." Id. at 1135.

Citing the analysis of California Chief Justice Traynor with approval, this Court emphasized that the harmless error test:

> is not a sufficiency of the evidence, a correct result, a substantial evidence, a more probable than not, a clear and convincing, or even an over-whelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Id. As the Court explained:

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[1] The State also argues that this error is procedurally barred "because there were no objections at trial and the issue was not raised on direct appeal." (Ans. Br. 38). As shown in Jones's Initial Brief, the prosecutorial misconduct is not barred for two distinct reasons. First, the error was fundamental to the fairness of the trial. Second, Jones could not have objected to the lie because the contents of the ballistics report were not in evidence. His objection, if made at all, would have been limited to the fact the prosecutor was commenting on non-record evidence. This issue is properly raised here. (In. Br. 43-44).

> Chief Justice Traynor argues, and we agree, that harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out:
>
> > Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result. Id. at 1136.

In sum, it is not enough for the State to merely argue, as it does here, that there was supposedly overwhelming evidence of guilt (as shown throughout this reply, there was not), and hence the error should be disregarded as "harmless." To the contrary, unless the State can prove beyond a reasonable doubt that "the error did not affect the verdict, then the error is by definition harmful." Id.

On the record before the Court, the State cannot establish beyond a reasonable doubt that the State's false argument did not affect the jury's verdict. The very centerpiece of the State's case was its contention that the gun found with Jones when he was arrested was the gun used to commit the murders and, ipso facto, Jones was the killer. Because of the patent deficiencies and conflicts in the fingerprint and identification

evidence, (see In. Br. 35-37, 52-58 and infra, pp. 16-17, 24-25), the State knew that the identification of the murder weapon was crucial to any conviction and subsequent death sentence. Recognizing this, it seized upon Jones's gun as the theme of its case, repeatedly asserting that this "very rare and unusual" gun was the murder weapon. This theory of the case permeated and infected the entire trial.

It began with the opening statement, where the State argued that the gun found with Jones at his arrest was the murder weapon. The Assistant State Attorney asserted that, on July 2, 1980, Jones arrived at the home of John Uptgrow and "pulled out from somewhere on his body a long silver pistol," which the State claimed was the murder weapon. (T. 142). She went on to describe Jones's arrest on July 3, 1980, telling the jury that Jones was arrested while asleep on a pillow "and right underneath that pillow was a long-barreled silver revolver; just like the gun that was used the day before in the triple murder." (T. 145).

Significantly, the gun was the only tangible evidence cited by the State in its opening that allegedly linked Jones with the murders. This theme continued in the State's examination of witnesses, with the State making the gun the central focus of its case by questioning every principal fact witness and every police detective called to the stand about it:

1. The State's first significant fact witness was David Lynch. Laeser asked Lynch whether he saw "anything unusual being produced by" Jones when Jones walked into Uptgrow's living room. Lynch

testified that "[I]t came from under his shirt, it was a gun." (T. 215). Lynch described the gun in a variety of inconsistent ways: It was "brownish-like" or "like rust" or "silvery color, brass looking," or about the color of a microphone stand. (T. 216). Laeser then had a gun marked for identification as Exhibit 1-G and asked whether this gun (which would later be introduced into evidence as Exhibit 30) was the gun that Smith remembered:

> Q. (By Mr. Laeser) David, let me show you what has been marked 1-G for identification, and ask you if you can just tell me - I know you can't be positive, but does that look like the gun that you saw in the defendant's hand that morning?
>
> A. Yes it is. (T. 217).

2. The State's next witness, Anthony McDonald, was asked by Laeser whether he saw Jones holding anything in his hands. He testified that Jones held "[a] chrome pistol with a brown handle." (T. 277). Laeser asked McDonald whether Exhibit 1-G for Identification was the gun that McDonald remembered, and McDonald agreed it looked "just like it." (T. 277).

3. The State's next witness, Raymond Fleming, who was in the house but did not witness the murders, testified that after the shootings he saw a man move past him "with a big old chrome gun." (T. 320).

4. The State's next witness, Gloria Tillman, testified on direct examination that she saw Jones on July 1, 1980, at Thompson Grocery with a pistol, a "long gun" that was "silver with a brown handle." (T. 431). He shot the gun at the wall. (T. 431). She testified that Jones had the "same gun" the next day. She walked

with Jones to Walter Winfield's house where Jones placed the gun under a pillow. (T. 437, 440). She also testified that Exhibit 1-G for Identification was the same gun:

> Q. I am going to ask you to take a look at State's Exhibit Number 1-G for Identification and tell us if this looks like the gun you are talking about?
>
> A. It does.
>
> Q. Is that the gun you saw the defendant put under the pillow?
>
> A. Yes.
>
> Q. Is that the gun that he had the day before he shot the wall?
>
> A. Yes. (T. 440).

5. The State subsequently called several police officers to the stand, all of whom were questioned about the gun. Detectives Shipes and Edgerton testified that they discovered the gun marked as Exhibit 1-G for Identification under the pillow in the bedroom where Jones was arrested. (T. 521-22, 547-50). Shipes testified that Exhibit 1-G for Identification "appear[ed] to be the same revolver that was under Mr. Jones' pillow." (T. 522). He stated that he had "never impounded a handgun of that type" in the time he had been on the police force. (T. 522). Edgerton testified that the serial number on Exhibit 1-G matched the serial number on the gun found at the scene of Jones's arrest. (T. 547-48). "It is, in fact, the same weapon." (T. 548). The gun was then moved into evidence as State's Exhibit 30. (T. 548).

6. The gun was also the centerpiece of the State's direct examination of the case's lead detective, Donald Blocker. After a

long series of questions about the gun, the following exchanges capped off his testimony:

> Q. With reference to this firearm, the one that is Exhibit 30 - have you ever seen or been in close proximity of this type?
>
> A. This is the first time that I have been in contact with it in reference to an investigation since I have been a police officer. I think I have seen one on one other occasion - it was owned by a police officer.
>
> Q. In terms of whether this is a common gun or not so common gun or rare gun, would you be able to give us some sort of an idea how often one would run into a weapon of this type?
>
> A. It has been from my experience very rare that you would see a six inch long weapon used in any type of crime. (T. 802-03).

Upon this testimony about the uniqueness of the gun found with Jones, the State rested.

Commensurate with the State's heavy emphasis on the gun in its questioning of witnesses, the gun was likewise the central premise of Laeser's closing argument:

> We know that he [Jones] was allowed to walk through the house with the firearm in his hand and surprisingly, the witnesses were able to describe that very same morning to the police a very rare and unusual firearm.
>
> When they spoke to the police officers the very same morning of the homicide, they said it was a long, six inch barrel silver gun with a wooden grip, a gun that the detective in this case has indicated is a very rare type of firearm, one that he almost never sees in common usage. They were able to give that information, and they said that this firearm was carried by that Defendant on the morning of July 2nd, 1980. (T. 1011-12).
>
> He further declared:

> . . . . But what I do know is that every single piece of evidence points to the fact that this Defendant fired that firearm.
>
> Where do we find that firearm? The police didn't drain some lake to find it, like the Defendant told them 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. He has got extra bullets in his pockets, just like he had extra bullets the morning of the homicide. (T. 1019).

Continuing to hammer at this gun as the supposed murder weapon, Laeser then went so far as to tell the jury:

> . . . .This Defendant is the one who had the six inch gun in his hand that night, just as he had it in his hand that very next morning.
>
> 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, and clearly those are the crimes listed in the information, in the indictment. I would ask you to think solemnly upon what you have to do. (T. 1024).

Of course, that was a false statement since every witness had not testified that "this is the gun that was used." Rather, that was merely the leap the State wanted the jury to make as a result of the State's repeated reference to the "very rare" gun found with Jones when he was arrested.

Then, when Jones raised the issue of the missing ballistics report in his closing statement (T. 1026, 1032, 1034), and sought to raise a reasonable doubt in the mind of the jury as to whether his gun was in fact the murder weapon as the State claimed, Laeser responded right out of the box in his rebuttal argument by blatantly lying to the jury:

> 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).

In truth and fact, of course, as Laeser well knew, and as the State has acknowledged on appeal, the bullets from the crime scene were not "just flattened pieces of nothing." Eight had been tested by the State's own ballistics expert, who concluded they probably had not been fired from Jones's gun. That expert finding was why the State failed to present any ballistics evidence at trial--not, as Laeser told the jury, because the bullets were so "flattened" they could not be tested.

Having demolished, with a blatant lie, the effort of this pro se defendant to raise a reasonable doubt about the State's theory of the case--his "very rare" gun, which the State claimed was the murder weapon--Laeser returned again to the gun in his rebuttal statement: "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). Again, that was false: the gun had been variously described as brown, rust, brass, silver, and chrome (nowhere in the undersigned's dictionary is "chrome" defined as "silver").

Given the pervasiveness of the gun identification evidence put on by the State and the centrality of that evidence to the State's overall case, there is no way the State can establish beyond a reasonable doubt that Laeser's admitted prosecutorial misconduct with respect to the gun did not affect the jury's verdict. It has

long been recognized that "[a]rguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury." Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985). That "heightened impact" was exacerbated here, where the State's false and misleading argument permeated the warp and woof of the State's case.

It bears emphasis that the State does not dispute the falsity of the statements make by the prosecutor to this jury. That alone makes this case a most extraordinary one. The State does not point to a single case where the court has found a deliberate and knowing lie to the jury in a death case to be "harmless error." That is not surprising since it appears self-evident that this State should not be in the business of putting people to death on the basis of a lie.[2]

It bears further emphasis that this was not simply improper comment or argument about some peripheral point; it was a blatant lie about the most crucial piece of evidence offered by the State to the jury. Nor was it a mere passing reference, as in Kokal v. Dugger, 718 So. 2d 138, 143 (Fla. 1998), where there was an improper "one-word reference to remorse in a lengthy and otherwise proper closing argument." It was a direct--but absolutely false--rebuttal, in highly colorful terms that would stick with the jury,

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[2] In Sissela Bok's seminal book, Lying: Moral Choice in Public and Private Life, (Pantheon Books 1978), she notes that "[r]easonable persons might be especially eager to circumscribe the lies told by all those whose power renders their impact on human lives greater than usual." (p. 105). She also cautions that lies told out of "a desire to advance the public good" "form the most dangerous body of deceit of all." (p. 166).

destroying a pro se defendant's attempt to create reasonable doubt in the minds of the jurors as to whether he was guilty of having actually fired the bullets that killed.

If this lie was so unimportant as to be nothing more than harmless error, why did the State begin its opening statement by telling the jury that the State's theory was that this gun was used by Jones to commit the murders? Why did the State ask every principal witness about that gun? Why did the State falsely tell the jury in closing that all the witnesses had come in and testified that this was the gun used? Why did the State lie to the jury in its rebuttal about the ballistics test?

Harmless error-Poppycock! The lie was told by Laeser because he thought the gun was the critical piece of evidence and he needed to rebut the argument advanced by Jones, which he could only do by lying to the jury. Having recognized at the time that a lie was needed to obtain a conviction, it is no answer for the State to protest now that there was overwhelming evidence of guilt (which there was not) without the lie.

To repeat the Court's admonition in DiGuilio, the test is not whether the evidence is sufficient to sustain the verdict--it is whether there is "a reasonable possibility that the error affected the verdict." 491 So. 2d at 1139. Here, given the centrality of the gun to the State's case, there is most certainly a "reasonable possibility" that the State's error affected the verdict. As such, the State has not satisfied its heavy burden of proving that its lie to the jury was harmless. See Donaldson v. State, 23 Fla. L. Weekly S245, 1998 WL 207909 (revised opinion) (Fla. 1998)(declining

to find error harmless where point was heavily emphasized by prosecution).

Even setting aside whether the State's false argument about the gun was or was not harmless error with respect to the guilt phase of the trial, it certainly was not harmless error at the penalty phase. It has long been recognized that "prosecutorial improprieties at the guilt phase can affect the jury in its sentencing determination." Cargill v. Turpin, 120 F.3d 1366, 1379 n.19 (11th Cir. 1997). Here, building on his theme of the gun as a centerpiece of the prosecution, Laeser declared in his closing argument at the penalty phase:

> He clearly was the person who shot John Uptgrow. He probably was the person who shot McKevas Smith. He probably was the person who shot Raymond Fleming, but the evidence indicates that there was only one person in that room whoever was seen with a firearm, whoever exhibited a firearm, and that was this defendant, Ronnie Lee Jones. (T. 1212).

In fact, what were Laeser's last words to the jury concerning the evidence put forward at the trial? Once again, they concerned the State's centerpiece exhibit--the gun:

> 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. 1228).

Thus, the improper argument carried over from the guilt phase and contributed to imposition of the death penalty. In order to impose the death penalty for a felony murder, the State had to prove beyond a reasonable doubt that Jones was recklessly indifferent to human life. See Tison v. Arizona, 481 U.S. 137, 158 (1986); Jackson v. State, 575 So. 2d 181, 190-91 (Fla. 1991).

Without the gun in Jones's hand, the State could not have reached this threshold. As such, the prosecutor's false argument regarding the gun undoubtedly affected the jury's decision to impose the death sentence in this case.

In sum, the State obtained its verdict--and death penalty sentence--by telling the jury a blatant lie in order to prevent this pro se defendant from raising a reasonable doubt as to his guilt. The State cannot escape the effect of its extraordinary conduct by arguing that its lie did not affect the jury's thinking. People--and certainly lawyers bound by a high professional code of honor and candor to the trier of fact--do not lie unless they perceive a good reason to do so.

This Court should send a strong message that blatant lies by prosecutors in death cases, especially those involving a pro se defendant, are intolerable and cannot be reconciled with fundamental notions of fairness, justice and the rule of law.[3] Garcia v. Manning, 727 So. 2d 59, 60 n.4 (Fla. 3d DCA 1998) (prosecutor's ethical obligations "particularly important . . . where the opposing party is unrepresented."). The conviction must be reversed. At an absolute minimum, the death sentence cannot stand.

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[3] Plainly, a message is needed on an even broader basis. See Bell v. State, No. 97-01141, 1998 WL 903638 (Fla. 2d DCA Dec. 30, 1998)("At times it seems as if certain counsel consider the harmless and fundamental error rules to be a license to

POINT TWO

The Trial Court Erred in Failing to Consider the Additional Ground Raised in the Defendant's Amended 3.850 Motion

The State argues, without citing any authority whatsoever, that Jones's amendment to his pending 3.850 motion (to detail the further prosecutorial misconduct of mischaracterizing fingerprint evidence) was untimely because it was filed ten years after the original motion. (Ans. Br. 40). The State completely misses the point. There are two ways to amend a 3.850 motion and, accordingly, two distinct inquiries as to timeliness. (See In. Br. 49-52). If the amendment raises a totally new issue, it must be asserted within two years; however, if the amendment simply "enlarges" an issue that was previously raised in an earlier timely-filed motion, the rules prescribe no set time limit. See Fla. R. Crim. P. 3.851(b)(3) ("this [two-year] time limitation shall not preclude the right to amend or to supplement pending pleadings pursuant to these rules").

The State ignores these different standards when it asserts that "[t]he instant claim was in no way presented to the court below." (Ans. Br. 40). That is simply wrong. Jones specifically raised the claim of prosecutorial misconduct in his initial Rule 3.850 motion, asserting the State overreached at trial by misrepresenting evidence and misleading the jury in closing arguments. Jones cited, as an example of this misconduct, the

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violate both substantive law and the ethical rules which prohibit improper argument.").

State's presentation of the gun evidence. (See Jones's Initial 3.850 motion, Claim XI at 90).

Thus, the issue of prosecutorial misconduct was explicitly raised in the original Rule 3.850 motion, and the State does not suggest to the contrary. Consequently, the fact that the original Rule 3.850 motion did not mention fingerprint evidence is of no moment. In now raising the fingerprint issue, Jones simply "enlarged" the previously-raised ground by pointing to yet another instance of prosecutorial misconduct. And, as this Court has made clear, "the two-year limitation does not preclude the enlargement of issues raised in a timely-filed motion for post-conviction relief." Brown v. State, 596 So. 2d 1026, 1027 (Fla. 1992).

Notably, the allegedly untimely amendment was filed before the State responded to the initial Rule 3.850 motion, before the motion was resolved by the trial court, and before any judicial resources were expended considering the post-conviction relief sought. Yet the trial court refused to consider the amendment. Indeed, the court even erroneously refused to consider the prosecutorial misconduct as to the gun, even though that was incontestably raised in the original motion itself!

Finally, even if the prosecutor's misconduct with respect to the fingerprint evidence was not itself a proper basis for reversal, it must nonetheless be considered in the context of the State's harmless error argument as to the prosecutor's lie about the gun. The State relies heavily upon the supposedly overwhelming evidence it presented against the defendant. But if this were true, why misrepresent the fingerprint evidence? Of course, the

answer is that there were admittedly substantial problems in the identification of the shooter (see Ans. Br. at 57-58, 64 and infra at 24-25), and the State needed a blatant lie (the gun) and a misleading argument (the fingerprints) to obtain its conviction. At the very least, this further example of prosecutorial misconduct confirms that the conceded lie as to the gun was anything but harmless.

But this alternative consideration should not distract the Court from this point's independent merits. The differences between the record evidence regarding the fingerprints and the State's argument regarding same are dramatic. The record shows there were over 52 other latent fingerprints that did not belong to Jones or the others tested. Yet, the State falsely told the jury that "[T]here isn't a single solitary fingerprint of anybody inside the apartment other than elimination [finger]prints." (T. 1020-21).

The State essentially concedes this misrepresentation, answering only that the jury should have understood that the prosecutor actually meant this statement to be considered in some kind of broader context. (See Ans. Br. 42). But the broader context offered by the State serves as an admission that the prosecutor's statements were, on their face, seriously misleading. Common sense dictates that when a jury is told by the prosecutor that "[t]here isn't a single solitary fingerprint of anybody inside the apartment other than elimination prints," that blanket assertion is what the jury is left with, not the unstated fact that, in truth, 52 latent prints of others were found. Jones's conviction must be reversed and his sentence vacated.

POINT THREE

The Uncontested Evidence of the Defendant's Lack of Competency to Stand Trial in 1981 Required Vacation of His Conviction and Sentence.

By its November 4, 1985 order, this Court reversed the trial court's denial of Jones's original Rule 3.850 motion, determining that Jones had put forward sufficient evidence to entitle him, *inter alia*, to a hearing on his competency to stand trial. In a later case, this Court stated it had remanded in this case because the Rule 3.850 motion presented extensive psychiatric history and evidence of organic brain damage that, unless refuted, would establish that the defendant had not been competent to stand trial. See James v. State, 489 So. 2d 737, 739 (Fla. 1986). More than 11 years after the remand order, the trial court conducted a competency hearing for Jones.

Under Hill v. State, 473 So. 2d 1253 (Fla. 1985), and Mason v. State, 489 So. 2d 734 (Fla. 1986)(Mason I), the trial court was required to engage in a two-part inquiry at the competency hearing: (1) whether, despite the passage of more than 15 years since the criminal trial, the tools of rational decision-making and sufficient quality evidence were available to permit a retrospective determination of competency without engaging in speculation and violating Jones's due process rights; and (2) if so, whether Jones was competent during all phases of his 1981 trial and sentencing.

The State does not dispute that these two issues were properly before the trial court as a result of this Court's remand order. The State argues, however, that the trial court's recollection of

the trial and the trial record itself were sufficient to establish that Jones was competent. The State's argument improperly ignores this Court's remand order and the evidence at the competency hearing, and is wrong as a matter of fact and law.

A. The Only Competent Evidence Adduced at the 3.850 Hearing Was That Jones Was Incompetent at the Time of Trial.

Four doctors testified at the competency hearing. Not one of them opined that Jones was competent to stand trial in 1981. Two of them expressly opined that he was incompetent.

Weinstein, the State's only expert witness, testified that he had formed no opinion of Jones's competency at the time he tested him in 1991, let alone as of the 1981 trial. Specifically, Weinstein did not assess Jones's capacity to appreciate the charges against him, the nature of possible penalties that might be imposed, his understanding of the adversary nature of the legal process, his ability to disclose pertinent facts to counsel, or his ability to manifest appropriate courtroom behavior--all of which are necessary inquiries for determining competency under Florida Rule of Criminal Procedure 3.210. (H. 326-27).

Moreover, Weinstein unequivocally declared that neither he nor any similar psychologist could go back and determine competency years before when Jones's trial took place. (H. 311). In light of that concession, Weinstein's belief that Jones performed inconsistently (and thus may have been "malingering") on the tests Weinstein administered in 1991 is irrelevant to the competency

issue before this Court.[4] Given Weinstein's failure to opine on Jones's competency in 1981--the only issue before the court--and his concession that he could not speak to that issue, his views on other issues could not satisfy the State's burden of refuting the prima facie showing that Jones was incompetent during trial. All his testimony could show (if it was accepted by the trial judge, who made no findings) is that the issue of Jones's competency cannot be determined retrospectively.

Dr. Jaslow was called by Jones as a fact witness. He was the only doctor to have done any examination of Jones during the 1981 trial.[5] However, it is undisputed that Jaslow's examination was limited to evaluating one possible mitigating factor; he admittedly did not conduct any sort of competency evaluation. (H. 25, 31). Jaslow also readily acknowledged that an examination for competency is a broader examination than what was required for him to perform his much more limited assignment. (H. 30).

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[4] Throughout its brief, the State puts heavy emphasis on its suspicion that Jones was malingering in 1991. Quite apart from the fact that such malingering, even if it occurred, would not establish that Jones was competent in 1981—an issue as to which Dr. Weinstein adamantly refused to opine—the State's argument shows the prejudice caused to Jones by the trial court's inconsistent rulings on the parties' objections related to malingering. (Compare H. 255-56, 276, 315 (overruling objections to State's questions to Weinstein) with H. 257-60 (sustaining objections to Jones's questions to Dr. Crown)).

[5] The State incorrectly states that most of the evidence dated from the time of trial. That is simply wrong. Of the four testifying doctors, only Jaslow offered testimony which dated from the original trial. And, he conducted no competency examination at that time and did not testify that Jones was competent in 1981.

The other two doctors called by Jones were Drs. Crown and Dudley, one a psychologist and the other a psychiatrist and both highly credentialed professionals. (See H. 61-66, 225-30). In stark contrast to Weinstein and Jaslow, both of these experts did opine on whether Jones was competent in 1981.

Dr. Crown testified it was more likely than not that Jones did not have a rational (nor a factual) understanding of the proceedings and was not competent at the time of trial. (H. 234, 243). When asked to focus on the 1985 time frame when he performed his evaluation, Dr. Crown was even more specific, opining that Jones was not competent. (H. 233). Dr. Crown based his opinion on neuropsychological tests he administered, tests which, according to research literature, are not susceptible to feigned mental impairment. (H. 237). These tests confirmed that Jones suffered from chronic brain damage caused by chronic polysubstance abuse including free-based cocaine, boxing, and a gunshot wound to the head which produced a hematoma.[6] As a result, his ability to engage in abstract problem solving was impaired, and he had deficiencies in concentration, attention and mental flexibility. (H. 231-35).

The State's witness, Dr. Weinstein, agreed that the mental impairments Dr. Crown found could be associated with diffuse organic brain damage. Moreover, although Weinstein questioned Jones's motivation to put forth his best effort on Weinstein's 1991

[6] Although the State seeks to minimize the effect of the gunshot wound, Dr. Crown explained how the effects on mental ability

tests, he conceded that he could not rule out the possibility that Jones suffered from diffuse organic brain damage.[7] (H. 324-25, 327).

Like Dr. Crown, Dr. Dudley opined it was more probable than not that Jones was incompetent at the time of trial. (H. 96). Thus, Jones presented evidence from both the disciplines of psychology and psychiatry, which use different analytical tools and evaluation processes, of his incompetence.

Dr. Dudley conducted his examination of Jones in 1996. Although Dr. Dudley explained that it is quite difficult to determine a person's mental state 15 years earlier (H. 102-03, 135-36), he believed he had sufficient information to reach conclusions on that issue. (H. 67-68). Specifically, Dudley concluded that, at the time of trial in 1981, Jones suffered from a major psychiatric disorder known as "a paranoid delusional disorder" in which an individual will hold onto a fixed, false, irrational

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caused by the resulting hematoma would not necessarily have been immediately observed. (H. 251).

[7] Moreover, the State's obsession with Weinstein's "malingering" suspicion betrays a fundamental misconception. The doctors testified that Jones had been incompetent based on their findings of psychological and cognitive abnormalities arising from organic brain damage--which are not dependent on a finding of mental retardation as the State would have the Court believe. See, e.g., Fairchild v. Lockhart, 774 F. Supp. 1429, 1455 (E.D. Ark. 1989)("courts have confused mental illness, which is an organic condition with psychologic or behavioral manifestations, and mental retardation, which is not an illness but rather a limitation on a person's ability to learn."); Donald H.J. Hermann, et al., Sentencing of the Mentally Retarded Criminal Defendant, 41 Ark. L.Rev. 765, 73 (1988)("Retardation must be contrasted with the disordered thought processes and perceptual distortions of mental illness. . . .").

belief in the face of all evidence to the contrary. (H. 70, 73, 82-85, 90). This paranoid disorder affected Jones's ability to engage in the abstract conceptualization and formal thought processes necessary to rational decision-making and reasoning. Instead, Jones engaged in "concrete thinking," fixating on a particular idea and not moving on to important items. As a result, Jones became convinced that anyone associated with the legal system, including his own attorneys, was plotting against him. (H. 70-71, 83, 93).

These findings, according to Dr. Dudley, were consistent with those of another psychiatrist, Dr. Stillman (now deceased), who had examined Jones in 1985, just a few years after the 1981 trial, and who had prepared one of the medical affidavits upon which this Court remanded for a competency hearing in its 1985 order. (H. 90, 119). Importantly, then, the only two medical doctors who examined Jones both came to similar conclusions regarding Jones's impaired mental functioning and psychological disorders.

Dr. Dudley went on to opine that it was highly probable that Jones was incompetent at the time of trial. (H. 95). In fact, Dr. Dudley believed the vast majority of the relevant legal factors regarding competency would not have been satisfied at the time of trial and that Jones's mental disorders would have affected his ability to make a judgment about how best to help himself at trial. (H. 97, 101).

Having failed to present any medical evidence contradicting Jones's experts, the State points to selected aspects of Jones's

examination of certain witnesses and incredibly suggests that these were conducted "with a skill approaching that of many attorneys."[8] However, Dr. Dudley noted that Jones was receiving help from other prisoners, and that he was asking questions that were in the materials that had been given to him. As a result, sometimes his questioning would appear to be somewhat organized and prepared while, on other occasions, Jones would say things that were difficult to understand, did not make sense, or were consistent with "fixated," irrational thinking. (H. 80-81, 170)

The State also asserts that Jones was lucid at trial and employed successful strategy. But isolated lucidity is expected with the type of cognitive deficit Jones suffered and hardly proves his competency. Moreover, Jones hardly employed sound trial strategy. To the contrary, a fair reading of the trial transcript demonstrates Jones's cognitive deficits, as described by the experts, rather than an ability for abstract conceptualization and rational reasoning. Most vivid from the transcript is Jones's lack of ability to conceptualize the fundamental weaknesses in the prosecution's case and pursue relevant key lines of inquiry. For example:

• Jones did not grasp and present to the jury the fact that the three eyewitnesses had given descriptions of the gunman, as

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[8] Ironically, in Point One, the State argues that overwhelming evidence precludes a finding of harmless error. In Point Three, however, the State emphasizes that Jones did a remarkable job of exposing all the flaws in the State's case. (See, e.g., Ans. Br. 57-59, 62-64, 66). By this later argument, the State confirms

well as the timing of events, that were wildly inconsistent, evinced signs of fabrication, and severely undermined their credibility;

• Jones did not implement the very easy challenges to the State's central theme – the gun; and

• Jones did not grasp and present the significance of the evidence implicating Clyde Facen.

Indeed, even the most cursory review of the actual facts demonstrates the falsity of the State's praise of Jones's legal skills at trial:

First, as to Identification of the Shooter: None of the witnesses identified Jones as the gunman in their initial statements to the police; they only did so later, when their testimony about other facts changed significantly. (A.VI-4, 5, 6). With Lynch, Jones did attempt to raise some points but he totally missed the significance of Lynch's inconsistent identifications. Jones neglected to mention that, in his police statement, Lynch described the gunman as wearing a black short-sleeved shirt; then in his deposition as wearing a bluish top; and then was not asked about the gunman's clothing at trial by the State (when the other two witnesses testified that the gunman wore a white t-shirt). (A.VI-4 at 3, A.VI-7 at 15). Also, Jones did not bring out Lynch's statement to the police that the gunman had plaited hair – the hairstyle undisputedly not worn by Jones but worn by Clyde Facen,

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that the prosecutorial misconduct could indeed have affected the jury's verdict! Thus, it cannot be excused as harmless error.

whose bloody fingerprint was found at the scene. (A.VI-4 at 5, A.VI-11 at 20; A.II-2 at 139; In. Br. 53).

With McDonald, Jones failed to pursue that McDonald had not been asked about the gunman's clothing in his police statement, but had later described it as a white shirt in his deposition and trial testimony. (A.VI-5; A.VI-8 at 79; T. 278). Also, McDonald had said that the other man wore a fluorescent blue top, which was inconsistent with Lynch. (A.VI-5 at 6).

With Fleming, Jones complained that the witness's repeating his direct testimony the gunman wore a white t-shirt was not responsive to Jones's question about what he saw. (T. 320). But, much more importantly, Jones utterly failed to point out that, in Fleming's prior statement and deposition testimony, he had claimed that he did not see the gunman's clothing and only changed his testimony after McDonald testified about a white shirt and after the State failed to ask Lynch about the black shirt he said he had seen. (A.VI-6, A.VI-9; T. 305).

Second, as to the Timing of Key Events. Jones did not pursue Lynch's wildly varying testimony on timing: (a) he arrived at Uptgrow's apartment either at 10:00 p.m. or between 11 and midnight, and (b) when Uptgrow and the gunman headed to the back bedroom, he heard shots either after 30 to 45 seconds or, alternatively, after 15 minutes. (A.VI-4; T. 207, 222). Moreover, McDonald had alternatively claimed that he arrived at the apartment either between 6 and 7 p.m., 10 and 11 p.m., or 11:30 p.m. and 12:30 a.m.; and that the gunman arrived either at 11 p.m. or between 1:30 a.m. and 2 a.m. or 11:45 p.m. and 12:20 a.m. (A.VI-5,

A.VI-8 at 22, 41; T. 269, 272-73). Jones did not pursue any of this either.

Third, as to the Key Evidence Implicating Facen. Jones failed to conceptualize and pull together the evidence against Facen that: (1) Facen had a gun that looked liked Jones's "rare and unusual" gun but was not tested against the bullets from the crime scene (A.VI-14); (2) Facen's bloody fingerprint was found on victim Uptgrow's identification card on the back porch of the apartment (In. Br. 53); (3) Facen was "on the scene" at the one bedroom apartment--rented by Walter Witfield and not Jones--where Jones was arrested and, hence, may have also slept in the room where the pouch purported to belong to Uptgrow was found weeks later (A.VI-11 at 29-30, A.VI-12 at 36); and (4) unlike Jones, Facen had plaited hair, as did the gunman described by Lynch. (A.VI-11 at 20, A.VI-4; A.II-2 at 139).

Fourth, as to Jones's Irrational View of the Proceedings. In choosing to represent himself, Jones stated: "Your Honor, could you add this: I choose to represent myself, because the State failed to present me with a fair trial as far as my expert witnesses, this is why I choose to try my own case." (T. 61). Jones also betrayed his irrational understanding of the proceedings (1) in thinking that the State was on his side and meeting with police detectives in secret from his court appointed attorney (T. 782), and (2) in refusing to call the ballistics expert, as an exercise of "strategy," even though that testimony could well have exonerated him.

In short, the trial transcript hardly establishes that Jones was competent. Furthermore, the State wholly ignores that those close to Jones with real legal acumen all questioned his competency at the time. As discussed in Jones's initial brief, the opinions of Crown and Dudley regarding Jones's competency are consistent with the testimony of three attorneys, each of whom were appointed by the trial court to work with Jones in 1981, and each of whom indicated that he believed, at that time, that Jones required a competency evaluation but had not raised that issue with the court.

The affidavits of Kershaw and Wilson were part of the basis on which this Court remanded for the Rule 3.850 hearing in 1985, and Judge Korvick, at the Rule 3.850 hearing, volunteered that Kershaw and Wilson were "very honorable people," "two of the straightest individuals" she knew, and "shining knights in the public defender's office," (H. 394, 396). Nevertheless, when they testified consistently with their affidavit testimony at the 3.850 hearing, Judge Korvick entirely discounted their uncontradicted testimony, voicing instead her own view that these lawyers "certainly would have spoken up" if they had thought Jones needed a competency evaluation. (H. 395, 400). Judge Korvick thus substituted her own fifteen-year-old recollection for what they testified in fact was in their minds.

In the end, the facts and evidence adduced at the Rule 3.850 competency hearing required a finding that Jones was incompetent when tried. The evidence fleshed out (and was fully consistent with) the prima facie showing upon which this Court remanded in 1985. Indeed, the State failed to present a single doctor who

could refute the opinions of Crown and Dudley--opinions which were consistent with the lay observations of the various lawyers who represented or interfaced with Jones during the trial period and who also testified as to his incompetency.

What the State is reduced to arguing, therefore, is the same argument it presented--and this Court rejected--the first time the Rule 3.850 motion came up for review: that based upon the recollections of the trial judge and the trial record itself, Jones should be found to have been competent.[9] But, if that were all the State needed to show, it had already done that and there would have been no reason for this Court to remand for an evidentiary hearing on competency. Instead, this Court would have rejected the submissions from three doctors and three lawyers Jones made in support of his Rule 3.850 motion, in favor of the contentions put forward by the State. That, of course, is not what happened.

Simply put, the competency hearing ordered by this Court amounts to wasted resources if the State's same, tired arguments

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[9] Manifestly, the State cannot argue that the same showing it made unsuccessfully in 1985 is sufficient now, in the face of compelling evidence to the contrary developed at the hearing. Given the uncontradicted medical evidence that Jones was not competent in 1981, the State's arguments are even less persuasive than they were when the Court rejected them in 1985. See Hill v. State, 473 So. 2d 1253, 1256 (Fla. 1985)(not enough that defendant can testify coherently, withstand cross, is oriented to time and place and mentally alert, and has some recollection of events; full competency hearing required); Callaway v. State, 642 So. 2d 636 (Fla. 2d DCA 1994) (trial court's statement that it could remember defendant testifying and that he could carry on an intelligent conversation not enough to dispense with need for competency hearing).

can carry the day in 1998 when they could not in 1985. But when the facts and medical evidence put forward at that hearing are considered, the only reasonable conclusion that can be drawn is that Jones was incompetent at the time of trial. It is not surprising, then, that the trial court made no findings, as she was expressly required to do, and instead merely denied the motion without explanation.

B. If a Retrospective Determination of Competency Cannot be Made Consistent With Due Process, the Conviction and Sentence Must be Reversed.

The general rule in Florida is that a hearing to determine whether a defendant was competent to stand trial cannot be held retrospectively. This was the holding of this Court in its seminal decision in Hill v. State, 473 So. 2d 1253 (Fla. 1985).[10] The rule has been reaffirmed. See Tingle v. State, 536 So. 2d 202, 204 (Fla. 1988); Pridgen v. State, 531 So. 2d 951, 955 (Fla. 1988). It has also been followed by the district courts. See, e.g., Holland v. State, 634 So. 2d 813 (Fla. 1st DCA 1994); State v. Weber, 466 So. 2d 345 (Fla. 3d DCA 1985).

Although Hill sets forth the general rule and notes the "inherent difficulties" of a *nunc pro tunc* competency determination

[10] The State asserts that Hill was wrongly decided because the Court reached a procedural claim on post-conviction review when that claim should have been raised on direct appeal. However, the briefs submitted by the parties in Hill make it plain that Hill was not claiming a procedural violation but, rather, a substantive one, which was properly raised on the 3.850 motion. Hill is highly relevant to this case and cannot be cavalierly brushed aside as the State attempts.

under even the most favorable of circumstances, "there is no per se rule in Florida prohibiting a nunc pro tunc competency determination if 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." Mason I, 489 So. 2d at 737. In those limited circumstances, "(t)he experts. . . will not have to rely upon a cold record or recent examination. . ., and the chances are therefore decreased that such a nunc pro tunc evaluation will be unduly speculative." Id. at 737.

The facts in Mason I, which are not present here, illustrate the narrow nature of the exception to the general rule of Hill.[11] After remand, the Court determined that a retrospective finding was sufficiently reliable because three psychiatrists had examined Mason contemporaneously with the original trial and determined him competent; two of them had reexamined Mason and confirmed their original findings at the evidentiary hearing. See Mason v. State, 597 So. 2d 716 (Fla. 1992) (Mason II). Moreover, numerous lay and expert witnesses testified, as did four new mental health experts and Mason's own trial lawyer (who said Mason was competent at the time of trial). Id.

Here, the trial court was asked to address the competency issue a year-and-a-half after Jones's conviction become final and

[11] The State incorrectly asserts that Jones relies mostly upon cases involving Pate [v. Robinson, 86 S. Ct. 836 (1996)] claims decided on direct appeal. Both Hill and Mason were 3.850 cases, and they are the seminal cases upon which Jones relies for the proper legal framework.

within four years of trial, but the State did not bring this matter to hearing until more than fifteen years after the criminal trial and more than eleven years after the remand order of this Court. Drs. Crown and Dudley conducted their examinations four and fifteen years after trial, respectively, and the State's witness, Weinstein, ten years after trial. Only Dr. Jaslow examined Jones at the time of his trial, but his limited examination did not include a competency evaluation.

Most significantly, no one who interfaced with Jones at the time of trial testified he satisfied the competency standards set forth in the rule. This case was therefore in a very different posture from the Mason cases and the handful of other Florida cases that have employed the narrow carve-out to the rule in Hill that *nunc pro tunc* competency hearings generally cannot be done.

The State correctly points out that a defendant who asserts a claim of incompetence at trial ultimately shoulders the burden of showing such incompetence by a preponderance of the evidence. But it also is axiomatic that a defendant has a constitutional right--which cannot be waived--not to be tried while incompetent. See Drope v. Missouri, 420 U.S. 162 (1975); Holland, 634 So. 2d at 816 (citing State v. Tait, 387 So. 2d 338, 341 (Fla. 1980)).

That is why this Court has squarely held that, when a defendant raises sufficient bona fide doubt as to his competency based on evidence discovered post-trial--which this Court's remand order already establishes was true here--the court must grant a new trial if, "for whatever reason, an evaluation of [the defendant's] competency cannot be conducted in such a manner as to assure [the

defendant] due process of law . . . ." Mason I, 489 So. 2d at 737; See also State v. Williams, 447 So. 2d 356, 359 (Fla. 1st DCA 1984) ("Should the evidence presented . . . convince the court that a retrospective determination of appellant's competency cannot be made with sufficient certainty to vindicate appellant's due process rights, then the court should so rule, set aside the conviction, and grant a new trial.").

A determination of competence based apparently on a trial judge's own fifteen-year-old recollection of Jones at trial is not constitutionally reliable in the face of (1)consistent, multiple expert opinions that Jones was in fact incompetent; (2) pervasive transcript evidence of aberrant mental functioning; and (3) doubts as to Jones's competence asserted uniformly by the several defense counsel appointed during pre-trial and trial proceedings. The due-process standard dictates that a new trial be ordered.

It remains only to note that applying the Mason competency standards will not, as the State suggests, open the floodgates to frivolous claims of incompetency. Indeed, this Court's prior opinion remanding this case for a competency determination exposes the fallacy in the State's argument: Any future defendant claiming incompetence based on evidence discovered post-trial will first need to make a sufficient, compelling showing--just as Jones did here--to convince a court that he or she is entitled to a hearing in the first place. That is no easy task.

Further, a large part of the difficulty in conducting a retrospective competency evaluation in this case is attributable to the fact that eleven years passed between remand and hearing. And

fifteen years had elapsed since Jones's trial. It is unlikely that similar difficulties would be faced in other cases, especially now that the defendant must raise his competency claim within one year of his conviction becoming final. See Fla. R. Crim. Pro. 3.850(b).

In sum, this case does not present the specter that any convicted defendant need simply ask for a *post hoc* competency hearing and then argue for reversal of the conviction because too much time has passed for a constitutionally sound hearing to be held. The State's straw man argument--that granting Jones the relief to which he is constitutionally entitled will open up the floodgates for other convicted defendants--rings hollow.

POINT FOUR

In violation of the Defendant's Federal and Florida Constitutional Rights, Counsel Failed to Raise Their Concerns About the Defendant's Competency With the Trial Court.

Jones was provided ineffective assistance of counsel by attorneys who failed to request a competency hearing for him. Arguing this point as "irrelevant" and "superfluous" in turn, the State continues its worn refrain that Jones was not prejudiced because he was in fact competent. The converse of such reasoning, logic dictates, is that Jones was prejudiced if he was in fact not competent.

As to the State's meager argument that the lawyers did not have the expertise to know Jones was incompetent, it misses the point: the question is not whether the lawyers knew Jones was incompetent, it was whether they had a concern he might be so impaired. See Scott v. State, 420 So. 2d 595 (Fla. 1982). In that event, they were required to seek a competency evaluation. The

State notes that some of these attorneys only had limited contact with Jones. But when each of the court appointed attorneys came into contact with Jones, no matter how limited the contact was, they all had a concern that Jones was not competent and was in need of a competency evaluation; yet none of the attorneys requested such a hearing for Jones. (See In. Br. 84-90).

Clearly, the duty to investigate Jones's competency to stand trial was ignored. See Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994) (holding that defense counsel has a duty to investigate client's competency to stand trial). The system failed Jones and vacation, reversal, and remand are required.

Conclusion

This is an extraordinary case in two ways.

First, the State has conceded that the prosecutor lied to the jury in rebuttal closing argument. The State argues this was nonetheless harmless error because the evidence of Jones's guilt was supposedly overwhelming. But then, in an effort to avoid the unrefuted medical proof of Jones's incompetency in 1981, the State points to the supposedly adroit way Jones was able to demonstrate the significant holes in the State's case (while the State ignores the even more significant holes Jones utterly missed). The State's effort to have it both ways should be seen as such and rejected. A lie about the centerpiece of the State's case--a case with such gaping holes that a pro se defendant could point some of them out to the jury--cannot be dismissed as harmless error.

Second, after this Court concluded that Jones had made a prima facie showing of incompetency, the State allowed 11 years to pass

before bringing the issue to hearing on remand. Given this inordinate lapse of time, the State's only medical witness conceded he was unable to make a determination of Jones's competency at the time of trial. The only medical doctors who opined, based on the information that was available, on Jones's competency at the time of his 1981 trial said that he was not competent. Without making any findings, the trial judge simply disregarded the proof before her, declaring Jones had to have been competent or someone would have raised this issue with her at that time. But this Court had already held that Jones made a prima facie showing of his lack of competency and the State utterly failed to refute Jones's expert (and other) evidence at the hearing on remand.

The convictions and death sentence cannot stand under these extraordinary circumstances. Accordingly, Jones's death sentence should be vacated, his convictions reversed, and his case remanded.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sandra Jaggard, 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 4th day of January, 1999.

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