

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1492

RANDALL SCOTT JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SEVENTH CIRCUIT COURT,
IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant appeals the circuit court's denial of his motion for post-conviction relief prosecuted pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The proceedings in his case will be cited to as follows:

"R." - record on direct appeal from initial trial court proceedings;

"R2." - record on direct appeal from resentencing;

"PC-R." - record of post-conviction proceedings; and

"EX." - exhibits from post-conviction hearing.¹

After the initial cite in the procedural history, the direct appeal opinions of this Court will be referred to as "Jones I" (appeal from 1988 original trial and sentencing) and "Jones II" (appeal from 1991 re-sentencing).

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Appellant, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

¹The post-conviction record on appeal lists five evidentiary hearing exhibits, all identified as state's exhibits. In fact, the exhibits admitted at the evidentiary hearing were all defense exhibits.

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Mr. Jones was charged by indictment with two first-degree murders, armed robbery, burglary of a conveyance while armed and/or with an assault, shooting or throwing a deadly missile into an occupied vehicle, second-degree grand theft, and sexual battery (R. 5-6). The case was tried before the Honorable Robert R. Perry. Mr. Jones was represented at trial by Howard Pearl of the Public Defender's Office. The jury found Mr. Jones guilty on all counts except for the second-degree grand theft, which was dismissed (R. 1650-51). At penalty phase, the jury recommended death sentences by a vote of 11-1 (R. 1830). The trial court followed the recommendation (R. 685-92). On direct appeal, this Court reversed the conviction for sexual battery, affirmed the remaining convictions, and remanded the case for a new sentencing hearing because of cumulative error at the penalty phase. Jones v. State, 569 So. 2d 1234 (Fla. 1990).

Mr. Jones' re-sentencing hearing was held in March, 1991, again before Judge Perry. Mr. Jones was again represented by Howard Pearl. The jury recommended death sentences by a vote of 10-2 (R2. 984-85). The trial court followed the recommendation (R2. 1020-34). On direct appeal, this Court

affirmed the death sentences. Jones v. State, 612 So. 2d 1370
(Fla. 1992).

Mr. Jones filed his amended 3.850 motion on November 10, 1997. (PC-R. 292-431). A "Huff"² hearing was held on January 23, 1998 (PC-R. 626-95). On November 9, 1999, the lower court issued an order granting an evidentiary hearing on Claim XXIX of Mr. Jones 3.850 motion (PC-R. 505-07). The evidentiary was held on February 1, 2000 (PC-R. 535-95). Thereafter, on June 8, 2000, the lower court denied Mr. Jones 3.850 motion in its entirety (PC-R. 605-07). Mr. Jones filed his notice of appeal of the denial of his 3.850 motion on July 6, 2000 (PC-R. 608-09).

II. STATEMENT OF THE FACTS

An evidentiary hearing was held on February 1, 2000 on Claim XXIX of Mr. Jones' 3.850 motion, which alleged that Mr. Jones was denied an individualized sentencing when the state attorney prepared the sentencing orders in violation of Florida's death penalty statute and the Florida and United States Constitutions and in contradiction of the established case law of this Court.

A. Testimony of Robert McLeod

Robert McLeod testified that he was the prosecutor at Mr. Jones' original trial proceedings (PC-R. 560). McLeod prosecuted two capital murder cases before Judge Perry, Mr.

²Huff v. State, 622 So.2d 982 (Fla. 1993).

Jones' case and that of Manuel Colina (PC-R. 572). McLeod testified that he drafted the sentencing order in both cases (PC-R. 572).

At the hearing, McLeod identified a document from the state attorney's files as a draft of the Jones sentencing orders (EX. 5; PC-R. 561). This draft "Judgment and Sentence" was for both victims (EX. 5; PC-R. 561). McLeod identified handwriting notations on the draft document as his own (EX. 5; PC-R. 562). McLeod also identified certified copies of the final orders entered by Judge Perry at the 1988 proceedings (EX. 1; PC-R. 570).³ Comparing the draft document to the final order entered by Judge Perry, McLeod testified that it appears his holographic entries were incorporated verbatim in the final order (PC-R. 570).

McLeod testified that the draft was prepared by him at Judge Perry's request (PC-R. 563). Further, McLeod testified that the content of the draft would have been based on what McLeod believed the evidence to have been (Id.) McLeod recalled that in either the Jones or Colina case, Judge Perry had specifically stated to him, "based on the evidence and the statute, give me an order" (Id.). McLeod testified that he

³Judge Perry signed two sentencing orders in 1988 and two orders in 1991, signing one as to each victim both times.

did not receive guidance from any other person or party in writing the orders (PC-R. 562-63).

McLeod testified that he knew of no input that defense counsel, Howard Pearl, had in drafting the sentencing order (PC-R. 566). McLeod further testified that he has no recollection of providing anyone with a copy of the draft (Id.).

McLeod stated that he is confident that, at the time of sentencing, his draft order had been sent to Judge Perry, who then read it at the sentencing hearing (PC-R. 569). He further identified the type of the final orders as consistent with that used by the state attorney's office (PC-R. 571).

B. Testimony of Richard Whitson

Richard Whitson testified that he prosecuted Mr. Jones' 1991 re-sentencing (PC-R.541). At the evidentiary hearing, Whitson identified a document from the state attorney's files with the word "wrong" written on the left side of the first page (EX. 2; PC-R. 542). Whitson testified that he believed he recognized the word "wrong" as being made in his handwriting (PC-R. 546). Whitson further testified that a circle on page one of the document is consistent with the way he would mark a document (PC-R. 543). Whitson testified that an "x" marking on page three of the document was not his

(Id.). Based on his recognition of the markings on the document, Whitson stated that "there's a high likelihood that I had a chance to look at it before it ended up in final form" (PC-R. 546). Although Whitson could not remember how he received the document, he thinks he had an opportunity to review it (PC-R. 550). Whitson stated that he did not "draft" the order (PC-R. 545). Further, Whitson stated that he recognized Judge Perry's writing style in both the draft document he identified and the 1988 order (Id.). However, Whitson did not know that Robert McLeod had written the 1988 order (PC-R. 547). Whitson testified that it would not be unusual for Judge Perry to forward orders to both the state and defense for comment (PC-R. 550).

C. Testimony of Pamela Koller

Pamela Koller testified that she is currently an Assistant Attorney General (PC-R. 552). At the time of Mr. Jones' re-sentencing, Koller worked as Judge Perry's law clerk (PC-R. 553). Koller testified that she was involved in the preparation of the sentencing order at the re-sentencing proceedings (Id.). Koller further testified that, as a starting point, she probably would have used the order from the original sentencing in preparing the 1991 sentencing order

(PC-R. 554).

At the hearing, Koller identified a document from the state attorney's files which she recognized as work product from the computer she used while working for Judge Perry (EX. 4; PC-R. 555). Koller further identified handwriting on page six of the document as her own (Id.). Koller examined "Exhibit 2", previously identified by Richard Whitson, and testified that it appeared to be a document generated from her computer (Id.). Koller could not identify the handwriting on "Exhibit 2", but she

stated that it did not appear to be Judge Perry's handwriting (PC-R. 555-56).

Koller testified that she does not remember sending any drafts of the Jones sentencing order to the state attorney's office (PC-R. 556). Further, Koller has no explanation for why the state attorney would have a draft of the sentencing order (Id.).

D. The Lower Court's Order

The lower court denied relief after the foregoing evidence was elicited and presented (PC-R. 605-07). The lower court held that the circumstances of the preparation of the first sentencing orders were not relevant (PC-R. 606). Regarding the 1991 sentencing orders, the lower court held that the defense was heard on all mitigating and aggravating circumstances (Id.). Further, the lower court held that only the judge's law clerk and the judge drafted the orders in 1991 (Id.). The court attributed any similarities in the 1988 and 1991 orders to the fact that "all parties and the judge well knew all of the facts, issues and arguments well before the 1991 re-sentencing (Id.). The court wrote that the defendant "produced no evidence whatsoever that the judge did not give every consideration to the arguments of the Defendant at re-

sentencing (Id.). The court concluded that there was no evidence of *ex parte* communications with either the

state or the defense in the drafting of the 1991 re-sentencing order and denied the claims (PC-R. 607).

SUMMARY OF THE ARGUMENTS

(1)(a). The lower court erred in holding that the trial court did not delegate its authority to write the sentencing order in Mr. Jones' case thereby denying Mr. Jones the constitutionally required individualized sentencing.

(1)(b). The lower court erred in holding that Mr. Jones was not denied due process and the fundamental right to a fair trial when the state and the trial court engaged in improper *ex parte* communications.

(2)(a). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that he was denied an evidentiary hearing on his claim that he was denied effective assistance of counsel at the penalty phase of his trial.

(2)(b). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that his trial counsel had a conflict of interest which denied Mr. Jones due process and the right to a fair trial.

(2)(c). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that he was denied effective assistance of counsel when his trial counsel conceded guilt without his permission.

(2)(d). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that he was denied his right

to an adequate mental health evaluation due to counsel's ineffectiveness.

(2)(e). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that he was denied effective assistance of counsel at the guilt phase of his trial.

(2)(f). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that the state withheld material, exculpatory evidence.

(2)(g). The lower erred in denying him an evidentiary hearing on his claim that his trial proceedings were fraught with procedural and substantive errors, denying Mr. Jones the fundamental right to a fair trial.

(2)(h). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that he was denied the fundamental right to a fair trial when the prosecutor impermissibly suggested that the law required a sentence of death.

(2)(i). The lower court erred in denying Mr. Jones an evidentiary hearing on his claim that the trial court impermissibly considered victim impact testimony.

(3)(a). The lower court erred in denying Mr. Jones relief on his claim that the jury in his case was improperly instructed on the cold, calculated and premeditated

aggravating factor.

(3)(b). The lower court erred in denying Mr. Jones relief on his claim that the jury in his case was improperly instructed on the aggravating factor of previous conviction of a violent felony.

(3)(c). The lower court erred in denying Mr. Jones relief on his claim that the trial court failed to find the existence of mitigation established by the evidence.

(3)(d). The lower court erred in denying Mr. Jones relief on his claim that the jury in his case was misled by comments and instructions which inaccurately diluted its sense of responsibility for sentencing.

(3)(e). The lower court erred in denying Mr. Jones relief on his claim that the jury in his case was improperly instructed that one single act supported the finding of two separate aggravating factors.

(3)(f). The lower court erred in denying Mr. Jones relief on his claim that the penalty phase jury instructions shifted the burden to Mr. Jones to prove that death was inappropriate and that the trial court employed this same standard in sentencing Mr. Jones to death.

(3)(g). The lower court erred in denying Mr. Jones relief on his claim that Florida's capital sentencing statute is unconstitutional on its face and as applied.

(3)(h). The lower court erred in denying Mr. Jones relief on his claim that his sentence rests on an automatic aggravating circumstance.

ARGUMENT I

THE LOWER COURT'S RULING FOLLOWING THE POST-CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

MR. JONES WAS DENIED HIS RIGHT TO AN INDIVIDUALIZED SENTENCING AND A REASONED WEIGHING OF AGGRAVATING AND MITIGATING FACTORS BY THE TRIAL COURT WHEN THE TRIAL COURT DELEGATED ITS RESPONSIBILITY TO WRITE THE SENTENCING ORDER IN THIS CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND FLORIDA STATUTE 921.141(3). FURTHER, THE TRIAL JUDGE ENGAGED IN A CONSTITUTIONALLY IMPROPER EX PARTE CONTACT WITH THE STATE.

A. Delegation of Sentencing Authority

The central issue presented at the evidentiary hearing was whether or not the trial court, by delegating its authority to set forth written sentencing orders, abdicated its fundamental duty to provide Mr. Jones with a reasoned, individualized sentencing. In reviewing the lower court's order, this Court must determine whether there is competent, substantial evidence to support the lower court's denial of relief. Grossman v. State, 708 So.2d 249 (Fla. 1997).

Initially, the lower court erred in concluding that the 1988 sentencing orders were not relevant to Mr. Jones claim. However, at the post-conviction evidentiary hearing, Robert McLeod testified that he was the prosecuting attorney at Mr.

Jones' 1988 trial and sentencing (PC-R. 560). McLeod stated that Judge Perry asked him to draft the sentencing order and that he would not have done so without a request from Judge Perry (PC-R. 563, 565). McLeod further testified that the sentencing order would have been written based on what McLeod perceived the evidence to have been (PC-R. 563). To McLeod's knowledge, neither defense counsel Howard Pearl nor anyone else had input in drafting the 1988 sentencing orders (PC-R. 566).⁴ In denying Mr. Jones' claim, the lower court ignored the relevant testimony, as the testimony of Richard Whitson and Pamela Koller makes clear.

Richard Whitson testified that he was the prosecuting attorney at Mr. Jones' 1991 re-sentencing (PC-R. 541). Whitson stated that, based on a document he reviewed, there is a "high likelihood" that he had an opportunity to review the sentencing order entered in the 1991 proceeding (PC-R. 546). The document Whitson reviewed is a draft sentencing order from the state attorney files (EX. 2). Whitson testified that he believes markings on the draft are his own (PC-R. 546). Thus, the record establishes that, at most, Judge Perry was following the same routine as he had in 1988 or, at least, the

⁴At the time of the post-conviction evidentiary hearing, both Judge Perry and Howard Pearl were deceased.

state attorney had input into the preparation of the 1991 orders. Further, as the law clerk's testimony establishes, portions of the 1988 orders, solely drafted by the state, are incorporated in the 1991 orders.

Pamela Koller testified that she was Judge Perry's law clerk at the time of Mr. Jones' re-sentencing and that she would have been involved in preparing the sentencing order (PC-R. 553). Koller further testified that she probably would have used the 1988 sentencing order as a starting point in preparing the 1991 order (PC-R. 554). At the hearing, Koller identified a draft sentencing order from the state attorney files with her writing on it (EX. 4; PC-R. 555). Koller stated that the draft was generated from her computer (PC-R. 555). Koller examined "Exhibit 2", the draft document previously identified by Richard Whitson, and stated she could not identify handwriting on the draft, but could state that it appeared to have been generated from her computer as well (Id.). Koller did not recall sending a draft to the state attorney and has no explanation for the drafts being in the state's files (PC-R. 556). The record, thus, reveals that Whitson and Koller wrote on drafts of the 1991 orders. Importantly, there is no evidence from either Koller or Whitson that Judge Perry had any input in preparation of the

1991 order. There is simply nothing in the record to show that Judge Perry, who had the state attorney prepare the order in this case in 1988 and at least one other case, that of Manuel Colina, had not followed the same practice of delegation in 1991.

At the hearing, the state contested the origin and admissibility of the draft documents entered into evidence, but resisted testifying as to the contents of the state's file (PC-R. 578-85). Counsel for Mr. Jones assured the lower court that the draft documents originated from the state attorney files produced during public records disclosure and that the documents did not originate from Howard Pearl's files (PC-R. 583).⁵ The lower court admitted the documents on this basis (PC-R. 585). The State did not cross-appeal this ruling.

A fundamental requirement of both federal and Florida capital jurisprudence is that the sentencer must afford the capital defendant an individualized, reliable, and independent sentencing determination. Florida's death penalty statute

⁵Howard Pearl did testify at the post-conviction evidentiary hearing in the case of State v. Richard Randolph (Supreme Court case no. 93,675), wherein the identical issue presented in Mr. Jones case arose. At the Randolph hearing, Pearl was asked whether he drafted a sentencing order at Judge Perry's request. Pearl stated that he had not been asked to do so and, further, that he "would not have done such a thing if [he] had been asked" (Transcript of Randolph evidentiary hearing at page 140).

requires the following:

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH--

Notwithstanding a recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence is based as to the facts:

- A. That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- B. That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment in accordance with S. 775.082.

Fla. Stat. Sec. 921.141 (3).

In its landmark, post-Furman⁶ decision, State v. Dixon,

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So.2d 1 (Fla. 1973), this Court discussed the various

⁶Furman v. Georgia, 408 U.S. 838, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

safeguards put forth in Florida's new death penalty statute which prevent arbitrary and capricious imposition of the death penalty. In Dixon, this Court explained the vital importance of the trial court's role in sentencing:

The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience.

The fourth step required by Fla. Stat. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

Id. at 7.

Since Dixon, this Court has held in numerous decisions that it is improper for the trial judge in a capital case to delegate its duty to set forth its sentence in writing. See

Nibert v. State, 508 So.2d 1 (Fla. 1987); Patterson v. State, 513 So.2d 1257 (Fla. 1987); Spencer v. State, 615 So.2d 688 (Fla. 1993); Card v. State, 652 So.2d 344 (Fla. 1995)⁷; and Riechmann v. State, 2000 WL 205094 (Fla.).

In Nibert, this Court addressed the delegation issue where the trial judge, after making oral findings at the sentencing hearing, instructed the state attorney to reduce his findings to writing. Nibert, 508 So.2d at 3-4. Assessing the adequacy of the order under that factual situation, this Court held that the trial judge's delegation of authority did not constitute reversible error given that the trial judge made the requisite findings independent of, and prior to, the delegation. Id. at 4. In the instant case, there is no evidence that the trial judge made any independent finding or conducted any independent weighing.

In Patterson, this Court examined the delegation issue in light of its opinion in Nibert. In Patterson, the state attorney wrote the sentencing order at the request of the trial judge after the trial judge made only a conclusory statement at the sentencing hearing. Patterson, 513 So.2d at

⁷In Card, this Court remanded to the lower court for an evidentiary hearing to determine whether Card had been denied due process when the state attorney prepared the sentencing order. Upon remand, the 3.850 court granted relief. The state did not appeal that order.

1261. In finding reversible error this Court contrasted Nibert:

This record, contrary to Nibert, does not demonstrate that the judge articulated specific aggravating and mitigating circumstances. On the contrary, the trial judge's action in delegating to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors raises a serious question concerning the weighing process that must be conducted before imposing a death penalty. It is insufficient to state generally that the aggravating circumstances that occurred in the course of a trial outweigh the mitigating circumstances that were presented to the jury. It is our view that the trial judge must specifically identify and explain the applicable aggravating and mitigating circumstances.

Id. at 1263-64. Implicit in both Nibert and Patterson is this Court's insistence that the trial judge conduct a serious

weighing and that the trial judge memorialize that weighing in the sentencing order.

Most recently, this Court confronted the delegation issue in Riechmann. There, the prosecutor testified at the post-conviction evidentiary hearing that he drafted the sentencing order at the request of the trial judge who then read the order into the record at the time of sentencing. Riechmann, 2000 WL 205094 at 5. The post-conviction trial court in Riechmann granted relief, holding that the defendant was denied an independent weighing of aggravating and mitigating circumstances. Id. The State appealed, and this Court, upholding the trial court's ruling, examined the facts in light of the Nibert/Patterson precedent:

In this case, there is no evidence in the record that the trial judge specifically determined the aggravating or mitigating circumstances that applied or weighed the evidence before delegating the authority to write the order. In fact, at the evidentiary hearing, the prosecutor testified that the judge asked him to prepare the order, but that the judge did not give him any specifics as to what he had or had not found... Moreover, the trial transcript reflects that at the sentencing hearing, the trial judge merely read from the order and articulated no specific findings for this Court to review.

Id.

Thus, to address the delegation issue, this Court has set

forth a two step analysis which must be applied to the facts of a given case before relief is warranted. The first question is whether the trial court delegated the responsibility of writing the sentencing order. If so, the next question is whether or not the record demonstrates that the trial court, independent of the delegation, weighed the aggravating and mitigating circumstances. Absent evidence of independent review, relief is required. Application of this analysis to the instant case dictates that Mr. Jones should be granted relief.

The record now conclusively demonstrates that Judge Perry delegated the responsibility of writing the sentencing order. Robert McLeod stated unequivocally that he wrote the 1988 sentencing order at Judge Perry's request (but with no substantive input) and that the content of the order was based exclusively on McLeod's perception of the facts and law (PC-R. 563). Richard Whitson, based on a draft sentencing order from the state attorney's file bearing his handwriting and markings, testified that there is a "high likelihood" that he was involved in preparation of the order upon re-sentencing (PC-R. 546). Further, Pamela Koller testified that she was involved in preparation of the 1991 order (PC-R. 553). The record is starkly bare of any evidence that would support the

lower court's conclusion that Judge Perry did anything to draft the 1991 order, let alone that he conducted a constitutionally sufficient weighing of the facts. To the contrary, the record is clear that Judge Perry delegated his statutory responsibility to write the sentencing orders in 1991, as he had in 1988 and in at least one other capital case.

Turning to the second prong of the delegation analysis, the record fails to reveal any independent findings by Judge Perry that satisfy the requirements of Section 921.141(3). Rather, as in Riechmann, the Jones record reveals that, at both the 1988 and 1991 sentencing hearings, Judge Perry merely read previously prepared orders and made no independent findings (R. 1837-53; R2 996-1035). The lower court's reliance on the fact that argument was permitted at the sentencing hearing does not support the lower court's conclusion that Judge Perry made independent findings or participated in preparation of the order. As in 1988, he merely read the previously prepared orders into the record immediately after argument.

In its order denying relief, the lower court only reaches the first prong of the delegation analysis, holding that the 1988 proceedings are "not relevant" because a re-sentencing

occurred and that the state attorney did not participate in drafting the 1991 order (PC-R. 606). The record, however, does not support either of these findings.

First, the lower court reasons that any delegation that occurred at the original sentencing proceeding is not relevant because a new sentencing proceeding was held (Id.).⁸ This analysis ignores the fact that large portions of the sentencing orders, indisputably written by Robert McLeod in 1988, adopted almost verbatim in the 1991 order, infect the 1991 orders.⁹ In fact, Pamela Koller testified that the 1988 orders would have been her starting point in preparing the 1991 orders (PC-R. 554). For example, the analysis of the "pecuniary gain" and "CCP" aggravating factors as to victim Matthew Brock are virtually identical in the 1988 and 1991 orders. The 1988 order as to victim Brock reads as follows:

(f) THE CAPITAL FELONY WAS COMMITTED FOR

⁸Based on McLeod's testimony and the hearing exhibits, neither the lower court or the state can contend that Judge Perry wrote, or even had substantive input into the preparation of the 1988 orders.

⁹The only substantive difference, in terms of aggravating and mitigating factors found, between the 1988 and 1991 sentencing orders are the additional aggravators in the 1991 orders of "prior violent felony" as to both victims, "committed while engaged in the commission of a burglary" as to victim Perry, and "committed while engaged in the commission of an armed robbery" as to victim Brock (R2 252-67).

PECUNIARY GAIN.

Testimony and the statements made by the Defendant which were admitted in evidence at trial show that the murders were committed so as to steal Matthew Paul Brock's pick-up truck. The truck had a value of in excess of Four Thousand (\$4,000.00) Dollars. The Defendant stole the vehicle after murdering its occupants and was attempting to sell it when apprehended by law enforcement in Mississippi.

(g) THE CAPITAL FELONY WAS A HOMICIDE AND
WAS COMMITTED IN A COLD, CALCULATED
AND PREMEDITATED MANNER WITHOUT ANY
PRETENSE OF MORAL OR LEGAL
JUSTIFICATION.

To borrow from Latin maxims of common law ... res ipsa loquitor. RANDALL SCOTT JONES got his car stuck in sand pits while target practicing with a high powered rifle. He came upon Matthew Paul Brock and Kelly Lynn Perry, who were sleeping in a truck at Rodman Reservoir, near the sand pits. JONES had asked another individual to pull his car out prior to encountering the victims, this person could not help him. JONES then made up his mind that he would not be turned down again. He approached the victim's truck, calmly wiped away the moisture on the window, aimed and, at close range, shot Matthew Paul Brock in the face twice, execution style, and Kelly Lynn Perry in between the eyes. Both victims had been sleeping. They were assassinated so that JONES could pull his car out of some sand pits.

There is not even a hint of reason, justified or unjustified, for these extremely violent murders.

(EX. 1, pp. 1-2). The 1991 order as to victim Brock reads:

(f) THE CAPITAL FELONY WAS COMMITTED FOR
PECUNIARY GAIN.

This aggravating factor has been proven beyond a reasonable doubt by the state.

Testimony and statements made by the defendant and admitted in evidence at trial demonstrate that the murders were committed to effect the robbery of Matthew Paul Brock's pick-up truck. The value of the truck was in excess of four thousand (4,000.00) dollars. The defendant stole the truck after murdering its occupants and was attempting to sell it when apprehended by law enforcement personnel in Mississippi. The Court recognizes that this aggravating factor must be taken in conjunction with the previous factor and the Court has considered these two aggravating circumstances as a single aggravating factor.¹⁰

(g) THE CAPITAL FELONY WAS A HOMICIDE AND
WAS COMMITTED IN A COLD, CALCULATED
AND PREMEDITATED MANNER WITHOUT ANY
PRETENSE OF MORAL OR LEGAL
JUSTIFICATION.

This aggravating factor has been proven beyond a reasonable doubt by the state.

The Defendant's car became stuck in sand pits while he was target practicing

¹⁰The last sentence of this paragraph appears at a point where there is an "x" mark on the draft document identified by Richard Whitson (EX. 2).

with a high powered rifle. He happened upon Matthew Paul Brock and Kelly Lynn Perry sleeping in a truck at the Rodman Reservoir, near the sand pits. Jones had previously asked another individual to assist him in freeing his car, but this person was unable to help him. JONES was determined not to be turned down again. He approached the victim's truck, calmly wiped away the moisture on the window, aimed and, at close range, shot Matthew Paul Brock in the face twice, execution style, and Kelly Lynn Perry directly between the eyes. Both victims had been sleeping. Jones' sole purpose for murdering the victims was to use the truck to extricate his car from the sand pits.

There is not a hint of reason, justified or unjustified, for these senseless murders. The defendant's expert witness testified the the defendant regarded the two victims as part of a world that had continually rejected him; one that would not reject him again. This is hardly a moral or legal justification for murdering two defenseless human beings.

(R2. 253-55). The analysis of the "CCP" aggravator relating to victim Kelly Perry is similarly identical in the 1988 and 1991 orders.

The lower court has also ignored the fact that the 1988 language relating to the mitigating factor of "age" and non-statutory mitigation is largely indistinguishable from the language used in 1991 for the same purpose. The 1988 order addresses the "age" mitigator in the following way:

The Defendant is 20 years old. He had been living on his own for a good while prior to the murders. He was engaged to be married. JONES was living like the emancipated young

adult he was. He had been a member of the military and had been supporting himself monetarily.

(EX. 1, p. 3). The 1991 order reads:

The Defendant was nineteen years of age at the time he committed the murders and had been living on his own for sometime prior to the murders. He had been engaged to be married and had been living like the emancipated young adult he was. He had been a member of the military and had been supporting himself financially, although at the time of the murders he was unemployed.

(R2. 256).

Similarly, the following passage from the 1988 order addresses the non-statutory mitigator of childhood trauma:

No doubt the Defendant has not had a perfect childhood or young adulthood. However, many men given worse situations have become great leaders. A less than utopian existence is no excuse or mitigation for two assassination type murders.

(EX. 1, p. 3). The 1991 order reads:

There is no doubt that the Defendant's childhood was not perfect but many persons given worse situations have become great leaders. A less than utopian existence is no excuse or mitigation for two assassination type murders.

(R2. 257).

In sum, the analysis and weighing of aggravating and mitigating factors done by Robert McLeod in 1988 was substantially copied in the 1991 orders. In effect, McLeod

remained the author of substantial important parts the 1991 orders. Pamela Koller's testimony that she used the 1988 order as a starting point in preparing the 1991 order supports this contention. Thus, the lower court's holding that the 1988 proceedings are not relevant to the improper delegation issue is not supported by the record and is, therefore, erroneous.

The lower court further erred when it held that state attorney Richard Whitson was not involved in drafting the 1991 sentencing orders and that Whitson did not have any contact with Judge Perry regarding their drafting (PC-R. 606). In fact, Whitson testified that he did have an opportunity to review the sentencing orders, as is evidenced by a draft order from the state attorney files bearing his markings and handwriting (PC-R. 546). Further, Whitson provided no testimony as to whether or not he had any "contact" with Judge Perry. Based on the facts that Koller identified the type of the 1991 orders as the type from her computer, that Whitson had an opportunity to review and marked the order, and that the draft order is in the state attorney's files, Whitson must have had contact with someone from Judge Perry's office regarding the sentencing order. On this point, law clerk Koller testified that, although the draft which Whitson

identified as having his markings originated from her computer, she has no explanation for how it came to be possessed by the state attorney (PC-R. 556). The evidence, at a minimum, shows that Whitson was involved in drafting the 1991 order, to the extent changes or additions were made from the 1988 order, which, in turn had been substantially incorporated by Koller. Thus, the lower court's holding regarding Whitson's and the state attorney office's involvement in preparation of the 1991 orders is not reasonably consistent with the evidence adduced at the evidentiary hearing, or the record as a whole, and is erroneous.

Further, the lower court's order is factually erroneous in its finding that Pamela Koller testified that she and Judge Perry were the "only ones" who drafted the 1991 order (PC-R. 606). There is no testimony from Koller that Judge Perry wrote any part of the order. Any inference from Koller's testimony to the effect that she and Judge Perry were the sole drafters of the order is belied by Whitson's testimony to the contrary. There is simply no record evidence that Judge Perry drafted anything.

Application of the delegation analysis set forth by this Court in Nibert, Patterson, and Riechmann demonstrates that

Judge Perry failed to provide Mr. Jones with the required independent, reasoned weighing of aggravating and mitigating circumstances. The record shows that Judge Perry delegated his duty to write the sentencing order in Mr. Jones' case, first to Robert McLeod in 1988 and then to McLeod, Richard Whitson and Pamela Koller in 1991. Further, the record now shows that Judge Perry had a practice of delegating his duty to prepare sentencing orders in capital cases.¹¹ Most importantly, the Jones record is devoid of any indication that Judge Perry, independent of the delegation, ever engaged in a reasoned weighing of aggravating and mitigating circumstances.

Mr. Jones asserts that the proper remedy is the imposition of a life sentence. See Van Royal; Muehleman; and Grossman v. State, 525 So.2d 833 (Fla. 1988)(holding that the trial court's failure in a capital case to prepare written findings prior to pronouncement of sentence will result in a reduction of sentence to life). In Van Royal, this Court found that the sentencing judge failed to recite oral findings in support of the sentence of death and did not independently weigh the aggravating and mitigating circumstances until after

¹¹As noted, Robert McLeod testified that he wrote the sentencing order at Judge Perry's request in both Mr. Jones' case and that of Manuel Colina (PC-R. 572). See also, post-conviction proceedings in State v. Richard Randolph, Florida Supreme Court case no. 93, 675.

the notice of appeal had been filed. Van Royal, 497 So. 2d at 628. Accordingly, this Court found that section 921.141 (3), Florida Statutes (1985) required the imposition of a life sentence. Id. Here, the record suggests that Judge Perry never participated in formulating the sentencing orders and merely read the previously prepared orders into the record at the sentencings. Therefore, this Court should order the imposition of a life sentence.

B. Ex Parte Contact

A secondary issue, which arose at the evidentiary hearing and which the lower court, ignoring delegation, erroneously used as the cornerstone of its holding is whether or not Mr. Jones' rights to due process and a fair trial were violated when the trial court engaged in *ex parte* contact with the state regarding the drafting of the sentencing orders. The lower court mistakenly writes that Mr. Jones' argument is that because the 1988 and 1991 orders are similar and because *ex parte* contact occurred in 1988 that, therefore, *ex parte* contact must have occurred in 1991. This reasoning, like the lower court's order as a whole, ignores significant record evidence of improper *ex parte* contact in 1991, regardless of the extent of any infection of the 1991 proceedings by the clear, uncontested improprieties of 1988.

Robert McLeod testified that he drafted the 1988 sentencing orders at Judge Perry's request and that he would not have done so without such a request (PC-R. 563-65). Further, McLeod stated that he had no knowledge of any participation by Howard Pearl in drafting the order (PC-R. 565-66). Similarly, Richard Whitson testified that there is a "high likelihood" that he had an opportunity to review the sentencing orders at the 1991 proceedings (PC-R. 546), and Pamela Koller testified that she has no explanation for why drafts of the sentencing order from her computer are in the state attorney's files (PC-R. 556). Further, as noted in footnote 3, *supra*, defense counsel Howard Pearl testified at the capital post-conviction hearing in State v. Richard Randolph (Florida Supreme Court case no. 93,675) regarding the identical issue presented here and stated he would not have participated in drafting a sentencing order (Randolph evidentiary hearing transcript at page 140). While Pearl's testimony in Randolph may be of arguably limited relevance because it was given in a different case, it is, however, revealing to the extent that the state contends that both parties were asked for comments. Certainly, the State presented no evidence that the public defender, Mr. Jones' trial counsel, was provided any draft orders by either the

state or the court. Thus, the record is unrebutted that there was *ex parte* contact between the state and Judge Perry and/or his law clerk in preparation of the order.

This Court has explained why improper *ex parte* communications between the judiciary and single litigants violate constitutional requirements. In Rose v. State, 601 So.2d 1181 (Fla. 1992), this Court wrote:

Noting is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other sides's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments...

... The most insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Id. at 1183. See also Spencer, 615 So. 2d 688 (1993) (finding that it was an improper *ex parte* communication when the trial judge, the state attorney, and the state attorney's assistant were found proofreading an order sentencing the defendant to

death) and Smith v. State, 708 So.2d 253 (Fla. 1998) (holding that *ex parte* communications between the judge and state attorney regarding the drafting of an order denying post-conviction relief resulted in a denial of due process).

Additionally, the lower court's order denying relief holds that any *ex parte* contacts that occurred at the 1988 proceedings are not relevant and that there were no *ex parte* contacts at the 1991 proceedings (PC-R. 606-07). As stated above, the lower court's holding as to the 1988 proceedings ignores the fact that the product of the improper contact between Judge Perry and Robert McLeod resulted in a sentencing order which, on substantive points, still stands today. Clearly, that improper contact is relevant.

Further, the lower court's holding that there was no *ex parte* contact at the 1991 proceedings ignores the evidence presented at the evidentiary hearing. Richard Whitson reviewed a draft sentencing order from the state attorney's files and stated that there is a "high likelihood" he had an opportunity to review the order before it ended up in final form (PC-R. 546). Pamela Koller testified that she did not submit any draft to Whitson and has no explanation for why he would have had it (PC-R. 556). Still, it had his markings on it (PC-R. 546). If this conflicting testimony is to be

rectified, then either Whitson received a draft sentencing order from someone in Judge Perry's office other than Pamela Koller or Whitson or others in the State Attorney's office provided the order to Koller. Either way, these contacts would constitute improper *ex parte* contact which the lower court ignores in its order.

Based on this record, it is clear that the trial court engaged in *ex parte* communications with the prosecutors at both the 1988 and 1991 proceedings. These improper communications compromised the impartiality of the judiciary and violated Mr. Jones' rights to due process and a fair trial.

Consistent with the rationales of Rose and Van Royal *supra*, this Court should reverse the lower court and impose a life sentence. Alternatively, this Court should remand the case for a new penalty phase so that Mr. Jones can receive the constitutionally required weighing and, if necessary, this Court can review an untainted order which articulates the trial court's reasoning in the manner this Court requires.

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING.

INTRODUCTION

Although the lower court granted an evidentiary hearing on one claim, the court summarily denied the others (PC-R. 505-07). A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record... Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999).

Appellant contends that the lower court erred in denying him an evidentiary hearing on the following claims of his 3.850 Motion. The pertinent portions of each are addressed below.

A. THE LOWER COURT ERRED IN DENYING MR. JONES AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE AS WELL AS TO PRESENT EVIDENCE IN SUPPORT OF MITIGATING CIRCUMSTANCES. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT AND, AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice to prevail on an ineffective assistance of counsel claim. Id. "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty

to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

The standard of review for claims of ineffective assistance of counsel by this Court was stated in Stephens v. State, 748 So.2d 1028 (Fla. 2000). There, this Court held that under Strickland, both the performance and prejudice prongs are mixed questions of law and fact and, on appeal, deference is given only to the lower court's factual findings. Id. at 1034.

In claim IV of his motion, which the lower court characterized as "deficient performance of attorney at sentencing phase", Mr. Jones alleged that, at his re-sentencing, trial counsel presented the same mental-health expert, Dr. Krop, who was presented at Mr. Jones' first sentencing proceeding. Dr. Krop had conducted personality tests and reviewed limited records. Dr. Krop conducted no new testing of him prior to the re-sentencing proceeding and counsel did not provide Dr. Krop with new or additional information to aide in Dr. Krop's opinion. Mr. Jones further alleged that, had counsel fully investigated the case, he would have provided the mental-health expert with the full history and records of his client that would have supported

strong mental-health evidence in mitigation.

Mr. Jones alleged that counsel failed to investigate and present witnesses that could attest to Mr. Jones' background, to his achievements even in his difficult circumstances, and to his disruptive family life. Mr. Jones contended that, while Dr. Krop testified from some reports, without benefit of either those who actually knew Mr. Jones and his family, or forensic mitigation specialists, much valuable information never got to the jury. In the motion, Mr. Jones alleged that he provided defense counsel with an extensive list of character witnesses to aid in his re-sentencing proceeding, but defense counsel failed to contact or call any character witnesses. Instead, counsel merely presented Dr. Krop again. Mr. Jones contended that defense counsel failed to provide basic information to his sentencers.

Mr. Jones alleged that defense counsel conceded throughout the trial and specifically during the penalty phase that Mr. Jones was the individual who committed this crime, that counsel did not present the full picture of Mr. Jones' life of turmoil, abuse, neglect, depression and dysfunctional upbringing.

Finally, the motion provided the following "life history" of Mr. Jones (set forth in pertinent part), which he alleged

was not presented at penalty phase and which he would present at an evidentiary hearing through lay testimony:

"Randall Scott Jones was born to Donald and Millicent Jones on May 7, 1968 in Elgin, Illinois. His biological mother, Millicent Jones, was born in Chicago on June 18, 1929 to Samuel and Gertrude Martinek."

"As a child, Millicent attended Catholic school. She was a very shy and inhibited child and hated school. She was tested in the first grade and the test results, as she described it, 'put me just above an idiot.' From then on she never liked school nor did she feel right in school. She would like to think of herself as being self educated. At the age of twelve, while still in school, she began working part-time at a vegetable stand. She also worked there during the summers full time along with any other jobs she could find."

"Millicent quit school at the age of 16 and began working full-time at Kemper Life Insurance in downtown Chicago. She worked in their medical records department. She quit her job at Kemper and began working at the restaurant for her mother and father. She worked from twelve midnight to eight in the morning, seven days a week. She had moved out of her apartment and began living with her family above the restaurant."

"When she moved back in with her family she began dating a man named Whitey, who she considered the love of her life. They got engaged and were going to be married. However, his family was a very religious Protestant family and her family was Catholic. She broke off the engagement to Whitey."

"She then met and married Jack Sipe. Almost a year to the day they got married they had their first child, Michael. Jack was working in Indiana and she was still working in Chicago at the restaurant. She remembers one incident where Jack had borrowed a car to come home to Chicago. Once he got there he wanted her to return to Indiana with him. At one point, she had the car and found a gun in the glove compartment. She began looking around in the car and found several cartons of cigarettes and stereos in the trunk of the car. It was during this same time that she had suspected that she was pregnant. She confronted Jack with what she had found in the car and told him that she was going to leave him. He became very violent and struck her several times in the mid-section and the head. He told her that she would never have the baby if she left him. He beat her to the point that she lost consciousness. After this incident she never saw Jack again. She later found out that Jack had been arrested and put in prison. She delivered her baby after Jack was out of her life."

"In 1952 she met and married Robert Lawler who they called Pete. Robert turned out to be a psychopath. Although they had five children together, he never had anything to do with the family. She was married to Robert for fifteen years. The final straw that broke the marriage came when she was hospitalized after being in car accident. She was in the hospital and Robert told the children that she did not love them, if she did she would be at home taking care of them. Once she heard this she could take no more and left him."

"She met Donald Jones that same year, 1967. As soon as her divorce was final from Robert, she and Don were married.

When she first met Donald he told her that he had been married before and his wife and child had been killed in a car accident. He told her that he owned his own business and he was ready and able to take care of her and her children."

"At the first of the year, 1968, her mother became very ill and had to be hospitalized. She took a two week leave of absence from her job to visit her mother in Phoenix, Arizona. This was the last time she ever saw her mother. Two days prior to Randy being born her mother passed away. Despite this traumatic experience that she had just experienced it seemed to her that Randy's birth went fine. She remembers Randy as a wonderful child full of life and always with a smile on his face. He had such a sparkling personality for a small child. He was very active; he could spend all day running, laughing and playing. She used to call him her 'little clown' because of his tremendous personality. It was very soon after Randy was born that she took him to Phoenix in order to help her father with his business. It was supposed to be only a temporary stay."

"Because of the strain of having just given birth, her mother's death and the demands put on her by her father's business, Trudy, Randy's half sister, cared for Randy on a daily basis. Trudy was only twelve years old at the time Randy was born. She did the best she could to see that he was fed, clothed and bathed. Because of this the two of them developed a very close relationship."

"Trudy recalls trying to do her very best to take care of Randy but she knew she could not replace the love and attention Randy needed from his mother. Trudy found the responsibility of being her baby brother's caretaker frustrating. She was

often left alone to care for Randy while her mother and stepfather went out four to five times a week."

"When Millicent left Chicago she left Don in Chicago to care for the house. They had to rent out rooms in the house to help supplement their income, since Don did not bring enough money in to support the family. Don was claiming that his partners had stolen all of his money in the business. They had not been in Phoenix very long when Don, out of the blue, just showed up. He had sold all of her jewelry and collected rent from the people living in the house to pay his way to Phoenix. He had left Chicago in such a hurry that he left her thirteen year old son there alone. It was then that she learned that Don had been living a double life. She found out that the reason he had left in such a hurry was because his 'wife' had showed up at their house! She knew then that everything he had ever told her was a lie. Millicent found out that Don was also married to another woman who lived in Shuler Park, Illinois. She divorced him in 1971 when Randy was just three years old."

"Millicent moved to Phoenix with her children. She began dating a man there named Jack. Jack, at first, seemed like a good person but this soon changed. She was terrified to leave her daughter, Dawn, alone with him. He would say things like, 'you need to take her to the doctor to see if she is still a virgin.' She was so afraid of what he might do or had done to her or the other children that she sent Dawn away. Jack was also physically abusive toward her. He was careful not to leave any marks and it was always behind closed doors. He was so careful that it was obvious to her that he had done this before. She knew that she had to get away from Jack but she just could not. Jack

wanted to move to San Diego and she was so afraid of him and what he would do that she sold her house and moved there with him."

"Prior to her moving to San Diego she thought it would be a good idea to let Don see Randy. Don picked up Randy, Mark and John and was to keep them for a only a week and then send them on to San Diego. The following week he sent Mark and John on but he claimed that Randy was too sick to travel. Don never did send Randy back instead, he moved to Florida with Randy and his new family. Randy was separated from the only caretaker he had ever known, his sister Trudy. Trudy and Randy never saw each other again. Soon afterwards, Trudy became pregnant and married in order to leave behind her chaotic and transient homelife."

"While in San Diego, Jack took all of Millicent's money and left. She had major back surgery and was reduced to going on welfare. All this time she was trying desperately to get Randy back but the local authorities were of no help to her. She wanted more than anything to get Randy back. Unfortunately, Millicent died without ever again seeing her son Randy."

"In October of 1973, Randy started school at Richey Elementary School. His report cards indicate that he was a good student. However, there was some indication that he was very talkative and liked to be the center of attention. It was believed that as a young child, he was always like this simply because he received no attention or affection at home. Later reports show that Randy has always had significant mental and emotional problems that were probably exhibiting themselves very early. Despite this need for attention his grades were good up to 1980 when he began to have problems."

"On September 24, 1980, Randy was admitted to the child psychiatric ward at Morton F. Plant Hospital. The reason that he was admitted was because he had caught a rug on fire in the house while he was working on his models. The parents interpretation of this incident was that the fire was deliberately set by Randy. He was admitted by his father to the hospital. According to reports his father gave the following history:

'Randy has had severe behavior problems since coming to live with him. He was living with his mother who was very unstable, did not take care of her children seemed to neglect them socially, physically and emotionally. He went on to say that Randy had no social skills, he was not potty trained and it was difficult to exercise discipline on him. He described Randy as being sexually active: it seems he was exposed to a lot of sexual acting out by his mother and her boyfriends.'

Other reports indicate that Randy was always trying to seek approval from others. He was released on October 15, 1980. The discharge summary indicates that the final diagnosis was Borderline Schizophrenic Syndrome of preadolescence. It also states, 'patient was discharged with partial remission of his symptoms.'"

"Once released from the hospital he remained under a doctor's supervision. His problems at home had not improved and in April of 1981 Randy was given a series of tests. His lowest score was made in the vocabulary subtest, although his score of eleven (11) was still above average it suggested that, 'although no definite reason can be given as to why such an obviously intelligent child's vocabulary

score should be so low, depression is a factor that must be considered.' Randy's other low score came on the coding the task on the performance scale, this score amounted to no more than nine (9) points. 'Such a relatively low score, once again, suggests the presence of depression, which is resulting in a certain psycho-motor sluggishness and/or retardation. In the draw the person test results it indicated that Randy has low self esteem and withdrawal tendencies.' "

"Despite his best efforts, Randy could not function at home. He was unable to please and unable to get along with his step-mother. In April 1981, he was admitted to the Lighthouse Children's Home in Kosciusko, Mississippi. While at this home he lived with dorm parents. Randy's dorm 'father' turned out to be very violent and physically abusive. He used a paddle like a baseball bat. He would beat Randy and others until they were black and blue. It reached a point when Randy felt he had had enough of the physical abuse, so he and another boy ran away from the home. They got about thirteen miles from the home before they were picked up by the police and returned. Randy was often in trouble at the home because he wanted desperately to escape the abuse he was suffering at the hands of those who were supposed to be taking care of him. Finally, in May of 1983 he was discharged from the home."

"Randy returned home to live with his father and his step-mother. He attended Sunshine Christian Academy for a brief period of time. Records from this school indicate that something was terribly wrong with Randy. Randy had gone from an intelligent outgoing individual to failing all six of his mid-term exams. His report card consisted of three C's and three D's."

"In January of 1984, Randy was placed in the custody of the Rodeheaver Boy's Ranch in Palatka, Florida, which was under the control of Ashley Jeter. The following is a summary of a letter entitled 'History' which was provided to the Ranch by Judith Jones, Randy's step-mother.

'When Randy was left with us at the age of 5 he had very unusual habits for a child of his age. He was not potty trained and was seen many times doing his business in the yard. This seemed to be normal and he would constantly mess himself. At mealtime, if he did not want to eat what we had he would throw up on the table. He had very unusual names for the parts of his body leading us to believe that there had been some sort of sexual activity performed while with his natural mother, the older step children and the man she lived with. At the age of five he was caught many times trying to masturbate. He was full of head lice and threw tantrums when made to take a bath. She continues to describe the problems they have had with Randy over the years and the help they have sought. She asks that Randy be placed at the Ranch until he is 18 years of age.'

Ashley Jeter summed things up in a memo he dictated on January 15, 1984, which states the following:

'We interviewed Randy on 1/15/84 and found him to be a very bright, interesting boy who wants very badly to come to the Ranch. I spoke at length with his HRS caseworker, Weyman Meadows, who has known the boy for several years. He said the home situation was very bad. The father is disabled and the stepmother was described as the original wicked stepmother right out of a fairy tale. Mr. Meadows said she hated him (Randy) so badly there was no way he could have a normal home life. We really believe

we can do something with this boy.'

After Mr. Jeter made personal contact with Randy's stepmother he concluded, 'she hated Randy with a passion' and wanted him out of the home and was 'always on his back.' She was 'a very unlikeable woman.' Mr. Jeter observed that Randy had no hope of going home and nobody to anchor to. Randy kept his feelings buried and people never knew what he felt. Mr. Jeter felt very sorry for Randy."

"Progress reports from Rodeheaver Ranch reveal that Randy adjusted well to Ranch life and posed very few problems either at the Ranch or at school. Randy was a hard worker who got along well with others. He was a bright kid and when he applied himself to a task, he proved to be very successful. Randy won the Americanism Award at a local American Legion function for an essay that he authored. Everyone agreed that Randy had great potential. However, as noted in one report:

'Randy is not using his full potential. I believe having a non-supportive family is causing this. It is believed that Randy doesn't take as much pride in his grades and his work because his family doesn't appear to be proud of his accomplishments.'

In fact, his parents had contacted the Ranch and stated that while Randy can continue to visit at home he cannot return home to live."

"While living at the Ranch, Randy regularly attended the College Park Baptist Church in Palatka. On Sunday mornings, Randy participated in the Sunday School program and then went to the church service. Bible studies were conducted by the Youth Minister on Thursday evenings. Randy enjoyed the activities at the church

and eagerly joined in. Randy's Youth Minister recalls him taking more of an interest in the church than most teenagers."

"Randy graduated from Palatka High School in June of 1986. His class ranking was 149/316. A former teacher remembers Randy as always having a smile on his face and always going out of his way to be liked by others. However, when assigned essays, Randy's inner turmoil was revealed through his writings. Randy's essays were often about wanting his mother's approval and love. Randy would fantasize about a loving family unit."

"In July 1986 Randy reported for duty with the U.S. Army where he completed his basic training at Fort Knox, Kentucky. In September of 1986 he left for Fort Sam Houston where he began his training for Ear, Nose and Throat Specialist. Upon completion of his Advanced Individual Training he was sent to Fort Jackson, South Carolina. All seemed to be going well for Randy until January of 1987 when his father died from congestive heart failure. To add to his troubles it was around this same time that his girlfriend's mother committed suicide."

"Randy immediately began having problems following these two very tragic events in his life. He began receiving disciplinary reports because he was over sleeping and not reporting to duty on time. He received eight (8) such reports in just a two month span of time. He was seen on several occasions by doctors who indicated that he was suffering from severe depression and having thoughts of suicide. On May 1, 1987 he received an Honorable Discharge based on 'less than satisfactory performance' from the U.S. Army. Randy was devastated when he returned to Florida. He

was now suffering from depression, rejection and humiliation. A short time later, Randy was arrested and charged with the present offense."

A complete investigation into Randy's background would have provided valuable information that would have assisted the jury in its deliberations. Particularly having had family members and friends to testified personally in front of the jury would have presented Randy in a sympathetic light to the jury. The jury would have at least had the impact of family members testimony about this incredibly damaged kid and his tortuous upbringing. Counsel's failure to do this denied Mr. Jones his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution.

In addition to the failure to investigate and present available mitigation, Mr. Jones further alleged that counsel failed to object to the trial court's refusal to give instruction on the mitigating factor of "influence of extreme mental or emotional distress" (R2. 926). The court refused to give the instruction because the mental health expert stated he could not "find" that it existed (R2. 926). The evidence presented should have gone to the jury with instruction to let the jury make the determination of whether the evidence rose to the level of statutory mitigation. Without proper instruction that they could make this determination, the

jury's deliberations were flawed. The court erred in refusing to instruct the jury, and counsel failed to object to the court's error.

Trial counsel's representation of Mr. Jones fell below acceptable professional standards. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Id. Had counsel performed effectively, there is a reasonable probability that the outcome would have been different -- that is, Mr. Jones would not now be facing execution.

Based on the foregoing, Mr. Jones contends that the trial court erred in concluding that presentation of the foregoing mitigation through lay witnesses and providing Dr. Krop with a full and accurate history does not constitute a showing of prejudice sufficient at the pleading stage to justify an evidentiary hearing where witnesses could be heard and the court could assess their credibility and the power of their testimony.

Mr. Jones asks this Court to remand this claim for an evidentiary hearing on his claim that trial counsel was

ineffective in failing to present substantial and compelling mitigation. But for counsel's failure, there is a reasonable probability the outcome would have been different.

B. THE LOWER COURT ERRED IN DENYING MR. JONES AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO EQUAL PROTECTION AND DUE PROCESS OF LAWS WHEN HIS REQUEST TO HAVE COUNSEL DISMISSED BECAUSE OF CONFLICTS OF INTEREST WAS DENIED.

The lower court erroneously denied Mr. Jones a hearing on Claim V, "the Howard Pearl Claim", on the ground that it was addressed and settled in Jones v. State, 612 So. 2d 1370 (Fla. 1992). The lower court erred in overlooking this Court's holding that each Howard Pearl claim had to be resolved on its own merits. Herring v. State, 580 So.2d 135 (Fla. 1991); Teffeteller v. State, 676 So.2d 369 (Fla. 1996).

Mr. Jones alleged in his Motion that, prior to the re-sentencing, he moved *pro se* to dismiss Mr. Pearl, who had been reassigned to the case, as his counsel and requested appointment of private counsel for the new sentencing proceeding (R2. 11). Mr. Jones stated that he had just become aware of Mr. Pearl's status as a special deputy with the Marion County Sheriff's Department. Mr. Jones also alleged that Mr. Pearl's representation was ineffective in that "he only does just enough to maintain an appearance of effectiveness" and that he refused to "call or even contact

any of numerous character witnesses for the Defendant" (R2. 13). Mr. Jones attached a copy of this Court's opinion in Harich v. State, 542 So.2d 980 (Fla. 1989)(R2. 23).

Howard Pearl then sought to withdraw from representation of Mr. Jones stating an irreconcilable conflict between himself and his client (R2. 25-26). The court denied the motions (R2. 29-30).

Mr. Pearl was not sure he would not compromise his advocacy:

[MR. PEARL] Now, Your Honor characterized my reaction to Mr. Jones' motion to dismiss counsel somewhat humorously, and there is far more to my reaction to his motion than just that I got my feelings hurt.

I'm very proud of the fact that I'm a lawyer and an officer of this Court. I'm very proud of the fact that I have a good reputation as a lawyer. His motion takes a pretty good cut at that and, to say merely that I am offended or that my feelings are hurt doesn't begin to describe my reaction to it. It is far deeper than that. I want nothing further to do with Mr. Jones and I feel that it would be anomalous to have me further represent a man who has said of me what Mr. Jones said in his motion, and which I characterized in my motion for leave to withdraw.

It is not only said that I was ineffective in representing him, he not only said that I was disloyal to him or that I had acted unethically, all of which he said. He implied that I would rather see him convicted of first degree murder and die.

Now, I don't think that anyone who knows me or knows my history has ever been

able to say that I have been disloyal to a client, and I never have. And, I feel that the allegations made by Mr. Jones go far beyond a mere accusation of ineffectiveness or an expression of dislike or a preference for another lawyer. They strike deep at what I consider and hold dear in my heart.

And, for that reason, while I cannot quantify it, I am sure you would suggest to me that I am professional enough to be objective and to go on and represent the man in spite of the fact that, as you put it, my feelings were hurt.

I cannot quantify the damage that may have done to me subconsciously or what I might fail to do for him without realizing that I was doing it, that might, in fact, hurt him during the re-trial of this case without intending to or wanting to. But, I feel that Mr. Jones and I, at this stage, very badly need a divorce.

(R2. 151-152).

After Mr. Jones filed a second pro se motion asking that Mr. Pearl be removed from his case (R2. 165-174) and just prior to selecting the jury, Mr. Pearl briefly addressed the court:

MR. PEARL: I have not read [Mr. Jones' motion] fully, Your Honor, but I think I have expressed my concerns with respect to the case as fully as I know how to do. . . Allow me, if you will, to make two observations, however. It may be possible for the court to find a lawyer with whom Mr. Jones would be satisfied, as he is not satisfied with me.

Second, although my advocacy is not diminished, I am not emotionally involved in any case in which I am appointed to represent a defendant. However, I cannot speak, obviously, for my subconscious. I

hope that I haven't, in some way, been impaired in my advocacy in a manner that I, myself, am not aware of. And, as to that, I cannot speak.

(RII. 285-287).

Mr. Jones alleged that this information was not discovered prior to Mr. Jones' re-sentencing but became known at a hearing on the "Howard Pearl Issues" ordered by the Florida Supreme Court.

Further, Mr. Jones alleged, Judge Perry's objectivity was called into question by his own relationship with law enforcement (he was also an honoree deputy). Thus, Mr. Jones was not only represented by an attorney with this conflict, but judged by a court with the same conflict.

The right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (1981). Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, a defendant predicating an ineffectiveness claim on a conflict of interest faces no such requirement. Strickland v. Washington, 466 U.S. 668 (1984); Kimmelman v. Morrison, 477 U.S. 365 (1986); Cuyler v. Sullivan, 446 U.S. 335 (1980). He

need not show that the lack of effective representation "probably changed the outcome of this trial." Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985). Rather, "it is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circumstances the error cannot be considered harmless." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1982).

Mr. Jones' allegations that his representation was fraught with conflicts of interest were sufficiently pled to require an evidentiary hearing. This Court should remand this claim for an evidentiary hearing on the merits.

C. THE LOWER COURT ERRED IN DENYING MR. JONES AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL CONCEDED MR. JONES' GUILT.

Counsel in a criminal case has the undisputed "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 689 (1984). In alleging that counsel failed in this duty, thereby rendering ineffective assistance, Mr. Jones argued that he must plead and demonstrate: 1) unreasonably deficient attorney performance, and 2) prejudice. Mr. Jones alleged that he had pled each in the instant motion, and could prove each in a full and fair evidentiary hearing.

Mr. Jones alleged that counsel gave no opening statement and did not put on a case-in-chief so it is unclear if counsel had, at the outset, believed that the best theory of defense was to argue for a verdict of second degree murder or if that strategy had been decided on following the state's case. Mr. Jones alleged that what was clear is that, in closing argument, counsel conceded his client's guilt:

MR. PEARL: Good morning, Ladies and Gentlemen. This has been a long trial. The evidence has been clear and brief and I think without much controversy. I don't intend to try to insult your intelligence.

I'm going to talk, of course, about what I want to talk about and Mr. McLeod then will have the opportunity to tell you what he wants to talk about.

It seems clear to me that the evidence proves beyond a reasonable doubt that Randy Scott Jones killed Kelly Lynn Perry and Matthew Paul Brock on the night of July 27th, 1987 and in the course of doing so performed other acts that will, that also constituted lesser crimes.

The question then to be answered is one that I'm afraid I can't answer for you. I'm a person of advanced age and I think I've got common sense and experience and I'm sure that all of you also have common sense and you are to rely upon your common sense in reaching a just and fair verdict.

The question that I can't answer for you is why. Why did what happened happen?

Those are the matters that I want to review with you rather than the technical evidence which shows guilt, that's Mr. McLeod's job and I'm sure he'll do very well.

But this killing and the actions that followed these killings were to me, it seems bizarre, depraved, not understandable.

(R. 1580-1581).

Mr. Jones alleged that his lawyer did not discuss this strategy with him and that the presumption of innocence was negated by defense counsel before the jury ever began deliberations. Further, Mr. Jones alleged that Mr. Pearl not only conceded guilt as to the murders, but as to the underlying crimes as well.

In Nixon v. State, 758 So.2d 618 (Fla. 2000), this Court

held that if a defendant can establish that he did not consent to trial counsel's concession of guilt, "then we would find counsel to be ineffective *per se* and Cronic¹² would control." Nixon at 623. Thus, this Court has held that prejudice need not be proved if the defendant can establish that he did not concede to trial counsel's concession of guilt. This Court further stated in Nixon that in cases involving concession of guilt "the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy." Id. Implicit in this Court's holding in Nixon is that the issue be determined by evidentiary development. Specifically, development of the facts surrounding the conversation between the defendant and trial counsel as to the strategy, if any, regarding concession.

Mr. Jones alleged that he was prejudiced because concession of these elements actually bolstered the State's case. Mr. Jones alleged that counsel conceded that death was appropriate without his consent. The duty of counsel in a capital case is to neutralize the aggravating circumstances

¹²United States v. Cronic, 466 U.S. 648 (1984) (holding that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed).

and present mitigation. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994). Trial counsel failed to do either of these tasks.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Mr. Jones was effectively deprived of adversarial testing at the outset by these concessions, and the outcome was thus rendered unreliable. No tactical reason can be ascribed to the concession of guilt or aggravating factors by an attorney. Counsel's actions in doing so was deficient performance which prejudiced Mr. Jones.

Mr. Jones's allegations of improper concession of guilt and of the appropriateness of the death penalty entitle him to an evidentiary hearing at which he can be heard and testify that he did not consent to such concession. This Court should remand this claim for an evidentiary hearing on the allegations set forth herein.

D. THE LOWER COURT ERRED IN DENYING MR. JONES A HEARING ON HIS CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA¹³ AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, WHEN COUNSEL WAS DENIED REQUESTED EXPERTS AND WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION BY FAILING TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT, ALL IN VIOLATION OF MR. JONES' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH

¹³Ake v. Oklahoma, 105 S.Ct. 1087 (1985).

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The lower court denied Mr. Jones a hearing on claim XIII, that he was not provided constitutionally adequate assistance of a mental-health professional and that counsel was prejudicially ineffective for failing to properly provide documents and prepare the expert who testified (PC-R. 506).

The lower court denied this claim on the ground that Dr. Krop did examine Mr. Jones and testify (Id.). The lower court, however, fails to address the ineffective assistance of counsel aspect of the Ake claim.

Dr. Krop was the expert hired by defense counsel to conduct a mental health evaluation of Mr. Jones. Dr. Krop testified at the first penalty phase:

So, the evaluation basically shows that we have a history of emotional, possible sexual abuse, but we're not sure of that. And since the time he actually came to live with his stepmother, although he started exhibiting more appropriate behavior in terms of socializing and eating and so forth, he's demonstrated a number of emotional problems, actually, from the time he was five years old. These problems include some of the real classic indications of emotional disorder, such as fire setting, I've already indicated the soiling and the bed wetting, he began to steal at an early age. He began to -- basically, he was lying, he was stealing, he was engaging in a lot of behavior that we see at that early of an age in classic emotionally disturbed child.

When he was about eleven years old he was engaged in behavior that required a referral to a psychiatrist. The psychiatrist placed him in a hospital for three weeks, which, again, is unusual for an eleven year old boy.

He was treated at the hospital for three weeks. He was released, thinking that he was somewhat better. And, then, within a few weeks he was again placed in the hospital by a psychiatrist, and stayed in that hospital, I believe, for approximately nine weeks.

He was diagnosed by that psychiatrist as borderline schizophrenic, which is a diagnosis, back then, which is not used currently, but back then that diagnosis meant that a person who may have difficulty dealing with reality and dealing with the environment in which he is living but who is not always psychotic, that means that he is not always out of touch with reality but there may be some time when that occurs.

There was continual problems after he was released from the hospital in that he eventually was referred to the Court and adjudicated, first, dependent and, then, later delinquent, and referred to a children's home because it was difficult at home for his father and stepmother to cope with some of the problems that he was demonstrating.

Interestingly, despite these problems, he continued to do fairly well in school. So, his high level of intelligence was getting him by and allowing him to compensate to some degree for some of the emotional problems.

But following his referral to a children's home, which he spent about two years, he received some therapy in that home and continued to exhibit some problems until he eventually was discharged from that home and started functioning as an adult.

However he continued to, again, have

problems adjusting in terms of his environment. He went into the military, and had some difficulty in the military in terms of adjustment. Although he wanted to be successful in the military, thinking that this was a way of starting all over again, he was discharged with a honorable discharge from the military, but he did have some problems.

He then was trying to work. He worked at a few different jobs. And, then, also had a few different relationship. He had, I believe, a very close relationship, at least in his perception, with Rhonda Morrell, the girl that he was close to and was planning on being married to.

His father died earlier that year, and then her, I believe, father or mother, I'm not sure, died, and that created some problems in terms of their relationship. And that relationship eventually broke up.

So at the time the offense occurred this individual had been released from the military, he had broken up with a girlfriend that he had planned to marry, his father had died earlier in the year, and I believe he had also lost a job which he had liked. So, there were a lot of different stressors going on in his environment at that particular time.

[MR. PEARL]: Stressors, did you say?

A Various stressors, meaning that the environment, various things in the environment that were going on that were creating stress for him which he has had difficulty in coping with.

He was in my impression fairly seriously depressed at the time that this offense occurred and was having a great deal of difficulty coping with the things that most of us would be able to cope with relatively well, at least certainly better than Mr. Jones.

The psychological testing that I

conducted was very consistent, interestingly enough --even though I did this evaluation about seven years after his original evaluation, I had not read his previous evaluation to see the diagnosis until after I did my psychological testing. And my diagnosis, based on the MMPI results, was consistent with the previous diagnosis when he was about twelve years old.

Now, I indicated that he was at one point diagnosed as borderline schizophrenic, we do not any longer have that diagnosis. And, basically, the symptoms --

[MR. PEARL]: When you say that, we no longer have that diagnosis, you mean that the condition of schizophrenia no longer exists?

A No. What I mean by that is the psychiatric organizations who develop the diagnostic categories. And in this particular case, the diagnostic manual, which is referred to as DSM-3, or the latest one is DSM-3-R, which is revised version, these are updated diagnostic classification which allow mental health professionals to be more accurate in terms of providing a given diagnosis. Certain categories of behavior have to exist prior to an actual diagnosis being given.

Because borderline schizophrenic was not viewed back when the revision of the DSM-3 was made, because borderline schizophrenic was not particularly a classification which had easy access to in terms of specific symptoms fitting that, a new classification was used, and it's called borderline personality disorder. Now, many of the symptoms are very similar to those that used to be borderline schizophrenic.

The reason it used to be called borderline schizophrenic is, as I indicated

earlier, was a person who was sort of on the border between being neurotic, that is an individual who had difficulty coping but would be able to be in touch with reality, and schizophrenic, a person who'd lost touch with reality.

The borderline personality disorder, according to the DSM-3, is an individual who, again, is sort of on that fence. It's a person who has an ongoing difficulty adjusting to society, an ongoing problem with coping with stress, and, at times, particularly during the highest levels of stress, that individual can become psychotic, that person can lose touch with reality, lose control of his impulses and so forth.

And I believe that my diagnosis of borderline personality disorder for Mr. Jones would be an accurate one, based on his history, as well as the current evaluation.

(R. 1721-1727)(emphasis added)

Dr. Krop's testimony was that he found Randy Jones to be a person that can "lose touch with reality", especially during times of high stress and he found that Randy had several serious stressors in his life just prior to this incident.

On re-sentencing, Dr. Krop testified substantially as he had at the first trial, but did not interview lay witnesses who knew about Mr. Jones' life.

In his motion, Mr. Jones alleged that Dr. Krop should have found the statutory mental health mitigators had he been properly prepared. Mr. Jones alleged that Dr. Krop was not

provided adequate information by trial counsel and was thus rendered ineffective.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake. 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). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel, 531 F.2d at 1279; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

Mr. Jones also alleged that Pearl should have used Dr. Krop at the guilt phase of trial, considering the testimony given by Dr. Krop and Mr. Pearl's apparent strategy to argue

for second degree murder. Mr. Jones alleged that, if Mr. Pearl's strategy was to argue that Mr. Jones was innocent of first degree murder, Dr. Krop's testimony would have been useful at the guilt phase where the diagnosis of borderline personality disorder would have militated against premeditated or first degree.

The basis of the denial of this claim is erroneous and this claim should be remanded for an evidentiary hearing.

E. THE LOWER COURT ERRED IN DENYING MR. JONES AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE THE STATE'S CASE. COUNSEL WAS INEFFECTIVE DURING VOIR DIRE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

The trial court erred in denying Mr. Jones a hearing on his claim that he was not provided effective assistance of counsel at guilt phase. The trial court held that this claim was re-argument of other ineffective assistance claims but failed to individually consider the allegations not pled elsewhere (PC-R. 505).

Mr. Jones alleged that counsel failed to thoroughly investigate and litigate the issues stemming from the illegal

arrest and extradition and the subsequent statements and evidence obtained from his client. Counsel made a motion to suppress statements, but in failing to fully investigate his client's background and mental state, especially as mental health issues applied, counsel missed the opportunity to challenge the statements on the grounds that his client was not capable of making any knowing, intelligent, voluntary waiver.

Mr. Jones alleged that, had counsel fully reviewed records and worked with his mental health expert he would have known that the mental health professionals who had dealt with Mr. Jones throughout his life had found him to be compliant with authority figures, wanting to please authority figures, and avoiding confrontation.

Mr. Jones alleged that, under the conditions presented, he virtually had no choice by reason of his particular mental and emotional difficulties but to "confess all" to the police. He alleged that counsel's failure to read the records he had and to consult on this issue with his expert denied Mr. Jones an adequate attack on his suppression motion.

Mr. Jones further alleged that counsel also apparently decided that his best strategy was to argue for second degree murder, and that he failed to put on evidence that could have

supported the "depraved mind" theory, i.e. Dr. Krop's testimony. Moreover, Mr. Jones alleged that counsel failed to cross-examine over half of the state's witnesses. Instead, counsel vouched for the credibility of the state's witnesses and conceded Mr. Jones' guilt. Counsel failed to adequately challenge the state's case. The outcome of Mr. Jones' capital trial is unreliable.

Mr. Jones also alleged that counsel failed to specifically argue for experts other than the mental health expert and in so doing was unable to effectively challenge the scientific testimony of the DNA expert.

Mr. Jones sufficiently alleged that counsel's omissions were deficient performance and that the resulting prejudice meets the Strickland standard.

The lower court erroneously denied Mr. Jones a hearing on these claims of ineffective assistance of counsel and this Court should remand this claim for an evidentiary hearing.

F. THE LOWER COURT ERRONEOUSLY DENIED MR. JONES AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

In claim III of his 3.850, Mr. Jones alleged that the state did not turn over a two-page handwritten report of a witness interview. The report reveals the following:

Rumor is that Chris told Elliott all about it...
Randy is well known... Does drugs. Always high at the ranch. With another guy 16 or so name Chris... Saw Randy Chris & Elliott frequently drunk or high...

Mr. Jones alleged that the identity of this witness and the content of the witness's statement was not revealed to defense counsel and that this is information which should have been disclosed to defense counsel and which Mr. Jones' jury should have heard about (PC-R. 319).

Mr. Jones alleged that had the jury learned of Mr. Jones' history of drug use and the effect of such long-term substance abuse on his existing mental illness, a reasonable probability exists that the outcome of Mr. Jones' capital trial would have been different. Brady v. Maryland, 373 U.S. 83 (1963).

The lower court denied Mr. Jones a hearing on this claim on the ground that the "rumor note is speculative and conclusory with no prejudice shown" (PC-R. 505)

Under the standard set forth in Gaskin v. State, 737 So.2d 509 (Fla. 1999), these allegations sufficiently alleged a substantial Brady violation, which, if proven at an evidentiary hearing, would entitle Mr. Jones to a new trial.

This Court should remand this claim to the lower court for an evidentiary hearing.

G. THE LOWER COURT ERRED IN DENYING MR. JONES A HEARING ON THE CLAIM THAT HIS TRIAL COURT PROCEEDINGS WERE 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.

The lower court denied Mr. Jones' an evidentiary hearing on his claim that cumulative procedural and substantive errors denied him a fair trial (PC-R. 506). The court held that this claim is not cognizable in post-conviction (Id.).

Mr. Jones contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So. 2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It is Mr. Jones' contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones I, this Court vacated Mr. Jones' sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Jones I at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the

basis for a new trial.

The flaws in the system which sentenced Mr. Jones to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Jones' direct appeal. There has been no adequate harmless error analysis. 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. Repeated instances of ineffective assistance of counsel and error by the trial court at both the original trial and re-sentencing significantly tainted the process. These errors cannot be harmless. State v. Gunsby, 670 So.2d 920 (Fla. 1996); see also Taylor v. State, 19 Fla. L. Weekly D1144 (1st DCA 1994).

This Court should remand this claim for an evidentiary hearing.

H. MR. JONES WAS DENIED RELIEF ON HIS CLAIM THAT HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH.

Mr. Jones plead this claim as an ineffective assistance of counsel claim and, to the extent trial counsel did not

preserve the prosecutor's improper comments by objection, has stated a claim for an evidentiary hearing on that basis. The lower court erred in denying Mr. Jones a hearing on this claim on the basis that the claim is "not the subject of a 3.850 motion." (PC-R. 506). However, the lower court ignored the ineffective assistance aspect of the claim.

Mr. Jones alleged that, during voir dire, the prosecutor repeatedly asked prospective jurors if they could vote for a sentence of death if the aggravating circumstances required or called for that sentence.

He further alleged that, first, in no instance does the law require that a death sentence be imposed and that, second, in a capital sentencing proceeding, the law does not require or call for the jury to recommend a sentence of death over life imprisonment, or vice versa; rather, the law requires the jury to determine the existence of aggravating and mitigating circumstances, and, thereafter, weigh them against each other. He alleged that, in other words, the law requires the jury to consider the evidence introduced in both the guilt and sentencing phases of the trial, and after having done so, recommend an appropriate sentence.

Mr. Jones alleged that the questions of the prosecutor guided the jury into thinking that the law required one

sentence over the other, when in fact, the proper question is whether, based upon the evidence regarding aggravating and mitigating circumstances, a juror would consider the appropriateness of a death recommendation.

Mr. Jones alleged that the prosecutor misled the jury into believing the recommendation of the jury was a simple counting process. The prosecutor inferred that the jury should merely compare the number of aggravating circumstances in relation to the number of mitigating circumstances. If the number of aggravating circumstances exceeded the number of mitigating circumstances, the prosecutor suggested to the jury the law required or called for a recommendation of death. The prosecutor implied the jury had no discretion in its recommendation.

Mr. Jones alleged that the questions of the prosecutor also diminished the jury's sense of responsibility for its life or death determination. The prosecutor's bottom line was that the only verdict the jury could return was death because the legislature intended that a death verdict be rendered against Mr. Jones. This type of improper questioning in effect tells the jury that a higher authority -- the Florida legislature -- has already determined that death is the only proper penalty. In fact, at closing argument during

the penalty phase on re-sentencing, the prosecutor made it sound as if there simply were no other possibility when he declared:

There's no doubt in this record, when Judge Perry instructed you, as a matter of law that this man had been convicted of the things for which he's being sentenced now, those convictions insofar as Brock's conviction is concerned, relates directly to the conviction establishing the aggravator on Kelli Lynn Perry.

Crimes of violence include the crimes of robbery, burglary and robbery, established as a matter of law in this case and about those things there can be no dispute. Those are established. Those are the aggravating circumstances for the two first ingredients. The cap felony was committed for pecuniary gain. I think the term is going to be defined as financial gain, when you are finally instructed on this case, ladies and gentlemen, and certainly, there's no dispute in this record and any evidence about the reason why Randy Scotty Jones executed Paul Brock and Kelly Perry the night that he did. He wanted to take the truck.

(R2. 945-946). This argument cemented the kind of improper questioning that occurred on voir dire and told the jury that it virtually had no alternative but to recommend death.

Finally, Mr. Jones alleged that because an objection and motion for mistrial should have been made by Mr. Jones' counsel, Mr. Jones was denied his right to effective representation of counsel as guaranteed by the United States

Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

The lower court erred in denying Mr. Jones a hearing on this claim and this Court should remand on that basis.

I. THE LOWER COURT ERRED IN DENYING MR. JONES A HEARING ON HIS CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE THE JUDGE CONSIDERED INADMISSIBLE VICTIM IMPACT EVIDENCE. TO THE EXTENT TRIAL AND APPELLATE COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE, MR. JONES RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

The lower court held that this claim is not the subject of a 3.850 Motion (PC-R. 506). The lower court erred in that Mr. Jones alleged that counsel was ineffective in litigating this issue at trial.

Mr. Jones alleged that courts may not consider a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence. Booth v. Maryland, 482 U.S. 469 (1987); Payne v. Tennessee, 111 S.Ct. 2597, 2611 (n.2); and Hodges v. State, 595 So.2d 929 (Fla. 1992).

Mr. Jones alleged that the court in Mr. Jones' case considered improper victim impact evidence. The court considered a statement by the victim's mother, Minnie Brock, in which she stated, "if the defendant and co-defendant had

awoke her son on the night of the crime, that he would have helped in any way he could." She further stated, "the defendant should be punished for these crimes; he should receive the death sentence for the murders."¹⁴

Sentencing in a capital case is to be individualized. The sentence must be tailored to the defendant's characteristics and the circumstances surrounding the crime. Zant v. Stephens, 462 U.S. 862 (1983). Consideration of the views of the victim's mother is not a "principled way to distinguish this case, in which the penalty was imposed, from the many in which it was not." Godfrey v. Georgia, 446 U.S. 420 (1980). Knowledge that the victim's mother wishes the individual convicted of killing her son to receive the death penalty in no way assists the court in understanding the defendant or the crime. Nor does it assist in distinguishing among defendants to determine whether the death penalty should be imposed. Thus, consideration of Ms. Brock's desire that Mr. Jones be put to death renders his sentence arbitrary and capricious in violation of the Eighth and Fourteenth Amendments. The error in the court's consideration of her statements cannot be deemed harmless beyond a reasonable

¹⁴This statement was made in the pre-sentence investigation report dated May 26, 1988.

doubt.

Mr. Jones alleged that, to the extent trial counsel failed to properly litigate this issue, Mr. Jones received prejudicially ineffective assistance of counsel.

The lower court erred in failing to grant Mr. Jones a hearing on this claim.

ARGUMENT III

THE LOWER COURT RULED THAT THE FOLLOWING CLAIMS WERE NOT THE PROPER SUBJECT OF A 3.850 MOTION. MR. JONES CONTENDS THAT THESE CLAIMS SHOULD NOT BE PROCEDURALLY BARRED AND ASSERTS THEM HEREIN. MR. JONES ARGUES THAT, DESPITE ADVERSE RULINGS, DUE PROCESS AND FUNDAMENTAL FAIRNESS IN THE CONTEXT OF A CAPITAL CASE MANDATE THAT THESE CLAIMS SHOULD BE CONSIDERED ON THE MERITS.

- A. THE LOWER COURT ERRED IN DENYING MR. JONES RELIEF ON HIS CLAIM THAT THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury was given the following instruction regarding the cold, calculated, and premeditated aggravating factor:

As to the Murder of Kelly Lynn Perry:

The crime for which the defendant is to be sentenced were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R2. 218).

As to the Murder of Matthew Paul Brock:

The crime for which the defendant is to be sentenced were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R2. 219).

This instruction violates Espinosa v. Florida, 112 S. Ct.

2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), Jackson v. State, 648 So.2d 85 (Fla. 1994), and the Eighth and Fourteenth Amendments. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor present.

This Court should reconsider its previous rulings on the prospective application of and preservation of Espinosa claims and remand this case for a new penalty phase.

B. THE LOWER COURT ERRED IN DENYING MR. JONES RELIEF ON HIS CLAIM THAT THE TRIAL COURT OVER-BROADLY AND VAGUELY INSTRUCTED THE JURY ON THE PREVIOUS CONVICTION OF A VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Jones' penalty phase jury was given the following instruction regarding the "previous conviction of a violent felony" aggravating circumstance:

As to the Murder of Kelly Lynn Perry:

1. The defendant had been previously convicted of a capital felony or of a felony involving the use of violence to some person.

a. The crime of Murder of the First Degree of MATTHEW PAUL BROCK is a capital felony;

b. The crime of Robbery, Burglary While Armed with Assault, and Shooting or Throwing a Deadly Missile into an Occupied

Conveyance are felonies involving the use of violence to another person.

(R2. 218).

As to the Murder of Matthew Paul Brock:

1. The defendant had been previously convicted of a capital felony or of a felony involving the use of violence to some person.

a. The crime of Murder of the First Degree of KELLY LYNN PERRY is a capital felony;

b. The crime of Robbery, Burglary While Armed with Assault, and Shooting or Throwing a Deadly Missile into an Occupied Conveyance are felonies involving the use of violence to another person.

(R2. 218).

This instruction violates Espinosa v. Florida, 112 S.Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. It fails to define the elements of the aggravating factor which the jury must find beyond a reasonable doubt.

This Court should over-rule its precedent that allows contemporaneous crimes to serve as aggravators and the instruction which fails to adequately define previous conviction of violent felony based upon facts arising out of the same crime for which the defendant is being sentenced to

death, and remand this case for a new penalty phase.

C. THE LOWER COURT ERRED IN DENYING MR. JONES' CLAIM THAT HE WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Jones alleged that he presented substantial evidence of mitigation that was considered by the trial court and which should have been found and considered. For example, the record evidence was that Mr. Jones had come from an unstable and disruptive background and had been taken from his mother's home at the age of five and had then lived with his father and stepmother. Dr. Krop, the mental health expert hired to assist defense counsel, testified that at the time Randy came to live with his father and stepmother:

Mr. Jones was described as very primitive, almost animalistic, when he first came to live with the father. He didn't have table manners, he didn't have any social skills, he wasn't toilet trained.

He had difficulty getting along with peers and he had difficulty getting along with people in general. They described him was [sic] wetting his pants, defecating in his pants, eating with his fingers, throwing up his food almost as soon as he ate it. . .

(R2. 827-828).

Mr. Jones alleged that, even though his behavior improved

somewhat, he still had serious enough problems that his father committed him to a psychiatric hospital when he was eleven years old. The doctors at Morton Plant Hospital diagnosed the young Randy as having "schizophrenic reaction to childhood" (R2. 829). Randy was later placed in group homes, the Lighthouse Children's Home and then the Rodeheaver Boys Ranch. Dr. Krop testified as to the continuing difficulties Randy had, with the constant rejections and failures in his life and the impact his illness and lifelong neglect had on this young man. Dr. Krop testified to a series of psychologically stressful events immediately preceding the crime, including Mr. Jones' failed military career (R2. 830), the death of his father (R2. 836), the unexpected cancellation of his marriage plans (R2. 835), and the loss of his employment (R2. 837). Dr. Krop also testified that in his opinion Randy was intelligent and a model prisoner and a good candidate for rehabilitation (R2. 846). The court simply ignored all that was presented in mitigation and failed to give any consideration to the facts presented.

Mr. Jones pointed out that Dr. Krop testified that, in his opinion, Randy's mental and emotional problems did not rise to the level of statutory mitigation (R2. 850, 851) and also stated that other experts might disagree with his opinion

(R2. 852). As a result of this testimony, the court erroneously refused to give the instructions on statutory mitigating circumstances (R2. 926).

This effectively precluded the jury from giving consideration to the evidence presented by the witness.

Jones alleged that the jury and judge were required to weigh these mitigating factors against the aggravating circumstances. According to his sentencing order, the judge did not weigh this substantial mitigation. The judge failed to understand what constitutes mitigation, and thus erred as a matter of law in not considering and weighing the unrefuted mitigation. See Hitchcock v. Dugger, 481 U.S. 393 (1987).

Mr. Jones alleged that he was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 103 S. Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 102 S. Ct. 869, 874-875 (1982); Lockett v. Ohio.

The lower court erroneously denied Mr. Jones a hearing on this claim (PC-R. 506). However, Mr. Jones urges this Court to reconsider its precedent barring record claims in post-conviction on the ground that, particularly when considered with the substantial mitigation Mr. Jones contends was not

presented, fundamental fairness and due process require that mitigation be considered and weighed by the trial judge. Further, this claim must be considered in light of the evidence that the trial judge never weighed the facts or wrote the orders sentencing Mr. Jones to death.

D. THE LOWER COURT ERRED IN DENYING MR. JONES RELIEF ON HIS CLAIM THAT HIS SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH INACCURATELY AND UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Jones' jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory" (R2. 827, 942), in violation of law. Time and again the jury was told that their role in sentencing was just a "recommendation." These instructions and comments infected every aspect of Mr. Jones' trial, including voir dire, opening statements, witness testimony, closing arguments, and the jury instructions.

During voir dire, the court conditioned the prospective jurors by telling them their decision was only an advisory verdict (R2. 322, 359, 375, 377). Contrary to the court's language, great weight is to be given to the jury's recommendation because the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Here, the jury's sense of

responsibility was diminished by the misleading comments and instructions regarding the jury's role. Defense counsel attempted to make clear the importance of the jury's recommendation (R2. 404), but the State objected (R2. 406). This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). See Pait v. State, 112 So. 2d 380 (Fla. 1959).

Relief is proper.

E. THE LOWER COURT ERRED IN DENYING MR. JONES' CLAIM THAT HE WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE INSTRUCTIONS DURING MR. JONES' PENALTY PHASE AND SENTENCING.

Mr. Jones' jury was instructed that, as to the murder of Matthew Paul Brock, it could consider as aggravating factors:

2. The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of Robbery.

3. The crime for which the Defendant is to be sentenced was committed for financial gain.

(R2. 218-219).

The jury returned a death sentence based upon the above-mentioned aggravating circumstances. The trial court found

both aggravating circumstances applied to the murder of Brock.

Trial counsel objected to the improper doubling (R2. 935) and on direct appeal from the re-sentencing, the Florida Supreme Court stated:

Moreover, the court did not improperly double the felony murder/robbery and pecuniary gain aggravators, but, rather, considered them as a single factor. Any error in the jury instructions, including not telling the jury to merge the pecuniary gain and felony-murder factors if found, is harmless beyond a reasonable doubt.

Jones II at 1375.

The Florida Supreme Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). Improper doubling occurs when both aggravators rely on the same essential facts. Provence v. State, 337 So.2d at 786. The facts in Mr. Jones' case cannot support multiple aggravating factors because murder committed during a burglary or robbery and murder for pecuniary gain are not separate and distinct aggravators. Davis v. State, 604 So.2d 794, 798 (Fla. 1992); White v. State, 403 So.2d 331 (Fla. 1981); accord Banks v. State, 22 Fla. L. Weekly S521 (Fla. August 28, 1997).

The jury in Mr. Jones' case was instructed on all of the aggravating factors listed above but not given a limiting instruction to prevent doubling. Castro v. State, 597 So.2d 259 (Fla. 1992)(jury instruction on doubling required). Even though the court merged those aggravators, it was improper to allow the jury to consider them and base its recommendation for death on the improper instructions. The jury, a co-sentencer, was allowed to rely upon the above-referenced aggravating factors in reaching a recommendation for death. The jury is a co-sentencer in Florida, and must be given adequate jury instructions. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992).

This type of "doubling" renders a capital sentencing proceeding fundamentally unreliable and unfair. See Welty; Clark. It also results in an unconstitutionally overbroad application of aggravating circumstances, Godfrey v. Georgia, 446 U.S. 420 (1980), and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence. Relief is proper.

F. THE LOWER COURT ERRED IN DENYING MR. JONES RELIEF ON HIS CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. JONES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JONES TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

[S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Dixon at 5 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Jones' capital proceedings. To the contrary, the court shifted to Mr. Jones the burden of proving whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Jones urges that the Court assess this significant issue in his case and grant him the relief to which he can show his

entitlement. Moreover, he asserts that defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

This Court should reconsider the applicability of its precedent to this important constitutional issue and consider whether the burden of proof has been unconstitutionally shifted to the appellant to prove he should be allowed to live, particularly considering the impact of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) on the capital sentencing scheme in Florida.

G. THE LOWER COURT ERRED IN DENYING MR. JONES A HEARING ON HIS CLAIM THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Jones his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case.

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 Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida 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 consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty

and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent re-weighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa.

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman; Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S. Ct. 528 (1992).

As Justice Anstead's dissent in Stephens v. State, 2001 WL 252160 (Fla.), suggests, the Florida death penalty scheme is not reserved for the most aggravated, least mitigated crimes. Mr. Jones therefore urges the Court to review the scheme and determine whether it now passes constitutional muster.

H. THE LOWER COURT ERRED IN DENYING MR. JONES RELIEF ON HIS CLAIM THAT HIS SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The death penalty in this case was predicated upon an unreliable finding by the judge of an automatic statutory aggravating circumstance. The consideration and finding of the "during the course of a felony" aggravator was tainted by unconstitutionally vague law and instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The judge considered and found an automatic statutory aggravating circumstance; therefore, Mr. Jones entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

Aggravating factors must channel and narrow the

sentencer's discretion. Arave v. Creech, 507 U.S. 463, 473-475 (1993). A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The use of the automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983); therefore, the sentencing process was unconstitutionally unreliable. Id.

"Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). The use of robbery as an aggravating factor and as an essential element of the crime of capital murder fails to narrow the class of death eligible first-degree murder defendants. See Godfrey v. Georgia, 446 U.S. 420 (1980); Tennessee v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Florida's capital punishment statute is defined broadly to include all first-degree murderers. Thus, Florida's broad capital punishment statute necessitates that the narrowing function be performed by the aggravating factors. United

States v. McCullah, 76 F.3d 1087, 1110 (10th Cir. 1996) citing Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988). Florida, like Wyoming, provides that the narrowing occur at the penalty phase. See Stringer v. Black. Weighing of invalid aggravating circumstances at the penalty phase defeats the narrowing which must occur there:

[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

Mr. Jones was denied a reliable and individualized capital sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. As applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon a non-legitimate narrower -- felony murder. See Lowenfield v. Phelps, 484 U.S. 231 (1988). There is no constitutionally valid criteria for distinguishing Mr. Jones' sentence from those who have committed felony (or more

importantly, premeditated) murder and not received death.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Jones' rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case 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 foregoing Initial Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this *5th day of April, 2001.*

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