IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-1351

CHARLES W. FINNEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

Joseph T. Hobson, Esq.
Florida Bar No. 507600
Assistant CCRC
CAPITAL COLLATERAL REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619
(813) 740-3544
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Finney's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

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

"R." -- The record on direct appeal to this Court.

"PC-R." -- The record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Finney lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Finney accordingly requests that this Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment dated February 13, 1991, with first degree murder, sexual battery and dealing in stolen property (R.16-19). The sexual battery charge was nolle prossed. (R.143).

The case proceeded to trial on September 14-18, 1992. The jury returned verdicts of guilty on all three counts (R-93). In the penalty phase, appellant, over a defense objection was shackled (R. 815). The jury by a vote of 9-3 recommended the death penalty (R.98).

On November 10, 1992, after denying as legally insufficient appellant's motion for disqualification, the trial judge imposed a death sentence for the murder conviction, a sentence of life imprisonment for the armed robbery conviction and a fifteen-year sentence for the conviction of dealing in stolen property (R.143).

On direct appeal, the Florida Supreme Court affirmed Mr. Finney's convictions and sentences, Finney v. State, 660 So. 2d 674 (Fla. 1995).

On April 16, 1999, Mr. Jack Crooks, then of Capital Collateral Regional Counsel Middle, (CCRC-M), filed on behalf of appellant a thirty-page final amended motion for postconviction relief. This motion contained five claims. On November 17, 1999, appellant filed a pro-se "Motion for Appointment of Competent Counsel" (PC-R. 199-204). No hearing pursuant to Nelson v. State, 274 So. 2d 256 (Fla.

4th DCA 1973) was ever held on appellant's pro-se motion.

The circuit court held a Huff hearing on appellant's 3.850 motion on May 26, 1999, (PC-R. 272-297).

As a result of this Huff hearing, an Order was entered on June 9, 1999, by the Circuit Court granting an evidentiary hearing on only one of appellant's five claims (PC-R. 190). The court did not, in this ruling, delineate any reasons for denial of the other four claims. Postconviction counsel Mr. Crooks, then filed on May 4, 2000, a "Motion for Rehearing and To Grant an Evidentiary Hearing" (PC-R. 212)[1]. The circuit court denied his motion for rehearing on May 17, 2000.

On June 4, 2000, Mr. Crooks then filed a notice of appeal of this order which denied his motion for rehearing (PC-R. 236).

During the pendency of this appeal, Mr. Crooks left the employ of CCRC-Middle and undersigned counsel assumed the case. Undersigned counsel immediately filed a motion to remand jurisdiction from this court to the circuit court so that it could render a final order in which it actually explained its reasons for the denial of appellant's various claims. While this motion was pending, the trial court, upon prodding from the Office of State

[1]It is unclear as to the very viability of this motion in the respect of timeliness. Presumably the order being appealed, that which granted a hearing on one claim but denied same on all four others, was rendered on June 9, 1999. Fla. R Crim Pr. 3.850(g) requires such motions to be filed within 15 days. This motion was filed on May 4, 2000 nearly one year later.

Attorney which was aware of this problem, produced a written final order denying appellant's claims on October 31, 2000, nunc pro tunc to the date of the Huff Hearing, May 26, 1999.

This Court denied appellant's motion to remand the cause back to the trial court and this appeal proceeds.

SUMMARY OF ARGUMENT

The trial court order was illegal, as it lacked jurisdiction to render the order. Upon appellant's filing a Notice of Appeal, the trial court was divested of all jurisdiction. See Pearson v. State, 657 So. 2d 21 (Fla. 2d DCA 1995). The trial court order is additionally defective because it fails to adequately explain its reasons for denying appellant's facially sufficient allegations.

The trial court erred in denying an evidentiary hearing on the claim that appellant's trial counsel was ineffective for: failing to object to improper prosecutorial comments which pervaded both voir dire and closing argument, failing to object to an improper aggravator and failing to object to a prosecutor's closing argument.

The trial court erred in denying without a hearing the claim that appellant's trial counsel was ineffective in failing to adequately question potential jurors about their views on race.

The trial court erred in denying without a hearing the claim that appellant's trial counsel was ineffective in failing to challenge the prosecutor in his successful exclusion of potential

jurors who were opposed to the death penalty but promised to keep an open mind.

The trial court erred in denying without a hearing the claim that appellant's trial counsel was ineffective in failing to present a greater breadth of mitigation evidence.

The trial court erred in denying without a hearing the claim that appellant's rights under Ake v. Oklahoma, 470 U.S. 68 (1985) were violated when his trial counsel failed to provide his psychiatrist with all the necessary information in evaluating appellant's condition.

The trial court erred in denying without a hearing the claim that appellant's trial counsel was ineffective in failing to retain a crime scene expert.

The trial court erred in failing to oversee and ensure the rendition of effective postconviction counsel as required by Section 27.711(12) Florida Statutes in failing to conduct a Nelson Hearing on the complaint of appellant as to the performance of his original postconviction counsel, Mr. Jack Crooks.

As a result of the ineffectiveness of appellant's previous postconviction counsel, his many meritorious claims are minimally and negligently pleaded in a manner that may well have harmed his prospect for an evidentiary hearing.

Execution by lethal injection violates appellant's rights under the Eighth amendment to the United States Constitution.

The Florida Capital Punishment Statute is unconstitutionally arbitrary and violates appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant's trial was fraught with procedural and substantive errors which violate his rights under the Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

Appellant is innocent of the death penalty and was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIMS WITHOUT AN EVIDENTIARY HEARING AND IN RENDERING A FACIALLY INSUFFICIENT ORDER WHICH FAILS TO CONCLUSIVELY REFUTE FACIALLY SUFFICIENT ALLEGATIONS.

The trial court's order of denial is illegal. Up until October 31, 2000, there had never been entered a written order of denial which actually explained the trial court's reasons for denying appellant's motion. On that date, the trial court filed an Order of Denial and entered it nunc pro tunc to the date of the evidentiary hearing, May 26, 1999.

The Circuit Court lacked jurisdiction to enter this Order. As of May 4, 2000, when appellant had filed his notice of appeal, this case had been in the Florida Supreme Court. The trial court had been divested of jurisdiction at the time of the entry of the nunc pro tunc order. The final order is accordingly invalid. See

Pearson v. State, 657 So. 2d, 21 (Fla. 2d DCA 1995).

The trial court order is also in error for having denied summarily appellant's motion without an evidentiary hearing and without adequately explaining its actions. It largely synposizes the history of the case, carefully lays out what appellant's claims are but only briefly and superficially deals with some of the claims in terms of analysis. It then affixes a large portion of the trial transcript to the order as if to add some sort of weight to its position.

As shall be argued with particularity in the body of this brief, legally sufficient claims were asserted by appellant in his motion for postconviction relief. Yet the trial court fails to sufficiently explain its reasons for summarily denying each claim without the benefit of a hearing. Consequently its order is far below any threshold of legal acceptability. See Patton v. State, 2000 WL 1424526 (Florida, September 28, 2000).

In Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000) the Supreme Court of Florida held that in addition to the unnecessary delay and litigation concerning the disclosure of public records, another major cause of delay in postconviction cases was the failure of the circuit courts to grant evidentiary hearings when they are required. Id. at 32.

The Supreme Court of Florida in its proposed amendments to Florida Rules of Criminal Procedure 3.851. 3.852 and 3.993 (no

SC96646) (4/14/00) states:

> "Another important feature of our proposal is the provision addressing evidentiary hearings on initial postconviction motions. As previously noted we have identified the denial of evidentiary hearings as the cause of unwarranted delay and we believe that in most cases requiring an evidentiary hearing on initial postconviction motions will avoid that delay" Id at 9.

(See also Mordenti v. State, 711 So.2d 30 (Fla. 1998))

This Court is not required to accord particular deference to any legal conclusion of constitutional deficiency or prejudice under the Strickland test for evaluating the effectiveness of counsel. The alleged ineffectiveness of counsel is a mixed question of fact and law. While an appellate court might defer as a question of trial court factual determination on the issue of the omission constituting a deviation, the issue of whether such an omission resulted in prejudice is a de novo determination by the appellate court.

This Court has stated such a principle in the decision of Stephens v.State, 748 So. 2d 1028 (Fla. 2000). This Court recognized the trial court's superior vantage point in assessing the demeanor and believability of witnesses.

> Yet despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems

> from the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the appellant's representation is within constitutionally acceptable parameters. That is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel "plays the role necessary to ensure that the trial is fair"

Stephens, 740 So.2d at 1032.

The United States Supreme Court addressed this identical issue in another context, as applied to the area of unreasonable searches and seizures.

> A policy of sweeping deference [to the trial court's legal conclusions] would permit "in the absence of any significant difference in the facts," "the Fourth Amendment's incidence to turn on whether turn on whether different trial judges draw general conclusions that the facts are insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law. This as a matter of course would be unacceptable. In addition, the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles. Finally, de novo review tends to unify precedent.

(Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 657, 134 L. Ed.2d 911 (1996))

Accordingly, appellant requests this Court to order an evidentiary hearing on his claims. Mr. Finney's claims involve issues requiring full and fair Rule 3.850 evidentiary resolution.

See, e.g., Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mason v. State, 489 So. 2d 734 (Fla. 1986).

Some fact-based postconviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-53 (Fla. 1987). "Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla. 1989)(emphasis added).

Mr. Finney has pleaded substantial, factual allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows appellant is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

Under Rule 3.850 and this Court's well-settled precedent, a postconviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Hoffman; Lemon; O'Callaghan; Gorham. Me. Finney has alleged facts which, if proven, would entitle him to relief.

Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

The trial court's denial of Mr. Finney's Rule 3.850 motion stands in stark contrast to the clear and unmistakable requirements of law. It makes no use of the record or files in this case to show conclusively that Mr. Finney is not entitled to relief. It attempts no analysis whatsoever. The order ignores the express requirements of Rule 3.850 and is oblivious to the substantial body of case law from this Court holding that courts must comply with the rule and, at least, conduct a hearing. Huff v. State, 622 So.2d 982 (Fla. 1993).

As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 So.2d at 450, and order a complete evidentiary hearing on Mr. Finney's 3.850 claims.

ISSUE II

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE MERITORIOUS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO PROSECUTORIAL COMMENTS IN VOIR DIRE AND IN CLOSING ARGUMENT: MISSTATEMENT OF THE LAW; IMPROPER REFERENCE TO OTHER CRIMES; EXPRESSION OF PERSONAL OPINION AND IMPROPER CLOSING ARGUMENT IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

2. Improper Prosecutorial Comment During Voir Dire.

A. Misstatement of the law.

In the trial of appellant, the voir dire of the jury panel was conducted by two individual assistant state attorneys. The first state attorney questioned the jurors relative to the guilt phase of

the trial, while a second state attorney, Nicholas Cox, queried the panel as to the penalty phase (R.1-238).

The second assistant state attorney, discussing penalty phase issues, misstated the law without an objection. Appellant's trial counsel was manifestly ineffective in not objecting to these comments by him:

> "...and we're relying on the facts of this murder, which the Legislature says we can do, -- if certain facts appear, we can still argue for the death penalty to you -- if the State were to go forward with no facts -- which wouldn't happen here -- but if that were the case, do you think you can still consider the death penalty based upon the facts of the murder itself." (R.130-131).
>
> " And the law says that if certain aggravating factors, one or more, -- I mean, you just need one..."

(R. 152).

These comments are not a correct statement of the law, which requires a weighing of the aggravating and mitigating factors. Counsel's failure to object and move for a mistrial was ineffective and prejudicial to the defendant.

Trial counsel failed to object to the prosecutor's misstatement of the law as it related to the weighing of aggravators and mitigators. The prosecutor's statements gave the jury the impression that if the State proved "just one" aggravator, then death would be appropriate (R. 152).

B. Improper reference to other crimes to be presented in the penalty phase.

Next, the assistant state attorney, Mr. Cox, plants and

cultivates the impression that "other evidence" would be presented in furtherance of or in support of the state's position for the death penalty the second so-called "penalty" phase. This is not merely an unwitting, verbal slip, it is a seemingly calculated ploy repeated through his line of inquiry especially in the following parts:

> "But one thing that is important is that if Mr. Finney is convicted of murder in the first degree that you can each **promise** Mr. Finney in all fairness to him, you know, that you can keep an open mind, okay, because like I said, it's a whole completely different hearing. You will probably hear new evidence, new testimony and new argument by counsel. Okay. And **you will have, you know, all of that additional evidence and testimony to work on.** Can you **promise** Mr. Finney and the people that regardless if you're a person who believes strongly in the death penalty or just believes in it moderately, can you all **promise us** that you will still consider that evidence and not make a decision until you have heard **everything** until the very end." (R. 111) (emphasis added). "You can **promise** both the people and Mr. Finney that you will not consider what may ultimately have to happen." (R. 136) (emphasis added)."Can you **promise** Mr. Finney that you wouldn't make a decision and you wouldn't commit yourself until you hear the second phase?" (R. 144) (emphasis added). " So, you would be willing to listen to the additional evidence and testimony in the second phase."

(R. 144)

The assistant state attorney's transgression occurred when he repeatedly, almost with seeming calculation, alluded to "additional evidence," which he would be presenting at the penalty phase of the trial.

The assistant state attorney alluded to the evidence which ultimately was presented at the penalty phase which was that the appellant had been convicted of a prior violent felony to wit a sexual battery (R901) and thus this was an appropriate aggravating circumstance to consider under Section 921.141 (5) Florida Statutes.

The clear inference reinforced by the assistant state attorney was that more evidence than that which would be presented at guilt phase would be available to the jury in the second phase.

The trial court's order of denial clearly fails to adequately refute this facially sufficient allegation regarding the improper prosecutorial statements which were made in the course of voir dire.

The court ruled as follows:

> Defendant Finney also argues that the prosecution extracted promises from the jurors regarding their ability to be fair and alluded to additional evidence they would hear in the second phase. The transcript clearly establishes that the prosecutor asked the jury to promise that they would keep an open mind." (Exhibit D - Transcript, page111). Furthermore, Defendant's contention falls under the analysis of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed 2d 624 (1984). It is the obligation of counsel to determine in voir dire if a juror can be fair and unbiased as well as the penalty phase.

Order at 12.

This finding of the Order vacuously glosses over the essence

of the allegation. The court ignores the inference of the comments by the prosecutor, that the jury will be receiving "additional" evidence which he cannot disclose until the commencement of second phase and which they will need to evaluate before they can decide the question of life or death.

C. Improper expression of personal views.

The prosecutor injected his personal feelings into the voir dire without an objection by defense counsel when the following statement was made while discussing the juror's feelings about the death penalty:

> "Some of you may think, Gee, it [the death penalty] should be imposed almost every time there is a murder in the first degree. **And we're not going to take issue and argue with you about that."**

(R. 110,111) (emphasis added).

This statement is a personal commentary that the prosecutor believes every first-degree murder deserves the death penalty and is highly prejudicial to the defendant because it sends a message to the ultimate panel that death is the only verdict. Counsel was ineffective for failing to object to such a statement and in failing to make a motion for mistrial.

2. Improper Closing Argument.

Counsel failed to object to personal comments made by the prosecutor, one of which was that the murder was disgusting as follows:

> " Thirty dollars to pawn that VCR...that is the value of Sandra Sutherland's life to

Charles Finney. **That is disgusting.**"

(R. 900,901) (emphasis added).

Failure to object by defense counsel was both ineffectiveness and prejudicial to the defendant.

The prosecutors' acts of misconduct both individually, and cumulatively, deprived Mr. Finney of his rights under the Sixth, Eighth, and Fourteenth Amendments.

Defense counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory, prejudicial and misleading arguments. The prosecutor exceeded the boundaries of proper argument throughout Mr. Finney’s case.

As a result of the State's misconduct, and defense counsel's deficient performance, Mr. Finney's case was not given a fair adversarial testing. Therefore, Mr. Finney's conviction and sentence are in violation of the United States Constitution. An evidentiary hearing is required.

ISSUE III

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE MERITORIOUS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADEQUATELY QUESTION POTENTIAL JURORS ABOUT THEIR VIEWS ON RACE.

Trial counsel performed only a perfunctory voir dire (R. 2-242). She failed to inquire about possible racial prejudice, even though the issue was brought to her attention by a juror, Ms. Kinsey. Ms. Kinsey had stated, "I thought it was a racial thing at the time" (R. 168). She seemed to be referring to the pre-trial press accounts of a black man killing a white woman.

Counsel was ineffective for failing to inquire of the juror who raised the racial issue as to exactly what she meant, and whether race would have any effect upon her in deciding the case and providing a fair trial to the defendant. Counsel should have inquired about racial bias with all the jurors. She was also ineffective for failing to request that the court inquire about such issues.

Mr. Finney was an African-American accused of murdering a white woman, which should have put counsel on notice to inquire about the possibility of racial bias.

Counsel was ineffective for failing to have the court inquire of the jurors at the conclusion of the trial as to whether the jurors had discussed or mentioned race during their deliberations.

Since racial questions existed in at least one juror’s mind, and neither counsel nor the court inquired about that issue with the remaining jurors, it is difficult, if not impossible, to

determine whether it played any part in the minds of the jurors or was considered in their deliberations, all to the detriment of the defendant. The danger of such racial bias entering into the verdict cannot be tolerated, and even the suggestion that it might have influenced the jury would be so prejudicial to the defendant that failure of the defense counsel to pursue it would be manifest ineffectiveness on the part of counsel.

ISSUE IV

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE MERITORIOUS CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADEQUATELY CHALLENGE THE PROSECUTOR IN HIS SUCCESSFUL EXCLUSION OF JURORS WHO WERE GENERALLY OPPOSED TO THE DEATH PENALTY BUT INDICATED THAT THEY WOULD KEEP AN OPEN MIND.

Trial counsel failed to object to the court and the prosecutor excluding jurors for cause who were opposed to the death penalty, even though they had indicated they would keep an open mind and follow the law (R. 118,132,174,193,218,221).

The jurors in question are Mr. Jennings and Mr. Silas who were excused for cause by the State and the Judge even though they had fully indicated they would follow the law even with their opinions about the death penalty. Mr. Jennings had told Ms. Vogel during her inquiry that he was opposed to the death penalty, and during second phase questioning he stated as follows:

> MR. COX: Okay, all right. Mr. Jennings, you indicated earlier, I believe, to Ms. Vogel that you were against capital punishment?
>
> MR. JENNINGS: Right. I don't believe in an eye for an eye.

MR. COX: Mr. Jennings, let me ask you, sir: If a person or if Mr. Finney in this case were convicted of first-degree murder, are you indicating to us under no circumstances could you impose capital punishment?

MR. JENNINGS: No, sir.
(R. 118).

MS. PITTMAN: Okay. My question is, though: Are you saying that even if you're selected as a juror and Judge Sexton reads you these instructions, you see, you have to keep an open mind that --

MR. JENNINGS: I'll keep an open mind, but I won't go for the death penalty.

MS. PITTMAN: But you can keep an open mind?

MR. JENNINGS: Right.
(R. 174).

MR. COX: No. 2, Mr. Jennings

THE COURT: anymore challenges for cause?

MR. COX: ...Okay. 25, Mr. Silas; ...
(R. 217).

THE COURT: Okay Barbara, what do you want to say?

MS. PITTMAN: I think I rehabilitated him. He said he can keep an open mind while listening.
(R. 218).

THE COURT: Okay. I have him down as a cause. I'm going to go ahead and excuse him for cause...
(R. 219)

MR. COX: Okay. Mr. Silas, is that to say if a person were convicted of murder in the first-degree, that under no circumstances could you impose the death penalty?

MR. SILAS: I'll say "Yes."
(R. 132).

MS. PITTMAN: Okay. Now, you also have very strong opinions about the death penalty. I

didn't know whether you were able to say one way or the other, if you were a juror and it gets to the second phase, whether you can keep an open mind and listen to the evidence presented during the second phase before you will make up your mind?

MR. SILAS: I can do that.

MS. PITTMAN: You can?

MR. SILAS: Yes.

(R. 193).

THE COURT: I'm going to excuse him for cause...

(R. 221).

Clearly these two jurors were indicating that they would keep open minds and thus follow the law and were able to serve on the panel. Defense counsel failed to object to either one being removed for cause. This certainly was ineffectiveness and prejudiced Mr. Finney by allowing exclusion from the jury panel jurors who didn't believe in the death penalty, which may well have changed the outcome of the recommendation for death.

ISSUE V

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE CLAIM THAT APPELLANT'S TRIAL ATTORNEY ERRED IN FAILING TO PRESENT MITIGATION WITNESSES AT THE PENALTY PHASE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

During Mr. Finney's capital penalty phase proceedings, substantial mitigating evidence -- both statutory and non statutory – went undiscovered. None of this information was presented for the consideration of the judge and jury, both of whom are sentencers in Florida. Mr. Finney pleads both Brady and ineffective assistance of counsel relating to the penalty phase. Either defense counsel failed to discover, or the State failed to disclose, information which would have led to mitigating factors. The resulting death sentence was unreliable. In this case, the defendant was portrayed as a vicious rapist and murderer. Counsel failed to conduct adequate background investigation which would have turned up numerous background and character witnesses. For example, Anastasia Jones, a female fellow employee at the Huddle House, worked with and knew, for many years, both the appellant and his common-law wife, Tammy. Jo Ann Nelson and Otis Williams, who also both worked closely with the defendant at the University of South Florida, were available at the time of trial, and could have provided the jury and the court with a different view of the defendant as a person. There are many other witnesses who could have been called if counsel had investigated properly. They were in

the nature of family relatives: Katherine Richardson; Rev. Billy Stubbs; Jamie Wesley; Lynn Wesley; and Joyce Wesley.

Mr. Finney was sentenced to death by a judge and jury who knew very little about him. The evidence set forth demonstrates that an unreliable death sentence was the resulting prejudice.

At the penalty phase, counsel provided only scant information about Mr. Finney to the judge and jury in contrast to the vast amount of revealing information that was available for mitigation as stated in the 3.850 motion.

Had information been provided to a competent mental health expert at or prior to trial, and had that expert adequately performed the necessary tests, Mr. Finney could have presented evidence to the jury that he was suffering from extreme emotional or mental disturbance at the time of the offense. These are two of the weightiest mitigating factors under Florida law.

The trial court, in its written order, which was filed a year and a half after the Huff Hearing is egregiously in error in its denial of this claim. The court claims that defense counsel admits that some of the mitigation evidence is cumulative. This is actually what Mr. Jack Crooks, postconviction counsel, actually said:

> "Your Honor, the next point would basically go again, to primarily ineffective assistance of counsel lack of presentation of mitigation evidence and I can say to the court candidly that some of it may have been somewhat cumulative to other witnesses who testified but there were at least a half a dozen other witnesses who could have testified in the

> mitigation phase or in mitigation that might have made a difference again. I can't state that as an absolute ."

(PC-R. 294).

Postconviction counsel Crooks stated that the testimony might have been cumulative not that it was. Notwithstanding the discrepancy, the court's very premise that mitigation evidence is even capable of being cumulative is specious. Cumulative evidence is additional evidence of the same character as existing evidence which does not need further support. Additional evidence of mitigation would have been helpful in that it would have served to enhance and strengthen the underlying proposition. Cumulative evidence would generally seem to be less necessary when attempting to establish a fact more objectively ascertainable , i.e. time of cause of death. In the area of consideration for mitigation of the penalty of death, an area of subjective truth, additional evidence would be useful to establish the extent and depth of the matter sought to be proven.

The order is equally flawed in its insistence upon the provision of specific examples. Firstly the postconviction motion does identify the aforementioned witnesses. Secondly, under Fla.R.Crim. P. 3.850, there is no such requirement, as suggested by the trial court, of appellant to have provided an affidavit of Dr. Gamache averring that any other mitigation evidence at trial would have changed his testimony.

ISSUE VI

COUNSEL WAS INEFFECTIVE FOR FAILURE TO PROVIDE MR. FINNEY'S MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION TO PERMIT A MEANINGFUL EVALUATION OF MR. FINNEY FOR THE PRESENCE OF MITIGATION OR NEGATION OF SPECIFIC INTENT.

Trial counsel did not provide Mr. Finney's mental health experts with adequate background information, although available at the time, including his school records, work records, statements from fellow employees, neighbors, friends, and relatives to enable them to make a meaningful evaluation of Mr. Finney at the time of the offense or develop mitigation. This failure constitutes ineffective assistance and greatly prejudiced Mr. Finney's defense during all phases of his trial.

A criminal defendant is entitled to meaningful expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Counsel has a duty to conduct proper investigation into his client's mental health background. This is done to assure that the client is not denied a professional and professionally conducted mental health evaluation.

Defense counsel's disregard of utilizing any character witnesses showed extreme ineffectiveness on the part of counsel.

Dr. Michael Gamache, who evaluated Mr. Finney, performed two clinical visits and talked with his common-law wife, Tammy Gilmore.

Dr. Gamache relied upon self-reporting by the defendant to base his evaluation. It was imperative for counsel to have provided the medical expert with information other than self-reporting. The Doctor was not provided with family members for the evaluation including Mr. Finney's sister, Katherine Richardson, cousins, Rev. Billy Stubbs, Jamie Wesley, Lynn Wesley, and Joyce Wesley, nor were these witnesses called for mitigation purposes by the defense counsel, although available at the time of trial. Thus, the doctor's evaluation was not complete.

Florida law is clear that insanity and mental health mitigation are assessed under distinctly different standards. Even though sane, a defendant may be legally answerable for his actions, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

As stated above, evidence of mental health and mitigation was not presented to Mr. Finney's jury. Under the basic tenets of death penalty jurisprudence, ignorance of mental health issues, mitigation, and the capricious results it engenders, is unconstitutional.

In addition, mental health experts could have rebutted the defendant's mental state at the time of the offense, as well as the weight of the aggravating circumstances which were presented by the prosecution.

The order is flawed in its denial of this Ake claim. Firstly the postconviction motion does identify the aforementioned

witnesses. Secondly, under Fla. R. Crim. P. 3.850, there is no such requirement, as suggested by the trial court, of appellant to have provided an affidavit of Dr. Gamache, averring that any other mitigation evidence at trial would have changed his testimony.

ISSUE VII

THE TRIAL COURT ERRED IN DENYING WITHOUT A HEARING THE CLAIM THAT APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO RETAIN AN EXPERT TO TESTIFY AS TO THE CRIME SCENE.

Defense counsel failed to hire a crime scene expert and an expert in sexual killing/bondage which would have shown that the victim engaged in some form of sexual activity by virtue of the fact that a tampon was found near the bed and the lack of defensive wounds. This failure constitutes ineffectiveness on the part of counsel and was highly prejudicial to the defendant because it would have provided reasonable doubt and provided another hypothisis of innocence.

Failure to accomplish the foregoing evidentiary matters cannot be said to be a tactic or strategy, since the failure to do any one may have been the one thing that resulted in Mr. Finney being acquitted or the charges dismissed; It was ineffectiveness on the part of counsel and extremely prejudicial to the outcome of the case.

The State had the burden of proving this case to the exclusion of every reasonable hypothesis of innocence. Defense counsel's ineffectiveness coupled with the State's failure to ensure that every lead and evidentiary matter was pursued, caused undue

prejudice to the defendant in being able to show there was more than one reasonable hypothesis of innocence.

ISSUE VIII

> **THE TRIAL COURT ERRED IN FAILING TO OVERSEE AND ENSURE THE RENDITION OF EFFECTIVE POSTCONVICTION COUNSEL AS REQUIRED BY SECTION 27.711(12) FLORIDA STATUTES AND IN FAILING TO CONDUCT A NELSON HEARING ON THE COMPLAINT OF APPELLANT AS TO THE COMPETENCE OF HIS ORIGINAL POSTCONVICTION COUNSEL, MR. JACK CROOKS. A CURSORY EXAMINATION OF APPELLANT'S POSTCONVICTION COUNSEL'S PRESENTATION OF HIS MOTION FOR POSTCONVICTION RELIEF SHOWS DEFICIENCIES THAT WARRANT A REMAND OF THE CASE TO THE TRIAL COURT.**

1. Support in Statute and Case law for this result.

Under Section 27.711(12) Florida Statutes, the trial court bears a duty to oversee and reasonably assure some degree of proficiency in the performance of postconviction counsel. The pertinent parts of that statutes provide as follows

> "The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The Courts shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Comptroller, the Department of Legal Affairs, the executive director, or any other interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing."

Appellant filed, pro se, a seven-page motion before the circuit court complaining of his postconviction attorney, Jack

Crooks, on November 12, 1999, (PC-R. 199-206). The trial court never conducted an appropriate Nelson Hearing on this motion. In this motion, appellant mentioned the difficulty he was having in maintaining communication with his attorney. Appellant was critical of the motion which had been filed on his behalf, labeling it a "boilerplate motion that had apparently been filed in other cases" of his counsel. Appellant also noted that in some of the pleadings which his counsel filed on his behalf, the names of other of his clients had appeared.

Although it is clear that in Florida, no cause of action or cognizable relief, per se, has been recognized for ineffective assistance of postconviction counsel, several decisions and orders of this Court make clear that certain facts can warrant a remand back to the circuit court so that justice may be done in certain circumstances. In Peede v. State, 748 So. 2d 253 (Fla. 1999), this Court remanded a case back for a new 3.850 to be filed because of concerns it had with the quality of postconviction counsel. Regarding the brief filed in that case, this Court wrote:

> "While we are cognizant that quantity does not reflect quality, the majority of issues raised were conclusary in nature and made it very difficult and burdensome to conduct a meaningful review...We remind counsel of the ethical obligations to provide competent representation, especially in death penalty cases, and we urge the trial court, upon remand, to be certain that Peede receives effective representation" Id. at 256

Furthermore, this Court in an order dated August 25,1999, in the case of Fotopolous v. State, Case No 91,277, was faced with a brief that had raised several grounds not raised in the original 3,850. In an attempt to properly administer justice, this Court remanded the case back to the trial court so that these claims could be properly asserted and heard and so that the interests of justice would be honored.

The Supreme Court has implicitly recognized that omissions by postconviction counsel can result in certain remedies available to the appellant. See Williams v. State, 2000 WL 1726782 (Fla. 2000), Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999).

More importantly it was reversible error for the trial court to have effectively ignored appellant's aforementioned motion. The trial court's discretion was abused by failing to provide the appellant with the opportunity to explain why he objected to counsel. Parker v. State, 423 So. 2d 533 (Fla. 1st DCA 1982).

In this motion, appellant cited the incompetence of his attorney as one of the grounds for his motion. This was the identical scenario in Kearse v. State, 605 So. 2d 534 (Fla. 2d DCA 1992) where the Court wrote:

> In the instant case, appellant requested that his court-appointed attorney be dismissed, and, in so doing, asserted incompetency as one of the grounds for relief in his motion. Although a Nelson inquiry was not required as to the conflict of interests and bias claims. Such an inquiry was required as to appellant's claims of ineffectiveness. While the trial

> court did provide appellant with an opportunity to explain his reason and complaints set out in his motion, it did not question defense counsel as to those complaints. Additionally, the trial court failed to question counsel concerning the issue of competency raised orally during the hearing when appellant asserted that counsel had nor asked for a bill of particulars before she took depositions. Finally, the court failed to make rulings as to the sufficiency of any of the ineffectiveness claims. Thus, because the record does not clearly show that the trial court followed Nelson, we hold that the court abused its discretion as to appellant's motion to discharge his attorney and reverse

Kearse, 605 So. 2d at 536-7.

Mr. Finney was even more disadvantaged than the appellant in Kearse, he never even had the opportunity to address the court of his concerns.

2. Factual Basis for this claim.

A. Original 3.50 filed on behalf of appellant.

The amended motion for postconviction relief ran a mere 29 pages in length, stocked with ten various claims, over half of which were standard prayers for relief not tailored to the unique facts of appellant's case. Furthermore those claims which do contain merit and which appear in the earlier portion of this brief are deficiently pleaded and might well prejudice appellant if this Court finds that based on the meagerness of his postconviction attorney's motion, dismissal was appropriate.

Postconviction counsel failed to discover and argue this claim

in such a manner. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further consideration by the trial court.

B. Postconviction counsel's deficient pleading of the claim relating to the prosecutor's unchallenged misstatement of the law with respect to the decision to seek the death penalty.

Mr. Crooks mentions only one aspect of this error. If the trial court had been advised of the following attachments, it well could have considered the extent of these comments and have granted an evidentiary hearing on a broader aspect of this claim.

> MS. O'CONNELL: Is the decision for the State to seek the death penalty discretionary on the State, or is there – are there legal requirements that must be met in order for you to seek that penalty?
>
> MR. COX: Let me answer that this way, because I can't speak with you about anything except the law as it would apply in this case. What I can tell you is this: In the State of Florida, just as Her Honor will tell you, we recognize the fact that not every first-degree murder is a death penalty case. But the Legislature basically in law has said, if there are certain factors or certain facts that exist, either in the murder or with that particular person convicted of murder, okay, certain factors or certain attributes that exist, then the State may proceed and ask for a death penalty recommendation and ask for the death penalty. Okay?
>
> So, basically what has happened is the Legislature has said there are certain – they have a certain list. And they say if these things exist, one of them, if something exists, then the State may proceed and ask for the death penalty. Does that answer your question?

MS. O'CONNELL: Yes.

(R. 113).

Later in the voir dire this issue resurfaces and the assistant state attorney reiterates his original position reinforcing this misconception of the law in the minds of the jurors.

> MR. THOMAS: You mentioned earlier that the Legislature says specific things you can go on for the death penalty, maybe one or more items that you can go on. That is leaving the decision up to your office, isn't it, as to really whether we go to the death penalty or not. Why do you say in one case, "I won't go for the death penalty even though some of these things are there, and anther one not?" I am still a little confused about that.
>
> MR. COX: I understand, and believe me, I'm not trying to avoid your question or avoid answering your question at all. Okay? I'm not trying to do that. All I can discuss with you right now is what the law is and what the law says. And the law says that if certain aggravating factors, one or more, – I mean, you just need one – but if certain aggravating factors exist, then the people of the State of Florida can come before the jury and say, "Look, because of this aggravating factor, we ask that you impose the death penalty and make that recommendation." I mean, the decision – I mean, you know, I guess the decision – But, you know, as to whether or not to impose the death penalty, you have to go through this second hearing, the second phase.
>
> I wish I could explain. I'm not trying to avoid your question. I would like to answer all your questions, but we're limited as to how much we can speak now as to the facts of the case and things of that sort. Okay? So, I hope you can bear with me on that. I hope you can understand that because as the trial progresses, if that becomes applicable, yea,

> as that part comes in, you know, you'll hear more about it. And you may understand more and answer more of your questions.

(R. 152-154).

The focus of the juror's question was to discover whether it was within the discretion of the office of state attorney in deciding to seek the death penalty. It is equally clear that in both of its responses to this question the assistant state attorney sought to evade giving the obvious categorical answer, which was yes, and sought rather to convey the impression that the legislature more or less dictated those circumstances under which the death penalty may be sought.

A very possible effect this error had was to leave the jury with the impression that there existed a rigid formula established by law as to when the death penalty is sought. Therefore the jury could have been misguided into thinking that the evidence was of such a nature as to fit into a legislative definition of circumstances which warrant the imposition of death. The jury accordingly was not inclined to look critically or skeptically at the office of state attorney. Rather it was undoubtedly prejudiced against the appellant believing that the facts of the crime was of a nature contemplated by law to warrant the imposition of death.

Postconviction counsel failed to discover and argue this claim in such a manner. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further

consideration by the trial court.

C. Postconviction counsel's deficient presentation of the claim that the prosecutor improperly referred to another crime to be used as a statutory aggravator in the course of his voir dire.

Again, Mr. Crooks includes in his motion only a small portion of the many and pervasive instances of the prosecutor's ongoing comments to the jury as to the "additional evidence" they will receive in the second phase of the trial where the only consideration will be whether or not to impose the death penalty. The jury was told that this is evidence they will receive from the side that will be seeking execution. The prejudice is self-evident. It is important to note that the comments excluded by postconviction counsel are those made by many of the panel members themselves, which illustrate more effectively the prejudice which the prosecutor's remarks caused.

> MR. COX: Okay. The same question to you. If you Her Honor, Judge Sexton, tell you that you must consider any additional evidence or testimony later on in the second phase before you commit yourself to a decision, could you do that, though?
>
> ME. BARLOTTA: Well, I'm sure I understand that because in my view if a person is not – I don't know. I don't know what those criteria are that your telling us.
>
> MR. COX: And you will learn later I'm not permitted to go over all of them now with you, and you will be instructed later.

(R. 114).

> MR. COX: Okay. The same question to you,

then: If Mr. Finney or anybody else were convicted of murder in the first degree, are you saying basically under no circumstances could you impose the death penalty? Or do you think you would like to hear additional evidence and find out more about it before you decide.

(R. 119).

MR. ROGERS: I believe in capital punishment, but I also believe that I can keep an open mind and hear all the evidence before I make up my decision.

MR. COX: Okay. So, you wouldn't go either way until hear all of the evidence?

(R. 124).

MR. BLATT: I have a little problem with the second half. If you have proven to me that this man is guilty beyond the shadow of a doubt –

MR. COX: Beyond a reasonable doubt.

ME. BLATT: Right.

MR. COX: Okay.

ME. BLATT: I can't envision any more evidence that could change my mind or our minds to not giving the capital punishment. I mean, if all the evidence is given in the beginning and the gentleman is – we determine that he is guilty

MR. COX: Guilty of Murder.

ME. BLATT: Right, without any – then

ME. COX:Let me just explain it to you this way: Let me be careful with the words I use. In the first part of the trial, in the first stage of the trial you're only going to be deciding his guilt or innocence.

ME. BLATT: I understand.

MR. COX: Okay. And you're going to be hearing

about facts of the case and everything like that.

ME. BLATT: Right.

MR. COX: Okay. But there will be – all I can tell you is there will be a second phase of the trial where you will more than likely hear mor evidence and testimony, okay? And –
(R. 125-126).

MR. COX: You Mentioned earlier as well that if the evidence went on in the second part as well – let me ask you this –
and, you know, this probably will not be the case here if we get to that point. But if the State were to go into the second phase and not present any evidence, okay, and we're relying on the facts of this murder, which the Legislature says we can do, – if certain facts appear, we can still argue for the death penalty to you – if the State were to go forward with no facts – which wouldn't happen here – but if that were the case, do you think you can still consider the death penalty based upon the facts of the murder itself?
(R. 130-131).

MR. MILLS: You didn't hear all the evidence.

MR. COX: I'm saying, you may and you probably will hear other evidence and testimony. I can't tell you anything more about it. I wish I could. Like I explained to you earlier, but we can't at this point – this isn't the point where we're allowed to do anything, okay? But I know that is so little to know. But you can keep an open mind and go either way?
(R. 147).

MR. MILLS: Okay. I believe in capital punishment, and I'll keep an open mind. But the evidence that you use to convict the person, and in the second phase you use different evidence. So, I can't see – you see what I'm saying?

MR. COX: I understand exactly. You're asking

the same question he did.
(R. 146).

MS. ROLLINS: When you decide to make a decision prosecuting someone, how do you determine whether or not – why do you ask – make it a confusing situation for a jury when you ask for a penalty along with the verdict.

MR. COX: You're basically asking, how do we decide whether or not to go for the death penalty?

MS. ROLLINS: No. Why do you give us both those situations at once that we have to determine the areas? I mean –

MR. COX: Basically it's not really at once. I mean, granted, it's going to be during the same trial and things of that sort. But, you see, the reason that we have broken it up into phases, one being the guilt phase, has absolutely nothing to do with the death penalty, nothing at all. Okay? And then we have a completely separate second phase where you will decide whether or not the death penalty is appropriate.

I don't know if you're asking why the same jury makes that decision. But, you know, I would venture to say that one reason is because you hear the evidence of the murder and, so you know, the reason behind the underlying facts for murder in the first degree. Did I answer your question, because I don't know if I follow you.

THE COURT: No, you didn't answer her question. The question is: Why do you bring it up all at once? Why don't you let them decide the guilt and then decide the penalty, correct?

MS. ROLLINS: Yes.

MR. COX: The law. We are bound to follow the law, and this is the way we handle it in the courts in Florida, and that is the way we do it.

(R. 150-151).

As reflected in the above-provided excerpts, Cox's comments prompted questions and apparent confusion on the part of any jurors. The state attorney, unwittingly or not, compounded the impropriety of his remarks when he went on to assure the jury he was not necessarily trying to keep anything from them but that he was prohibited from commenting further.

Mr. Cox's questioning clearly planted and cultivated the clear and unmistakable impression that "other evidence" would be presented in furtherance of or in support of the state's position that the death penalty should be imposed. Especially in the above passage, it is clear that the jurors questioned why they would not hear all the evidence on appellant's guilt at the same time. This cannot be considered as an unwitting articulation on the part of the speaker as it is repeated too often to be considered anything other than what it probably is, a calculated attempt by the assistant state attorney to taint the jury and alert them to "other" evidence.

Postconviction counsel failed to discover and argue this claim in such a manner. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further consideration by the trial court.

D. Postconviction counsel's deficient pleading and presentation of the claim regarding improper arguments from the prosecutor in closing arguments.

Mr. Crook's 3.850 motion offers a paltry one paragraph description of a phenomenon which is pervasive throughout Mr. Cox's closing argument. A properly pleaded claim could and should have appeared as the following.

In the closing argument of the penalty phase, Mr. Cox continued on with his proclivity toward improper argument. Firstly he implied that the defense was free to and did present less than veracious testimony in the penalty phase that they were totally unrestricted in what they could argue.

> "Now I'm going to speak with you about the mitigating and the aggravating factors in a moment, because you see, as we spoke about in voir dire, there are certain things that if these certain circumstances exist, the state can come to you and urge you to sentence the defendant to death. The Defense is limited only by their own creativity. They can argue anything. This was their day in court. This was Charles Finney's day. You didn't hear Ms. Vogel or myself say anything because that is the way it should be. His witnesses should get up there and tell you whatever they want to and they did"

(R. 897).

It was ineffective assistance of counsel for appellant's trial counsel not to have moved for a mistrial. The comments by Assistant State Attorney Cox were a subtle invitation to the jury to disregard whatever was being offered by the defense. The implication of his remarks is that while the state is bound by the rules of law, the defense can essentially say whatever it wants. The defense is not bound by anything other than their own

creativity. The defense is implied to have no accountability to veracity, no duty to show relevance. The comments were thus damaging in that they suggested that only the state had to account for itself in the presentation of evidence in the penalty phase.

The prosecutor continues:

> "And folks we have not heard the first thing that mitigates this murder. Nothing can mitigate this murder. Some of the things we heard in mitigation – and I anticipate that Mr. Escobar may pop out some of these to you- whether the defendant has a good work history. He's been honorably discharged from the service. Folks, there are a lot of people that work well, there's a lot of people who have been honorably discharged from the service, and they don't go out and tie people up and stab them thirteen times. That is not mitigation. That is not what society expects.

(R. 898).

Trial counsel should most emphatically have objected to the characterization by the state attorney that Mr. Escobar would "pop out" the proposed factors for mitigation. The very term "pop out" connotes huckstering an illusory gimmick, something unworthy of the jury's serious consideration. Combined with his preceding remarks that the defense can say whatever they want, the state attorney here effectuates a cumulative erosion on whatever credibility the defense may have in the eyes of the jury. The state attorney continues:

> "The man whose in court today who you heard

> testify he other day and who you heard these people talk about is not the same man who on January the 16th killed Sandra Sutherland, and he's not the same man who thirteen days later raped Judy baker. You see, its s a different picture being painted here. But let's remember why we're here. Let's remember Charles Finery's character is. There's good thongs from his friends but you can't overlook the bad"

(R. 899).

The state attorney continues on implying that the purpose and nature of defendant's friends are to perpetuate lies, which constitutes his penalty phase defense. All of this is effectuated without any objection from trial defense counsel. Again without any objection by appellant's trial counsel, the state attorney continually attempts to usurp the jury's function from them, scoldingly admonishing them that "the evidence of the appellant is not mitigation." The state attorney is improperly expressing his opinion here.

> "There is nothing more despicable than taking a human life for money. And what's the value of Sandra Sutherland's life by this man? Thirty dollars and the contents of whatever came out of that wallet. Thirty dollars to pawn that VCR and whatever came out of that wallet. Thirty dollars to pawn that VCR and whatever came out that wallet and the purse was ransacked. That is the value of Sandra Sutherland's life to Charles Finney. What is disgusting and that is certainly aggravating"

(R. 901).

The expression of the state attorney's opinion as to the actions of appellant as "disgusting" is met by no objection by the defense counsel.

In referring to one of the crimes that was used as an

aggravator, an incident involving Ms. Judy Baker, the prosecutor continues:

> "And we also know as well in Judy Baker's case that the value for the rape of Judy Baker was fifty-five dollars, for money that is disgusting"

(R. 902).

Defense counsel finally interposes an objection at a point when the full prejudice of the prosecutorial misstatements has inured to the prejudice of the appellant's case. In fact his attorney concedes that

> "I allowed it once but I can't allow it a second time. He is giving this jury his personal views,which contrary to what closing arguments aresupposed to be. As to his own personal views about it being disgusting, he can't d o that. That is improper prosecutorial closing and he knows it.

(R. 902).

Postconviction counsel failed to discover and argue this claim in such a manner. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further consideration by the trial court.

E. Postconviction counsel's deficient pleading and presentation of the claim regarding trial counsel's failure to bring mitigation witnesses.

Firstly appellant would direct this Court's attention to the record transcript of the Huff hearing for appellant's cause which was heard on May 26, 1999 (PC-R. 272-288). There is a noticeable lack of advocacy in the tenor of counsel's remarks. In arguing the claim that trial counsel failed to present mitigation witnesses,

counsel inexplicably tells the court of the possibility of some of the witnesses being "cumulative," further evidence of the significant deficiencies in the performance of postconviction counsel. He also limits the strength of his own argument when he comments sheepishly that "I can't state that as an absolute (PC-R. 294).

> "Your Honor, the next point would basically go again, to primarily ineffective assistance of counsel lack of presentation of mitigation evidence and I can say to the court candidly that some of it may have been somewhat cumulative to other witnesses who testified but there were at least a half a dozen other witnesses who could have testified in the mitigation phase or in mitigation that might have made a difference again. I can't state that as an absolute ."

(PC-R. 294).

In the trial court's order dismissing the claims of ineffectiveness for failure to present mitigation evidence, the trial court relied upon the very statement of appellant's own lawyer when he mentioned that the evidence might be cumulative. He does not even mention the names and testimony of the witnesses.

An effective argument as follows could have and should have been made.

The mitigation witnesses which were presented by the trial attorney did have some limited impact as reflected in the statutory

mitigators found to exist by the court in its sentencing order.[2] However by presenting only his wife and a co-worker he met late in his (appellant's) life, trial counsel allowed a major void in the evidence of his background. The court gave some but not great weight to this aspect of appellant's background. The jury and judge failed to receive a comprehensive account of appellant's background as they would have, had the aforementioned witnesses named in the postconviction motion testified. The trial court ruling summarily denying this claim compounded the error by denying an evidentiary hearing so as to review what the omitted testimony was and as to properly assess the impact its omission had on the integrity of the judgment and sentence of death.

Trial counsel failed to call: Anastasia Jones, a co-worker of the appellant; Jo Ann Nelson, also a coworker; Otis Williams, co-worker; Katherine Richardson, a sister; Louis Stubbs, a cousin; Rev. Billy Stubbs, a relative; Jamie Wesley, a relative; Lynn Wesley, a relative; and Joyce Wesley, a relative.

Through these witnesses trial counsel could have strengthened the story of appellant's upbringing, childhood and teen years

[2]As mitigating factors, the judge found and gave some weight to (1) appellant's exemplary work and military history; (2) his deprived childhood, marked by poverty and abandonment by an alcoholic father; (3) his positive character traits, such as being a hard worker and a good parent; (4) excellent potential for rehabilitation and productive adjustment within the prison setting; and (5) continued opportunity to maintain a loving relationship with his daughter, through frequent visitation (R155-56, T948-50).

through independent sources, perhaps more persuasive than the appellant himself. A careful review of Dr. Gamache's testimony shows that the portrait of appellant, which he offers, falls remarkably and strikingly short of presenting the full range of relevant facts about appellant's background. For example, at the age of three or four, appellant sustained a serious fall from a rocking chair resulting in a four to five inch scar on his head. Also as a child, appellant was anemic which resulted in his frequent fainting and acquiring the name "Falldown."

Throughout his elementary school years, he struggled with a reading problem and exhibited a stubborn demeanor. As a youth in Macon, Georgia, appellant sustained several emotional traumas. His best friend, Willie B. Spencer, drowned when appellant was only thirteen. Louis Stubbs, his cousin, shot appellant, then 14, in the abdomen in his backyard. As a result of this unfortunate accident, appellant had surgery and was hospitalized at the age of 15. Appellant witnessed the hit and run death of his cousin, Alvin Stunt. While in the military appellant was assigned to Germany where he was in the Third Brigade handling coded military messages. He later completed a five-week training course in voice radio in Fort Dix, New Jersey.

Most importantly for purposes of mitigation was the omission of any evidence of the drug problem appellant developed while in the service. Appellant smoked hashish and pot while in the service

and developed a usage habit of heroin as well. Unquestionably the omission of this information in the compilation of his mitigation evidence was paramount. Appellant had admitted this problem to his military superiors but never received any professional counseling. Appellant, while in the military, entered the CCDAC rehabilitation program, an in house treatment program for drug and alcohol dependence. Records obtained from this agency indicated that appellant had a condition which was impairing his judgment and reliability for temporary periods of time. This Court has held that failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. Heiney v. State, 620 So.2d 171 (Fla. 1993); *See also*, People v. Wright, 488 N.E.2d 973 (Ill. 1986). In Ross v. State, this Court held that a defendant's past drinking problems, among other things, were "collectively a significant mitigating factor". Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Unrebutted evidence that the defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

Although trial counsel presented some evidence in mitigation, Mr. Finney's girlfriend, Tammy Gilmore, his co-worker, Joe Williams, and Dr. Gamache, such a body of mitigation evidence could hardly be considered exhaustive. Compare Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir.1995) (trial counsel, who had a "small

amount of information regarding possible mitigating circumstances regarding [petitioner's] history, but ... inexplicably failed to follow up with further interviews and investigation" rendered constitutionally deficient performance); Blanco v. Singletary, 943 F.2d at 1500-01 (11th Cir.1991) (deficient performance where counsel left messages with relatives mentioned by defendant but neglected to contact them); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir.1988) (deficient performance where counsel learned of mitigating personal history evidence from defendant but failed to investigate).

The testimony of Tammy Gilmore (R-840-869) was essentially a narrative account of her relationship with appellant. She had met the appellant in 1986, and their relationship evolved into a serious and close relationship. Ms. Gilmore further established appellant's stable and exemplary employment history. He also, in the course of their relationship, was both ambitious and diligent as evidenced by his obtaining a second job at night with Greyhound Bus. Appellant did this she said, so that he could faithfully discharge child support obligations, which he fulfilled voluntarily. During Miss Gilmore's relationship with appellant, he was a tremendous source of emotional as well as financial support (R. 842). On April 21, 1988, a child, Shannon was born to the couple. Appellant proved to be an extremely positive role model for the daughter.

The trial counsel called one other additional lay witness in mitigation , Joseph C. Williams (R. 860). He had met the appellant in Tampa, established a quick and warm relationship with and eventually helped him find employment at University Community Hospital. Mr. Williams testified that the appellant was a warm, caring and generous man. He left appellant alone with his 80-year old mother with never any cause for concern (R.866). Williams was surprised to learn of appellant's arrest for this crime because he had always observed him to be polite and circumspect in the presence of his mother (R. 866-67).

As can be gleaned by a review of this evidence, the witnesses who could have been called were clearly **not** cumulative to the body of evidence which was adduced. The trial court order denied this claim and cited the cumulative nature of such excluded witnesses as the reason. It was resoundingly wrong in such a holding; the case should be remanded for an evidentiary hearing on this claim.

Postconviction counsel failed to discover and argue this claim in such a manner. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further consideration by the trial court.

F. Postconviction counsel deficiently pleaded the Ake Claim that trial counsel was deficient in failing to provide the trial expert, Dr. Michael Gamache with all relevant data.

Mr. Crooks pleaded this claim no better than the straight

mitigation claim because he failed to mention in his 29 page 3.850 motion what the proffered testimony was. A better and more completed claim should and could have been provided. It would have read as follows.

In a capital case, the test for determining whether counsel's deficient performance prejudiced the defendant is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695. A reasonable probability is one which undermines confidence in the outcome of the sentencing. Strickland, 466 U.S. at 694.

In the landmark legal case of Ake v. Oklahoma,470 U.S. 68 (1985), the United States Supreme Court entertained the question or whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question. Although admittedly the facts of this case, as framed in both the direct appeal and the postconviction motion, do not necessarily raise the specter of an insanity defense, wherein, as in the case at bar, the state has made the defendant's mental condition relevant to the degree of culpability and to the ensuing punishment, the role which a psychiatrist or mental health expert plays is unquestionably significant. By laying out the

investigative and analytic process to the jury, the psychiatrists for each party enable the jury and judge, to make its most accurate determination of the truth on the issue before them.

In the case at bar, trial counsel failed to provide Mr. Finney's mental health experts with available, adequate background information, including his school records, work records, statements from fellow employees, neighbors friends and relatives to enable them to make a meaningful evaluation of Mr. Finney at the time of the offense or develop mitigation.

Dr. Michael Gamache, who evaluated Mr. Finney, was called by trial counsel as an expert witness in chief during the penalty phase of the trial (R.869). Dr. Gamache is a forensic psychologist. Dr. Gamache testified that he conducted two clinical examinations of Mr. Finney totaling approximately five and a half hours. This examination included a clinical interview, a mental status examination, a psych-social history consistency testing and psychological testing.

Dr. Gamache offered testimony breaking down appellant's life into four phase comments upon challenges and difficulties which attended each phase and how they evolved over time. A significant weakness in Dr. Gamache's testimony was the limited base of information. Essentially Dr. Gamache relied upon only that which was related to him by the defendant. It was imperative and ineffective for counsel to have provided the medical expert with

information other than self reporting. It is not established by trial counsel that Dr. Gamache consulted any other independent data, be they reports by other doctors, documented family histories or other psychological tests in his examination and testimony. The appellant was the sole source of Dr. Gamache's testimony. The doctor was not provided with family members for the evaluation, including Mr. Finney's sister Katherine Richardson, cousins, Rev. Billy Stubbs, Jamie Wesley, Lynn Wesley and Jocye Wesley.

Dr. Gamache's testimony is actually quite superficial. There is a wealth of highly pertinent data an appellant's background which having never been known or considered by the Doctor, render his evaluation incomplete.

Although its holding appears to pertain to cases where the defendant's sanity is in question, Ake clearly stands for the proposition that in circumstances where psychiatric assistance would be of probable value, the defendant should not be denied access to such aid. Appellant, because of the ineffectiveness of his trial counsel in not properly furnishing Dr. Gamache all relevant data, was effectively denied access to significant psychiatric assistance which was warranted.

Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of

investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of appellant at the time of the offense.

By organizing defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. See Hildwin v. Dugger, 654 So.2d 107 (Fla.1995)(Counsel's failure to investigate and present mitigation evidence which would have supported two statutory mitigators was ineffective assistance of counsel); Eutzy v. Dugger, 746 F.Supp. 1492 (N.D. Fla. 1989)(Trial counsel was ineffective for failing to prepare and present mitigation even when client said he did not want his mother involved.).

This claim alleged specific facts which were not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced appellant and he was entitled to an evidentiary hearing. Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). Because "counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary," counsel's failure to investigate appellant's background and family cannot be considered

strategy. Under Strickland, such a strategic choice must be made after the relevant investigation. Strickland, 466 U.S. 691. Counsel's deficient performance to research appellant's background and uncover other sources to support what little information they had prejudiced appellant because the experts hired to help him and the jury and judge who sentenced him to death never heard the horror and abuse he had endured his entire life. This was not a case in which counsel made a reasoned decision not to present the circumstances for tactical or strategic reasons. The circumstances were not presented to the experts and jury simply because counsel never took the time to develop them.

Postconviction counsel failed to discover and argue this claim in such a manner. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further consideration by the trial court.

G. Postconviction counsel deficiently pleaded both the motion for rehearing and the notice of appeal.

On May 17, 2000, at the hearing for his motion for rehearing, postconviction counsel was regrettably meek and nonchalant. Here is the essence of his remarks in argument:

> "So I filed a motion for rehearing Judge, and I provided a copy of that asking the court the Court to reconsider granting us an evidentiary hearing on all claims. That seems to be the Supreme Court's desire where they are trying to go at this point. I will leave the motion stand on its own."

(PC-R. 343).

Postconviction counsel then filed a Notice of Appeal which purported to appeal a May 17, 2000, order summarily denying postconviction relief. The Notice actually appealed a written order of that date which denied a motion for rehearing of such a denial. Up until October 31, 2000, there had never been an actual written order of denial of appellant's postconviction motion. On that date, the trial court filed an Order of Denial and entered it nunc pro tunc to the date of the evidentiary hearing, May 26, 1999.

Postconviction counsel failed to better argue the motion for rehearing. In the interests of justice, remand of the motion on this issue is warranted for an evidentiary hearing and further consideration by the trial court.

As a result of the ineffectiveness of appellant's previous postconviction counsel, his many meritorious claims are minimally and negligently pleaded. This omission may well have harmed his prospect for an evidentiary hearing. It is in the interests of justice that this matter be remanded to the trial court for its consideration of these claims in the manner in which they should have been and could have been pleaded. See Williams v. State, 2000 WL 1726782 (FLA 2000); Peede v. State, 748 So. 2d 253 (Florida 1999); Steele v. Kehoe, 747 SO. 2D 931 (FLA. 1999).

ISSUE IX

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND

FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. FINNEY RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

Florida's capital sentencing scheme denies Mr. Finney his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976).

Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S.Ct. 528 (1992).

Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. See Claim XII.

Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances."

Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed

in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to the arbitrary and capricious imposition of the death penalty, as in Ms. Wuornos's case, and thus violates the Eighth Amendment.

Florida's capital sentencing procedure does not utilize the independent re-weighing of aggravating and mitigating circumstances envisioned in Profitt v. Florida, 428 U.S. 242 (1976). Profitt is particularly offended when, as in this case, the judge finds, a statutory aggravator (CCP) which both includes the element of premeditation and is struck on direct appeal.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992). Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors.

The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Richmond v. Lewis, 113 S. Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

To the extent trial counsel failed to properly preserve this issue, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Finney's case entitles him to relief.

ISSUE X

MR FINNEY'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Finney contends that he did not receive the fundamentally fair trial to which she was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Mr. Finney's contention that the process itself failed her. It failed because the sheer number and types of errors involved in her trial, when considered as a whole, virtually dictated the sentence that she would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

The flaws in the system which sentenced Mr. Finney to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Finney's direct appeal. While there are

means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Rule 3.850 relief must issue.

ISSUE XI

MR. FINNEY IS INNOCENT OF THE DEATH PENALTY. MR. FINNEY WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court has held that, where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So. 2d 911 (Fla. 1991). The Florida Supreme Court has recognized that innocence of the death penalty constitutes grounds for Rule 3.850 relief. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Finney's trial court relied upon three aggravating circumstances to support his death sentence: (1) previous conviction of a felony involving the use or threat of violence;

(2)murder was committed during the course of kidnaping and sexual battery (3) heinous, atrocious, or cruel (R. 4649). Each of these aggravating factors is invalid, to wit: prior violent felony is based on a prior conviction that is constitutionally infirm; the elements of the sexual battery and kidnaping not established; and the sentencing judge relied on facts not in the record to find the heinous atrocious, or cruel aggravating circumstance. Absent constitutionally adequate constructions, the aggravating circumstances cannot be said to have been proven beyond a reasonable doubt.

Mr. Finney's death sentence is disproportionate. In Florida, a death-sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the overwhelming evidence of mitigating evidence discussed elsewhere render the death sentence disproportionate. Mr. Finney is innocent of the death penalty.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Finney's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the cases for a new trial, an evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the following has been has been furnished by United States Mail, first class postage

prepaid, to all counsel of record on February _____, 2001.

_____
Joseph T. Hobson
Florida Bar No. 0507600
Assistant CCRC-Middle

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in a Courier non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210.

_____
Joseph T. Hobson
Florida Bar No. 0507600
Assistant CCRC-Middle

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant

Copies furnished to:

The Honorable Chet A. Tharpe
Circuit Court Judge
Hillsborough County Courthouse
317 Tower
801 East Kennedy Blvd.
Tampa, Florida 33602

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, Seventh Floor
2002 North Lois Avenue
Tampa, Florida 33607

Sharon Vollrath
Assistant State Attorney
Office of the State Attorney

Hillsborough County Courthouse
Annex
800 East Kennedy Boulevard
Tampa, Florida 33602

Charles Finney
DOC# 516349; P4226S
Union Correctional Institution
Post Office Box 221
Raiford, Florida 32083