ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LUTHER T. BASSE,
Petitioner,

vs. CASE NUMBER: 93,760

STATE OF FLORIDA,
Respondent.
_____/

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE

COMES NOW the Petitioner, Luther T. Basse, and files this Reply Brief pursuant to this Honorable Court's Order dated November 17, 1998, and replies to Respondent's Response:

PRELIMINARY STATEMENT

The substance of the Response argument necessitates Petitioner reply to Respondent's statement of fact and argument separately. The Response at page one, paragraph two is Respondent's statement of fact, which will be replied to in POINT ONE. The remainder of the Response is frivolous rhetoric, insulting the integrity of this Court and Petitioner's competence as an adversary. It is a pathetic attempt, being totally consumed with inaccurate facts and irrelevant argument, to excuse Respondent's actions due to his lack of competent legal argument. Petitioner moves that the Response from page one, paragraph three to its conclusion be struck, as replied to in POINT TWO.

Respondent's Response Brief will be cited as (Response).

Petitioner's Petition for Writ of Prohibition/Mandamus will be cited as (Prohibition).

Petitioner's Petition for Writ of Habeas Corpus will be cited as (Habeas Petition).

Petitioner's Notice of Filing will be cited as (Notice).

POINT ONE

A review of Respondent's statement of facts (Response, pg. 1, par. 2) reveals Respondent concedes:

1. The petition filed in the Second DCA is a petition for writ of habeas corpus.
2. The Second DCA struck said petition for exceeding a 50 page limit, relying upon Fla.R.App.P. 9.210(a)(5).
3. The habeas petition is an original proceeding, not an appeal.

These concessions by Respondent in no way, shape or form rebut the issue raised in the Petition for Writ of Prohibition. Since the habeas petition is an "original" proceeding, Fla.R.App.P. 9.210(a)(5) does not control its proceedings, Fla.R.App.P. 9.100 does. The Rule relied upon by Respondent is inapplicable to original proceedings and Respondent cannot promulgate by implication a new Rule of Court. Secondly, even if, for the sake of argument, Fla.R.App.P. 9.210(a)(5) could be applied to "other" original proceedings filed under 9.100, it could not be applied to petitions for writ of habeas corpus as argued in the Petition for Writ of Prohibition, (Prohibition, pg. 10-11), as petitions for writ of habeas corpus are immune to dismissal for technical irregularities.

POINT TWO

While Petitioner finds Respondent's confession (Response, pg. 1, para. 3, and pg. 2) to this Court of his additional usurpation of Second DCA judicial authority by his unauthorized interpretation (Prohibition, pg. 8 at FN: 8) of the content, complexity, sophistication and number of issues presented in the habeas petition in his determining cause to strike, to be repulsive, Petitioner will defer respect to the Honorable Respondent and ask this Court to review the record on its face.

This Court need only look at the file of the case instantly before them to discern the absurdity of Respondent's complaint of "[u]niversally appreciated principles of criminal law and procedure are painstakingly detailed." Is there any wonder that Petitioner "painstakingly details?" There is nothing novel in the instant case, simply a total disregard by Respondent for the Florida Constitution, the Rules of Court, substantive law and the rule-making authority of the Florida Supreme Court[1]. Surely there is no greater "universally appreciated principle of criminal law and procedure" than the constitutionally guaranteed right to timely file an original habeas corpus petition in a court of competent jurisdiction, it being engraved in its own Section of the Florida Constitution, Article I, Section 13. Then

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1/ Noting, both Respondent Parker and Respondent Haddad had ample opportunity to correct any clerical error by Respondent "C.S." in ruling on Petitioner's Motion for Rehearing. (Prohibition, Exhibit B; and pg. 3 at FN: 2; and Exhibit C).

why has Respondent made it necessary for Petitioner to painstakingly detail this law and procedure and infringe upon the judicial resources of the Florida Supreme Court? Petitioner cannot get the extremely simple and undiscretional procedure of filing accomplished, determine competent jurisdiction, without "painstaking detail".

Is Respondent's Response Brief an example of the substance and "sophistication" (Response, pg. 2) desired in the Second DCA? Respondent's only citation of authority is a Rule that does not even remotely apply to an original proceeding, much less a habeas corpus petition. The Response is rife with inaccurate facts, unfounded complaints and irrelevant argument. Does Respondent suggest this Honorable Court adopt his "implied" Rule and "sophisticated," but empty, rhetoric to overcome the direct conflict with the controlling Rule and case law cited by Petitioner? Petitioner does not join Respondent in insulting the integrity of this Court.

By contrast, concerning the facts Respondent inaccurately cites, Petitioner will gladly place the substance of his habeas petition, interestingly, the **ONLY** relevant issue that must be determined once jurisdiction has been satisfied, against the substance of ANY response, as Petitioner's five (not one as

Respondent claims[2]), exquisitely documented, (as required by Rule 9.100, 1977 Committee Notes[3]), constitutional violation issues

2/ See Prohibition, pg. 7, pg. 9 at FN: 9; and Exhibit H: Habeas Petition, pg. i, ii, Table of Contents, and pg. 104-105, Summary of Issues. Respondent's description of the ineffective assistance of counsel issue is erroneous. He begins by improperly "qualifying" Petitioner's original proceeding as being based upon a "purported failure". (Response, pg. 1, par. 3). It is not "purported", but a factual legal claim that has, to Petitioner's knowledge, not been refuted by response to order to show cause. To correct the instant record, the factual legal failure presented is that Appellate Counsel himself did not obtain the Record on Appeal. The Court record was eventually supplemented, although, the last minute supplementation of the record included two illegal ex parte supplementations by the State and the Second DCA's own Order to Supplement the Record with documents outside the Record. Respondent's inartful "interpretation" would be easily refuted as there was also a last minute supplementing of the audio tapes to the Court Record after all briefs had been filed. (Exhibit I: Habeas Petition, pg. 26-40). Also, Respondent's eleven and a half minute audio tape is not eleven and a half minutes, but rather, a two and one half hour interrogation recorded in its entirety. (Exhibit J: Habeas Petition, pg. 10-11, Request for Oral Argument). That two and a half hour audio tape, that Appellate Counsel failed to obtain, is the entire case, in fact, the content of that audio tape was the basis for the pre-trial hearing, sole evidence against Petitioner at trial and the only foundation for issue of error on Direct Appeal.

3/ See Prohibition, pg. 11 at FN: 10. Petitioner had to create an accurate transcript of the two and a half hour audio tape (Included as Exhibit A of habeas petition) and re-create the entire **pre-trial hearing** record due to the State's malicious and intentional manufacture and introduction of false written testimony by some unknown secretaries concerning material facts relevant to the foundation of the conviction. This is not a case of simply citing an accurate record, but rather, having to refute the tainted record, then, establish the true facts. Add to that, a **petition for writ of habeas corpus**, detailing the constitutional violation of Appellate Counsel's ineffective assistance of counsel. And to that, add an **Initial Brief on Direct Appeal**, detailing four constitutional violations that should have been filed by Appellate Counsel if he had bothered to obtain the minimum sufficient Record on Appeal. (Exhibit K: Habeas Petition, pg. 41-42, introduction to QUESTION TWO).

Wrapping all three of the above into one petition would seem

raised in the habeas petition are every bit as substantial as the Petition for Writ of Prohibition.

Petitioner's writing style, legal presentation and competence as an adversary is sufficiently represented in the filings in the instant case to refute Respondent's other unfounded literary complaints.

It is sufficient to establish that the true content, complexity, sophistication, or number of issues contained in the habeas petition, much less Respondent's unauthorized "interpretation", are totally irrelevant to the issue of filing a petition for writ of habeas corpus.

Also, Respondent's "routine" in his filing of plenary and interlocutory appeals is irrelevant to the issue of filing an original proceeding by way of petition for writ of habeas corpus. If Respondent's "routine" is being raised as a defense, "routine" does not make an action legal, hence, not a defense. If that action is illegal, the "routine" only makes Respondent an habitual offender.

Respondent's slanderous assault on Petitioner's habeas

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to fulfill the definition of "complex" for a professional attorney, realizing, of course, that without reservation, the Second DCA holds pro se litigants to a tougher standard. (Notice, Exhibit F: McConn v. State, 708 So.2d 308, 311 (Fla. 2 DCA 1998), dissenting opinion, ("...the majority would require **pro se** prisoners to get everything right in their first motion while highly paid civil lawyers are often allowed to amend civil pleadings three or four times."); see also, Prohibition, pg. 8 at FN: 7.

petition is unauthorized, improper and refuted on the face of the habeas petition and Petitioner's filings in this case. Respondent's "interpretation" and argument in the Response from page one, paragraph three to conclusion are wholly irrelevant, not a defense, and can have no bearing or influence on the decision of the issue before the Court instantly. Petitioner moves this Honorable Court to strike said portion of the Response pursuant to Fla.R.Civ.P. 1.150 and Pentecostal Holiness Church, Inc. v. Mauney, 270 So.2d 762, 769 (Fla. 4 DCA 1972); citing Westervelt v. Istokpoga Consol. Subdrainage Dist., 160 Fla. 535, 35 So. 641 (Fla. 1948); Gossett v. Ullendorff, 114 Fla. 159, 154 So. 177 (Fla. 1934); and Guaranty Life Ins. Corp. of Florida v. Hall Bros. Press, Inc., 138 Fla. 176, 189 So. 243, 246 (Fla. 1939).

CONCLUSION

Petitioner has demonstrated in POINT ONE that Respondent concedes to every fact necessary for the legal determination of this Petition. Petitioner has demonstrated in POINT TWO that the facts and argument presented in the Response from page one, paragraph three to conclusion are wholly irrelevant, not a defense and can have no bearing or influence on the decision of the issue before this Court and should be struck. Respondent has fatally failed in response to the issue raised.

Furthermore, concerning the orderly function of the administration of the courts in the State of Florida, this

Honorable Court, as the Supreme Court and caretaker of the Rules of Appellate Procedure, cannot tolerate the utter chaos that would result in allowing each District Court to promulgate by implication their own set of Rules of Court, as **NO** litigant, pro se or professional attorney, would know what rules he must follow this week to properly file a petition.

WHEREFORE, based upon the foregoing, Petitioner moves this Honorable Court to strike said portion of the Response Brief and issue the Writ of Prohibition/Mandamus, granting the Requested Relief as detailed in the Petition for Writ of Prohibition/ Mandamus, adding, due to the filing during this cause:

ORDER, in accord with Petitioner's Notice of Filing, that Petitioner's "Amended" Petition for Writ of Habeas Corpus be struck and Petitioner's "Original" Petition for Writ of Habeas Corpus be reinstated;

ORDER, as verification of fulfillment of this Court's Order, Respondent Clerk certify notice of the date of assignment and names of the panel of judges assigned to rule on Petitioner's "Original" Habeas Petition, to all instant parties within seven days of the entering of this Court's Order;

and any and all further relief as law and justice demands.

Respectfully submitted,

Luther T. Basse, Petitioner

OATH

Pursuant to Fla.R.Civ.P. 1.150(b), Petitioner hereby swears, under penalty of perjury, that the facts stated in this Reply Brief/Motion to Strike are true and correct; and the attached Exhibits are true and correct copies of the originals filed.

Executed this 11th day of December, 1998 by the undersigned.

Luther T. Basse, DC# 140306
Hardee Correctional Institution
6901 State Road 62 (MB# 515)
Bowling Green, Florida 33834

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this PETITIONER'S REPLY TO RESPONDENT'S RESPONSE has been furnished to the Honorable Jerry R. Parker, Chief Judge and Judicial Administrator, Second District Court of Appeal, 801 E. Twiggs Street, Suite 600, Tampa, Florida 33602-3547; The Honorable William A. Haddad, Clerk of Court, Second District Court of Appeal, Post Office Box 327, Lakeland, Florida 33802-0327; John Doe (known only as "C.S.") Office of the Clerk of Court, Second District Court of Appeal, Post Office Box 327, Lakeland, Florida 33802-0327; Robert A. Butterworth, Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050; Assistant Attorney General, Office of the Attorney General, Criminal Division, 2002 N. Lois Avenue, 7th Floor, Tampa, Florida 33607, by U.S. Mail, this 11th day of December, 1998.

Luther T. Basse, Petitioner

EXHIBIT "H"

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SUMMARY OF ISSUES

Reviewing the totality of these issues, one has only to return to Miranda, supra, at S.Ct. 1614-1620, [10] and [11], and ask if the majority opinion of "police manuals" and "tactics" was accurate and this case is a classic example of the very evils Miranda was enacted to absolve. From the preponderance of the evidence, law enforcement's total disregard for the Constitution is evident. Beginning with law enforcement's initial order, arresting Petitioner at his home without probable cause; to the transporting of Petitioner to the police station for the express purpose of incommunicado interrogation in the hopes that something might turn up; to Petitioner being thrust into the police-dominated atmosphere of the interrogation room, cut-off from any outside assistance; to law enforcement's deceit of Petitioner as to his entitlement to Miranda rights, the denial of Petitioner's unequivocal request for counsel, and the illegal persistence in obtaining an unknowing waiver; to the application of the rack and thumbscrew over Petitioner's objectively communicated pleas.

As if these violations were not serious enough, the State stood by, ready, willing and able to perjure themselves by their manufacture and introduction of false testimony to cover-up law enforcement's prior violations of Petitioner's constitutional rights, in order to obtain a conviction[104]. That conviction itself, based solely on the State's own violation of Petitioner's constitutional due process right to a fair trial. This conviction is illegal

104/ U.S. v. Janis, 96 S.Ct. 3021, 3029, n. 18 (1976)("There are studies and commentary to the effect that the exclusionary rule tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence").

and must be vacated, with retrial barred due to insufficiency of the evidence as argued in QUESTION THREE.

QUESTION TWO CONTINUED

In re: ISSUE ONE.

Counsel was ineffective in failing to raise the error of the Court in allowing and relying upon the knowing use of perjury by the State in its manufacture and introduction of the unsworn testimony of some unknown secretaries. The use of the unauthenticated transcript is contrary to law and is inadmissible hearsay [105]. Moreso, in this case it was deliberate and malicious perjury by the State concerning material facts dispositive of the entire case, a fundamental error that can be raised at any time. The knowing use of perjury also implicates the least stringent standard of appellate review.

The State's knowing use of perjury was plain on the face of a sufficient Record, specifically State Exhibit 10, and Counsel was made aware of the unauthenticated transcript by Petitioner prior to filing of the Initial Brief.

105/ Grubbs v. Singletary, 900 F.Supp. 425, 428 (M.D.Fla. 1995):

> The present case is distinguishable because the grounds asserted by the Petitioner, which were not included in the brief by appellate counsel, were not "weaker" arguments. The grounds now asserted by the Petitioner appear to be strong grounds for an appeal based on ineffective assistance of trial counsel. These grounds include trial counsel's failure to object to inadmissible hearsay statements and trial counsel's own solicitation of inadmissible hearsay which was extremely prejudical to the Petitioner. Appellate counsel's failure to include these apparent and meritorious grounds in the Anders brief falls outside the range of reasonable professional assistance.

See also, Chambers v. Mississippi, supra, at 1045-47; Williams v. State, 515 So.2d 1042 (Fla. 3 DCA 1987).

EXHIBIT "I"

On July 19, 1994, the State filed a "Motion to Correct or Supplement the Record" (Dk. # 021) complaining:

> 2. However, the record itself is devoid of a complete transcript of the interview. The record indicates that the transcript does exist, but was never actually entered into evidence. In the absence of the transcript it is impossible for the state or the court to properly review the appellant's allegations of government violations of his constitutional rights....In any case, a complete transcript of the interview of which excerpts are included in the appellant's brief is necessary for the state to respond to the appellant's brief and for the court to decide the instant appeal on its merits.

REMEMBER THIS ADMISSION BY THE STATE! "In the absence of the transcript [of [the March 6, 1992 interrogation] it is impossible for the State or the Court to properly review the Appellant's allegations of government violations of his constitutional rights...and...decide the instant appeal on its merits." The answer to QUESTION ONE has just been provided by none other than the State!

On July 19, 1994, Petitioner wrote (A.E. "M") and asked:

> Were you provided a copy of the March 6, 1992 transcripts? I noticed your transcription in the brief does not match either the Largo Police transcript nor does it include the transcript corrections discussed in court.

Petitioner has again demonstrated to Counsel the critical necessity of obtaining State Exhibit 10, asking-What are you quoting from? His quotes do not even include the corrections discussed in court.

On July 22, 1994, Petitioner again wrote Counsel (A.E. "N"). In this letter Petitioner explicitly notified him of the State's editing of the transcript, specifically stating:

> I have a copy of the Largo Police transcript. Of course, you will find in the January 8, 1993 Suppression Hearing the judge deemed them so inaccurate she would not allow them into evidence.

> Thus, the prosecution's objection of January 11, 1993 to the defense's reference to them. (R. 229). To be honest, the transcripts are slanted to the Largo Police's interpretation. As I have already expressed to you and to Judge Susan Schaeffer on February 13, 1993 the tape is seriously edited. To that end, I personally feel we should object to the use of the Largo Police's transcripts. If transcripts are in fact required, I would think it to the benefit of our case to have an experienced company (i.e. Dempster and Associates) transcribe the tape. As I stated in my letter dated July 19, 1994, I noticed your transcription in the initial brief does not match the copy provided by the Largo Police nor does it include the corrections discussed in court on January 8, 1993.

(See also Motion to Dismiss Counsel, R. 151; A.E. "O").

Petitioner then wrote Counsel on August 8, 1994 (A.E. "P") concerning the points to look for in the January 8, 1993 Suppression Hearing Transcript when he received it. Petitioner again reiterated the Miranda violations and the illegal arrest, noting: "I can not imagine anyone listening to the tape and not understanding the defendant's tone of voice when complaining of their order, plus the repeated apology of Detective Short."

On September 8, 1994, the transcript of the January 8, 1993 suppression hearing was supplemented to the Record, (Dk. # 024, R. 255-356), as Supplemental Transcript of Record on Appeal. With this supplementing, the Record now demonstrated that the L.P.T. was NEVER authenticated and was complained of by EVERY participant at the pre-trial hearing, including the Court, to be false testimony (See QUESTION TWO/ISSUE ONE), yet, was quoted EXCLUSIVELY by all parties. Now Petitioner's complaint to Counsel that the L.P.T. was "seriously edited" is supported by the Record.

On September 21, 1994, the State filed their Answer Brief (Dk. # 025). On September 22, 1994, Counsel filed a Supplement to the Initial Brief (Dk. #

027), and on September 23, 1994, the Reply Brief (Dk. # 028).

On September 23, 1994 the State filed a Motion to Strike Appellant's Supplement to Initial Brief (Dk. # 029), complaining that Appellate Counsel "had access to the transcript of the investigating officer's interview with appellant..." The Largo Police Transcript nor any Court Reporter transcription is in the Record, so maybe the State would like to explain how Appellate Counsel just happened to come up with a copy of the State's perjury!

On September 26, 1994, Appellate Counsel filed a Response to the State's Motion to Strike (Dk. # 030), stating he did not receive the January 8, 1993 hearing transcript until September 15, 1994, and that:

> **Appellant's counsel is not clairvoyant and; therefore, could not make an argument regarding the transcript that was made a supplemental portion of the record until appellant's counsel saw the transcript.**

REMEMBER THIS ADMISSION BY APPELLATE COUNSEL! This will determine the answer to this QUESTION!

On January 12, 1995, after all briefs were filed in this case, the Second District Court of Appeal established the critical necessity of State Exhibit 10. On its own motion, this Court found the Record to be incomplete[33], as there is absolutely no record of the March 6, 1992 interrogation, written or audio, in the Record on Appeal. The State's complaint of July 19, 1994 (Dk. # 021) in their "Motion to Correct or Supplement the Record":

33/ Fla.R.App.P. 9.200(f)(2). "If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined, because of an infomplete record, until an opportunity to supplement the record has been given."

> In the absence of the transcript it is impossible for the state or court to properly review appellant's allegations of government violations of his constitutional rights...and for the court to decide the instant appeal on its merits.

was now echoed by this Court. They could not review the material issues without some record of the March 6, 1992 interrogation. This Court vacated their August 16, 1994 Order that denied the State's request to introduce the Largo Police Transcript into the Record. This Court ordered the State to supplement the Record with documents outside the record-the Largo Police Transcript-within ten days, (Dk. # 034).

On January 15, 1995, Petitioner, in response to this Court's Order allowing the State to supplement the Largo Police Transcript into the Record on Appeal, wrote Appellate Counsel (A.E. "Q"), again, specifically stating:

> May I reiterate my objection raised in my July 22, 1994 letter. The Largo Police Department's transcription is biased. They incorrectly transcribe the tape and insert comments and pauses to their advantage. As such, I would like to express by objection to the use of the Largo police transcript. Since the circuit judge ruled to exclude the trancript from evidence, I believe we have grounds to object to the introduction of the Largo Police transcript in the appellate process....I would prefer, if in fact the court does give the state and continuance, there be a new transcript.

On January 19, 1995, the State erroneously supplemented the Record with a transcript of the December 22, 1991 interview (Dk. # 036; R. 357-402), by ex parte communication (R. 360). This interview was never introduced at pre-trial or trial and there is no confession on the audio tape that is supposedly represented by the transcript entered as the Second Supplemental Transcript of Record on Appeal.

On January 21, 1995, Petitioner again wrote Counsel (A.E. "R") complaining

about the maliciously edited Largo Police Transcript and that it was specifically excluded from evidence by the Court, stating:

> My motivation for this objection is that the transcription errors were a constant problem. There were omissions, words added, erroneous punctuation, and comments added....
> **Needless to say, these are critical points in this case, and to give credence to an inaccurate transcript in deciding this case is a travesty of justice.**

And concluded with:

> 3. Should we take the initiative to prevent a future problem by making a motion for a new and accurate transcript to be made of the tape? That would allow us the opportunity to ensure quality control of the transcription.

WHAT DOES PETITIONER HAVE TO DO TO MOTIVATE APPELLATE COUNSEL? Give me a break-NO-just give me an active advocate that the law guarantees Petitioner! Petitioner specifically informed counsel that the L.P.T. is false testimony and we need to make an accurate transcript if this Court required a transcript in addition to the tape in evidence, Petitioner being unaware at that time that State Exhibit 10 was not in the Record.

The Second DCA's Order combined with Petitioner's warning still did not stir Counsel. Instead of filing a "Motion to Supplement the Record with State Exhibit 10"[34], and filing an "Objection to Introduction of Documents Outside the Record"[35], or moving the Court to authorize an accurate transcript to be transcribed by a Court Reporter, on January 23, 1995, Appellate Counsel filed a totally absurd "Motion for Court to Modify its Order" (Dk. # 038), and

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34/ It was still not too late for Appellate Counsel to supplement the Record on Appeal. See Mingo v. Cain, supra, at 458.
35/ Introduction of documents outside the record is a violation of Petitioner's Right to Confrontation.

stated:

> 3. The tape is not clear at various points, and the Appellant believes that the state's transcript contains some inaccurate transcription.
>
> Wherefore, without waiving the Appellant's objection to listening to the tape or reading the entire transcript, which the Appellant believes is prejudical, the Appellant moves for this Court to modify its Order to include the actual tape so that any ruling is based on the tape rather than the State's transcription of it.

Petitioner immediately responded to Counsel's absurd motion, on January 24, 1995 (A.E. "S", C.R.R. P 029 955 799), specifically stating:

> Did you file an objection to the introduction of the inaccurate Largo Police transcript? If so, what was the court's ruling? I have not received a copy of any such transaction.
> * * *
> I would like to clarify, the original tape is of excellent quality. It is the transcript that is erroneous.
>
> I believe the introduction of the inaccurate Largo Police Transcript will do irreparable harm to our case. I believe the introduction of the transcript is illegal as it was never introduced as evidence.

On January 25, 1995, without objection from Appellate Counsel[36], the State supplemented the Record with the perjury in the inadmissible hearsay by written testimony of some unknown secretaries-the Largo Police Transcript, (Dk. # 039, R. 403-528), as the Third Supplemental Transcript of Record, by ex parte communication[37]. This supplementing did not cure Appellate Counsel's

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36/ Appellate Counsel's failure to timely object to the illegal admission of the L.P.T. not only was fatal to the direct appeal, but was fatal to Petitioner's 3.850 motion, as the court ruled that since the L.P.T. was admitted into the Record on Appeal, it has now become "law of the case", even though it was proven to be knowing use of perjury by the State.

37/ The L.P.T. was supplemented by Assistant State Attorney Marie King through ex parte communication (R. 406) as it was never certified that it was sent to the attorney or record. Therefore, Appellate Counsel still does not

failure to supplement the Record with State Exhibit 10, as now, not only do ALL briefs quote the perjury of the L.P.T., but now the perjury itself that was erroneously relied upon by the lower Court, is now in the Record. The Record on Appeal is still legally deficient.

On January 30, 1995, Counsel finally filed the proper motion to object to the introduction of the Largo Police Transcript and supplement the Record with State Exhibit 10 (Dk. # 040). Sadly, it was too late as the Largo Police Transcript had been entered into the Record five days prior to Appellate Counsel's untimely motion.

On February 2, 1995, upon receiving Counsel's "Supplement to Motion to Modify Order" and the Court's Order of February 1, 1995, allowing State Exhibit 10 to be supplemented to the Record, Petitioner wrote Counsel (A.E. "T") stating:

> I must assume you have a copy of the tape as you quote from it for the initial brief, and that it will present no problem to meet the 2nd DCA's deadline.

On February 20, 1995, State Exhibit 10, **THIS ENTIRE CASE**, was FINALLY made a part of the Record, (Dk. # 044, R. 529-531).

On March 8, 1995, without any argument concerning the perjury of the Largo Police Transcript or any argument based upon State Exhibit 10, the Second District Court of Appeal Per Curiam Affirmed the Appeal, (Dk. # 045); Basse v. State, 651 So.2d 1201 (Fla. 2 DCA 1995). Only the Honorable Justices, Patterson, A.C.J., Blue and Lazzara, JJ., know if they produced an audio

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possess, even after all briefs were filed, ANY documentation containing or even "claiming" to contain the interrogation of the Petitioner on March 6, 1992.

player to facilitate the playing of State Exhibit 10 for review on direct appeal. If only Judge Blue had been told of the prosecutorial misconduct in this case[38].

On March 16, 1995, Petitioner wrote Counsel (A.E. "U") and requested the entire Record on Appeal be forwarded to him since the appeal was now complete. Petitioner made arrangements for postage to be paid for shipping and Counsel forwarded his entire Record as requested.

On March 30, 1995, Petitioner wrote Counsel (A.E. "V") stating:

> I anticipated a copy of the March 6, 1992 interrogation audio tapes to be included in the record.

38/ Appellate Counsel could have demonstrated, as this Petition does, to this Honorable Court, and specifically the Honorable Judge Blue, that his choice in believing the frequent prosecutorial misconduct in the Sixth Judicial Circuit is due to "ignorance rather than duplicity", is sadly misplaced. See Palazon, supra, at concurring opinion and n. 2. While calling opposing counsel names during closing arguments in a case concerning the credibility of a witness, is improper, it is trivial compared to the knowing use of perjury and manufacturing of false testimony concerning material facts by the State in its malicious prosecution of this case. Petitioner doubts placing a copy of Justice Terrell's advise on the Sixth Judicial Circuit Court's State Attorney tables would help, as it needs to be placed on the Judge's Bench. As the Honorable Judge Blue stated: "When trial judges fail to condemn the improper argument, it becomes acceptable and thus repeated." The State had no reason to care that every party at the pre-trial hearing complained of the State's knowing introduction of false testimony, since the Court itself condoned the false testimony to the point of asking for stipulation to the use of the false testimony, and allowed its use, while in the same breath, claiming it needed to be corrected as it was missing material facts relevant to the issues under review. It is no wonder the State Attorney donned a ski mask and ran around the courtroom swinging a hatchet lake a crazy man during closing arguments (T. 418, L. 3-15; Cf. T. 418, L. 24-T. 419, L. 10). This entire case has been a sideshow at a circus, and has made a farce and mockery of the judicial system. The prosecutor in this case was not a lawyer representing the State, but rather, a graduate from acting school. He edited and rewrote the March 6, 1992 interrogation into a thrilling script to ensure a conviction, then acted out his dramatic role.

Until the courts condemn the prosecutorial misconduct, the side show and injustice will continue. After reading Judge Blue's concurring opinion in Palazon, supra, Petitioner can vividly imagine the concurring opinion that could rightfully accompany this case.

> It will be nearly impossible to continue my legal process without an accurate transcript of that interrogation....Since there is no accurate transcript of the March 6, 1992 audio cassettes, I will need to have her arrange to have an accurate transcript made that I can refer to and quote from.

On April 3, 1995, Appellate Counsel responded (A.E. "W"):

> The tape of the investigation was send directly from the Clerk of the Circuit Court to the Clerk of the Court of Appeal. I **never had a copy of the tape.**

Counsel was kind enough to tell Petitioner how Petitioner could obtain a copy.

Petitioner can only believe that the question that was asked to Appellate Counsel by Petitioner is weighing heavily on this Court's mind:

WHAT WAS APPELLATE COUNSEL QUOTING FROM IN POINT ONE OF THE INITIAL BRIEF?

Furthermore;

IF THE STATE AND COURT CANNOT REVIEW THIS CASE WITHOUT A RECORD OF THE MARCH 6, 1992 INTERROGATION, HOW COULD APPELLATE COUNSEL REVIEW AND BRIEF THE MATERIAL ISSUES IN THIS CASE WITHOUT STATE EXHIBIT 10?

and;

HOW COULD APPELLATE COUNSEL TELL THIS COURT THAT THE AUDIO TAPE, STATE EXHIBIT 10, WAS NOT CLEAR WHEN HE HAD NEVER LISTENED TO IT?

and;

WITH PETITIONER'S COMPLAINTS CONCERNING THE SEVERELY EDITED L.P.T. BEING SUPPORTED IN THE RECORD BY EVERY PARTICIPANT AT THE JANUARY 8, 1993 SUPPRESSION HEARING (QUESTION TWO/ISSUE ONE), HOW COULD APPELLATE COUNSEL FULFILL HIS ETHICAL AND LEGAL DUTY WHEN HE FAILED TO OBTAIN A COPY OF STATE EXHIBIT 10 TO SEE WHAT MATERIAL FACTS "RELEVANT TO THE ISSUES UNDER CONSIDERATION TODAY" (R. 313, L. 17-23) WERE MISSING?

Maybe the State would like to answer these questions considering Appellate Counsel was not in Boise, Idaho during the March 6, 1992 interrogation, he was not counsel at trial, therefore he did not hear State Exhibit 10 at trial, he never had a copy of State Exhibit 10, there is no Court Reporter transcription of State Exhibit 10 in any trial transcript, he never even had a copy of the L.P.T. that the State hollowly embraces as "containing" the contents of State Exhibit 10, since it was entered by ex parte communication, and he has already admitted he is NOT clairvoyant and could not even brief an argument concerning the January 8, 1993 hearing without a transcript. The fact is, the March 6, 1992 interrogation is this entire case which Counsel failed to obtain, much less review.

From the incomplete Record possessed by Appellate Counsel, it must be rightly assumed that he simply read the comments made by the State, trial counsel and the trial court recorded in the transcript of proceedings of the January 11, 1993 Suppression Hearing closing arguments. It is especially noteworthy that the arguments of counsel are not evidence[39]. But even more noteworthy is the fact that the State, trial counsel and the Court quote EXCLUSIVELY from the inaccurate L.P.T. which is, by law, unsworn written testimony by some unknown secretaries, making it unrefutably, hearsay.

In total disregard of Petitioner's timely warning, supported by the Record

39/ Fla.Jur.2d, Trial, section 102: "Although it is axiomatic that the arguments of counsel are not evidence, it would be naive to suppose that they do not have a profound effect on the jury." See also, Florida Standard Jury Instructions, Preliminary Instructions, Closing Arguments; Springer v. Wal-Mart Assocs. Group Health Plan, 908 F.2d 897, 901 (11th Cir. 1990)("Counsel's closing argument, of course, is not competent evidence."); U.S. v. Rojas, 731 F.2d 707, 710 (11th Cir. 1984); U.S. v. Smith, 918 F.2d 1551, 1562 (11th Cir. 1990).

and the L.P.T.'s obvious lack of authenticity, Appellate Counsel repeats in Briefs the perjurous hearsay quoted at trial. Counsel, instead of correcting, now has duplicated and compounded on Direct Appeal the fatal error made at Trial. The State, trial counsel, the Court, some "unknown" secretaries and now Appellate Counsel are all more than willing to give their interpretation as to what was said on March 6, 1992 in Boise, Idaho, when none of them were present at the interrogation, none of them have bothered to provide an authenticated transcript to quote from and none of them give State Exhibit 10 the **DIGNITY** and **FINALITY** it deserves as the best and only authenticated evidence concerning what was actually said during the interrogation, by simply listening to and quoting from State Exhibit 10. As stated by this own Court in Lewis v. State, 335 So.2d 336, 340 (Fla. 2nd DCA 1967):

> **"There could have hardly been stronger evidence of the conversation than the recording of what actually was said."**

Petitioner, as one qualified to authenticate the conversation of State Exhibit 10, respectfully demands that someone stop and listen to State Exhibit 10 to hear what was actually said on March 6, 1992 in Boise, Idaho, since none of you were there! It is especially interesting to note that Luther Basse, the suspect on the audio tape, and Largo Police Detective Michael Short, the interrogating officer on the audio tape, readily authenticate State Exhibit 10 as an accurate recording of the interrogation, while both Petitioner and Detective Short claim the L.P.T. is erroneous[40]. There appears to be a major problem here, the two major participants in the March 6, 1992 interrogation complain that the L.P.T. is inaccurate. They were there. They know what was

40/ See ISSUE ONE of QUESTION TWO.

said. Everyone else must LISTEN TO STATE EXHIBIT 10 to know!

Counsel is given great latitude of "professional judgment" in deciding which issues to raise on appeal. That responsibility can only be fulfilled by a thorough review of the trial proceedings. In the case sub judice, Appellate Counsel's failure to obtain State Exhibit 10 made it impossible for Counsel to examine the record, and without the record he cannot know what law is applicable or marshal an argument that is factually supported in the record. Point One of Counsel's Initial Brief and the Supplement to Initial Brief are unsupported by any written or audio record containing, or even claiming, to contain what was said during the March 6, 1992 interrogation. Further, Counsel represented the appeal without reviewing the testimony that was the sole basis for the pre-trial suppression motion and the only testimony that could prove guilt at trial. Counsel was emphatically informed of the insufficiency of the Record to review this case by the State (Dk. # 021) and the Court (Dk. # 034). The failure to obtain a sufficient record can only be attributed to Counsel's ineptness and indifference, as there is no strategic decision involved in not doing so.

If Counsel had bothered to obtain a copy of State Exhibit 10, he would have discovered that, according to Petitioner's complaints, the State's case was based, not on State Exhibit 10, the best and only authenticated evidence of the March 6, 1992 interrogation, but rather, the perjury in the inadmissible hearsay by some unknown secretaries-the maliciously edited Largo Police Transcript. The Florida Supreme Court stated in Johnson v. State, 442 So.2d 193, 197 (Fla. 1983)(Justice Shaw dissenting) and repeated in Johnson v. Singletary, 695 So. 263, 268 (Fla. 1996)(Justice Anstead dissenting):

> Reversible error can turn on a phrase. Did it occur here? We cannot be certain.

Appellate Counsel never knew if reversible error occurred as he failed to perform the essential act of obtaining a copy of State Exhibit 10; this entire case. Without ever obtaining, much less listening to State Exhibit 10, he told the Court that the audio tape was "not clear at various points" (Dk. # 038) which is false, as the audio tape is crystal clear (T. 335). He failed to listen to that crystal clear audio tape to hear the "phrases" that had been maliciously edited from the L.P.T., as Petitioner has warned. He told the Court that the L.P.T. was inaccurate (Dk. # 38 and 40), but never bothered to review State Exhibit 10 to see what was missing or if it was relevant to this case. Instead, Counsel based his entire argument on the State's perjury and failed to present any argument based on the actual conversation recorded on State Exhibit 10. If Appellate Counsel had obtained State Exhibit 10, he would have found four fundamental issues of constitutional magnitude, plain on the face of a sufficient record.

Griffin v. Illinois, supra, at S.Ct. 591, requires a transcript of the proceedings. This is not a "meaningless ritual" that transcripts be prepared, thus fulfilling the law, for the preparation of a transcript can only be meaningful if that transcript is reviewed by an active advocate, searching for fundamental errors[41]. It is the duty and responsibility of Counsel, to obtain the Record on Appeal. He also has a responsibility to review the Record to find errors objected to at Trial and fundamental errors, plain on the face of the Record. Counsel has the duty to know the law concerning the issues of the

41/ Evitts v. Lucey, supra, at S.Ct. 834-835.

case and the procedural rules to properly protect his client's rights[42]. Supported from the Record, he must present those issues as an active advocate of his client. If he fails to obtain a sufficient Record on Appeal, he must be deemed to have been ineffective in his representation. Petitioner's Counsel fell below any reasonable standard of effective assistance of counsel on all the above.

Petitioner's entire constitutional right to first appeal as of right was denied him due to Counsel's failure to even bother to obtain a copy of State Exhibit 10 and timely supplement the Record on Appeal, with a minimum record of the trial proceedings before the Court, as in Evitts, supra, and directly on point with Entsminger, supra, at S.Ct. 1404:

> Such procedure automatically deprived him of a full record, briefs, and arguments on the bare election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record in the case. By such action "all hope of any [adequate and effective] appeal at all," Lane v. Brown, 372 U.S. 477, 485, 83 S.Ct. 768, 773, 9 L.Ed.2d 892 (1963), was taken from the petitioner.

It is documented in the Record, Appendix and case law cited that Counsel did not obtain sufficient Record on Appeal to brief the material issues on Direct Appeal, denying Petitioner his due process right to Direct Appeal, which is p se ineffective assistance of counsel, in violation of Petitioner's Due Process right to effective assistance of counsel on first appeal as of right.

QUESTION TWO can only be answered in the affirmative, that Appellate

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42/ Torna v. Wainwright, 649 F.2d 290 (5th Cir. 1981); Hopkins v. State, 413 So.2d 443 (Fla. 3 DCA 1982); Howard v. State, 417 So.2d 1152 (Fla. 1 DCA 1982); Chapman v. State, 442 So.2d 1024 (Fla. 5 DCA 1983).

Counsel's specific omission of failing to obtain and review the minimum sufficient Record on Appeal satisfies Strickland's first prong of ineffective assistance of counsel.

EXHIBIT "J"

REQUEST FOR ORAL ARGUMENT

The basis for an Oral Argument is for this Honorable Court to hear for itself what actually occurred on March 6, 1992 during the interrogation of Petitioner by Largo Police; to authenticate before this Court the attached Defendant's Transcription; and to present sufficient evidence and argument to support the issues raised herein.

The Constitutional violations at issue are recorded on the first 7 minutes and 28 seconds of tape one, side one and from 15 minutes, 57 seconds to 19 minutes, 59 seconds of tape one, side two, State Exhibit 10, thus, reducing the seemingly burdensome task of reviewing two and one-half hours of audio tape to only eleven minutes and thirty seconds.

This Honorable Court deemed it necessary for a transcript of State Exhibit 10 on Direct Appeal, but instead of an accurate transcript, this Court was given the State's perjury in the unsworn Largo Police Transcript. Petitioner has included with this Petition and is prepared to authenticate before this Court an accurate, sworn transcript of State Exhibit 10, the Defendant's Transcription.

Petitioner has included "Motion for Production of State Exhibit 10", pursuant to Fla. Stat. 90.952 and "Motion for Subpoena Duces Tecum of Michael Raymond Short", the interrogating officer on State Exhibit 10, to properly authenticate the audio tape of the March 6, 1992 interrogation. Petitioner is prepared to present the defense copy of State Exhibit 10, received in reciprocal discovery before trial, as "secondary" evidence, pursuant to Fla. Stat. 90.954(2) and (3), if for any reason the State fails to produce State Exhibit 10, by "Motion for Subpoena of Phillip Charles Basse", the curator of

the defense copy of State Exhibit 10. Petitioner has also included "Motion for Production of Audio Player", in order to facilitate the necessary means for this Honorable Court to hear State Exhibit 10.

EXHIBIT "K"

QUESTION TWO

DOES THE SIMPLE, BUT NECESSARY, ACT OF SUPPLEMENTING AND REVIEWING A MINIMUM SUFFICIENT RECORD ON APPEAL, SPECIFICALLY STATE EXHIBIT 10, REVEAL MERITORIOUS ISSUES DISPOSITIVE OF THIS APPEAL AND ENTIRE CASE?

Having determined in QUESTION ONE that Appellate Counsel failed to even obtain, much less review, a sufficient Record on Appeal, the Florida Supreme Court raised in Johnson v. State, supra, at 198, and repeated in Johnson v. Singletary, supra, at 268, a question that can be applied instantly:

> Reversible error can turn on a phrase. Did it occur here? We cannot be certain.

In the case now before this Court, the insufficient record can be made sufficient with the simple, but necessary addition of State Exhibit 10. Although Appellate Counsel never knew if reversible error occurred, due to his failure to obtain and review State Exhibit 10, this Court can and will know.

The four issues raised in this QUESTION will reveal the actual conversation during the March 6, 1992 interrogation as recorded on State Exhibit 10. These issues will address the "phrases" maliciously edited, in knowing use of perjury by the State in their creation, manufacture and introduction of the inadmissible hearsay by unsworn written testimony of some unknown secretaries.

Petitioner cites from the sufficient Record, specifically including State Exhibit 10, presenting four issues concerning violations of constitutional rights, plain on the face of that Record that could and should have been raised by Appellate Counsel, had he obtained and reviewed the minimum sufficient Record on Appeal.

ISSUE ONE raises a violation of Petitioner's fundamental right to a fair trial by the State's knowing use of perjury. ISSUE TWO, THREE and FOUR raise violations of Petitioner's constitutional rights, each dispositive of this entire case and requiring a judgment of acquittal (Argued in QUESTION THREE).

The Eleventh Circuit addressed the prejudice prong of Strickland for an ineffective assistance of appellate counsel claim concerning omitted arguments in Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991):

> A petitioner has satisfied the prejudice prong of Strickland when he or she can show that the appellate counsel's performance was sufficiently deficient to deprive the defendant of "a trial [or an appeal] whose result [was] reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In the context of an ineffective assistance on appeal claim, this Court in Cross v. United States, 893 F.2d 1287 (11th Cir. 1990), held that in order to determine prejudice the court must first perform "a review of the merits of the [omitted or poorly presented] claim." Id. at 1290.

See also, Davis v. Singletary, 853 F.Supp. 1492, 1549 (M.D.Fla. 1994). Pursuant to Heath, Cross, and Davis, supras, Petitioner presents, based on a sufficient Record, specifically State Exhibit 10, the arguments erroneously omitted from Appellate Counsel's briefs on Direct Appeal.

ISSUE ONE

DID THE TRIAL COURT ERR IN ALLOWING THE KNOWING USE OF PERJURY BY THE STATE, IN THEIR MANUFACTURE AND INTRODUCTION OF PERJURED WRITTEN TESTIMONY BY SOME UNKNOWN SECRETARIES, TO TOTALLY DISPLACE THE BEST AND ONLY AUTHENTICATED EVIDENCE, STATE EXHIBIT 10?

This case involved an interrogation of Petitioner by Largo Police, in Boise, Idaho, on March 6, 1992, at the Boise Police Station (R. 275, L. 25- R.

December 11, 1998

The Honorable Sid J. White
Clerk of Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Certified Return Receipt Number: Z 146 095 690

RE: Luther T. Basse v. State of Florida, case number 93,760

Dear Clerk:

Merry Christmas.

Please find enclosed one original and one copy of Petitioner's Reply to Respondent's Response, to be filed in the above-styled cause.

Your assistance in this matter is greatly appreciated.

Respectfully,

Luther T. Basse, 140306
Hardee Correctional Institution
6901 State Road 62 MB# 515
Bowling Green, Florida 33834