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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

REPLY I

A. THE STATE'S ARGUMENT THAT THE JUDGE DID NOT DELEGATE HIS SENTENCING AUTHORITY AND ENGAGE IN EX-PARTE COMMUNICATIONS WITH THE STATE OVERLOOKS EVIDENCE FROM THE EVIDENTIARY HEARING THAT THE STATE ATTORNEY POSSESSED A DRAFT OF THE ORDER PRIOR TO THE JUDGE'S LAW CLERK MAKING NOTATIONS AND PUTTING THEM INTO THE FINAL ORDER. THE STATE ALSO OVERLOOKS THE HISTORY OF THE JUDGE IN DELEGATING HIS SENTENCING AUTHORITY TO THE STATE. 1

1. The timing of the receipt of the draft by the State 3

2. The supplier of the draft to the State . . . 4

3. The course of conduct of the Judge in providing copies of orders to the respective parties . . . 4

B. THE STATE'S ARGUMENT THAT THE 1988 SENTENCING ORDER IS IRRELEVANT TO THE 1991 ORDER FAILS TO CONSIDER THAT PORTIONS OF THE ORDER WHICH WERE DRAFTED BY THE STATE IN 1988 WERE IMPORTED VERBATIM INTO THE 1991 ORDER, THUS TAINTING THE 1991 ORDER WITH THE STATE'S ANALYSIS OF THE WEIGHT OF CERTAIN AGGRAVATING AND MITIGATING FACTORS. 5

C. THE STATE'S ARGUMENT THAT A LIFE SENTENCE IS NOT APPROPRIATE IF IT WERE SHOWN THAT THE JUDGE DELEGATED HIS SENTENCING AUTHORITY FAILS TO CONSIDER THE PLAIN LANGUAGE OF SECTION 921.142(4)(B) FLORIDA STATUTES (1990). 7

REPLY II

THE STATE'S ARGUMENT THAT THE JUDGE'S SUMMARY DENIAL OF CLAIMS WAS SUPPORTED BY SUBSTANTIAL FACTS AND LAW FAILS TO CONSIDER THE POST-CONVICTION JUDGE PREPARING THE ORDER DENYING CLAIMS WITHOUT A HEARING WAS NOT THE SAME JUDGE WHO PRESIDED OVER THE RESENTENCING OF MR. JONES. 8

A. THE STATE'S ARGUMENT THAT THERE WERE INSUFFICIENT FACTS PLEAD BY MR. JONES TO WARRANT A HEARING ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OVERLOOKS NEW FACTS REGARDING MR. JONES' LIFE PRIOR TO AGE FIVE AND THE LIMITED AMOUNT OF INFORMATION PROVIDED TO DEFENSE WITNESS DR. KROP BY DEFENSE COUNSEL. 10

C. THE STATE'S ARGUMENT THAT DEFENSE COUNSEL'S CONCESSION OF GUILT WAS A REASONABLE STRATEGY ADOPTED AFTER A FORCEFUL TESTING OF THE STATE'S CASE IS INCONSISTENT WITH THE RECORD. 14

E. THE STATE'S ARGUMENT THAT INSUFFICIENT FACTS WERE PLEAD TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE IGNORES THE FACT THAT TRIAL COUNSEL KNEW OF MR. JONES MENTAL HEALTH PROBLEMS, YET DID NOT HIRE AN EXPERT TO ANALYZE MR. JONES' STATE OF MIND WHEN HE GAVE TWO CONFESSIONS. TRIAL COUNSEL ALSO FAILED TO HIRE A DNA EXPERT TO COUNTER DAMAGING EVIDENCE ALTHOUGH COUNSEL ADMITTEDLY DID NOT UNDERSTAND THE EVIDENCE. 23

G. THE STATE'S ARGUMENT THAT THE CUMULATIVE ERRORS WHICH TOOK PLACE DURING THE TRIAL WERE PROCEDURALLY BARRED DOES NOT TAKE INTO CONSIDERATION THE CUMULATIVE ERRORS OF DEFENSE COUNSEL AS IT APPLIES TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS. 26

CONCLUSION AND RELIEF SOUGHT 27

CERTIFICATE OF SERVICE 28

CERTIFICATE OF COMPLIANCE 29

TABLE OF AUTHORITIES

Atwater v. State,
26 Fla.L.Weekly S395 (Fla. June 7, 2001) 15

Buenoano v. Dugger,
559 So.2d 1116 (Fla. 1990) 12

Card v. State,
652 So. 2d 344 (Fla. 1995) 2

Diaz v. Dugger,
719 So.2d 865 (Fla. 1998),
cert. denied, 526 U.S. 1100 (1999) 9

Freeman v. State,
761 So.2d 1055 (Fla. 2000) 9

Gaskins v. State,
737 So.2d 509, 516 (Fla. 1999) 8

Gorham v. State,
524 So.2d 1067 (Fla. 1988) 9

Hoffman v. State,
571 So.2d 449 (Fla. 1990) 9

Huff v. State,
622 So.2d 982 (Fla. 1993) 9

Jones v. State,
569 So.2d 1234 at 1235 (Fla. 1990) 27

Lecroy v. Dugger,
727 So.2d 236, 242 (Fla. 1999) 9

Marahaj v. State,
684 So.2d 726 (Fla. 1996) 9

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602 (1966) 24

Morton v. State,
26 Fla.L.Weekly S429 (Fla. June 28, 2001) 6

Nixon v. State,
758 So.2d 618 (Fla. 2000) 14

Peede v. State,
748 So.2d 253 (Fla. 1999) 14

Randolph v. State,
SC93,675 (Fla. 2000) 5

Riechmann v. State,
777 So.2d 342 (Fla. 2000) 8

Routly v. State,
590 So.2d 397 (Fla. 1991) 12

Rutherford v. State,
727 So.2d 216 (Fla. 1998) 13

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052 (1984) 10, 25

Teffeteller v. State,
495 So.2d 744, 745 (Fla. 1986) 7

United States v. Cronic,
466 U.S. 648 (1984) 14

Van Royal v. State,
497 So.2d 625 (Fla. 1986) 8

PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant, Randall Jones, in reply to the Answer Brief of Appellee, the State of Florida. Appellant will rely upon his arguments in the Initial Brief of Appellant on issues II(B), II(D), II(F), II(H), II(I), and III.

REPLY I

A. THE STATE'S ARGUMENT THAT THE JUDGE DID NOT DELEGATE HIS SENTENCING AUTHORITY AND ENGAGE IN EX-PARTE COMMUNICATIONS WITH THE STATE OVERLOOKS EVIDENCE FROM THE EVIDENTIARY HEARING THAT THE STATE ATTORNEY POSSESSED A DRAFT OF THE ORDER PRIOR TO THE JUDGE'S LAW CLERK MAKING NOTATIONS AND PUTTING THEM INTO THE FINAL ORDER. THE STATE ALSO OVERLOOKS THE HISTORY OF THE JUDGE IN DELEGATING HIS SENTENCING AUTHORITY TO THE STATE.

The State contends that the improper delegation of sentencing authority claim was not established by the evidence presented at the evidentiary hearing because of Assistant State Attorney Richard Whitson's broad statement that he "did not draft" the sentencing order. (PC-R. 545). However, Mr. Whitson had an imperfect memory regarding his role in the sentencing order. He stated that he did not have any specific recollection of the sentencing order being sent to him, nor did he have any recollection of how he received a copy of the sentencing order draft. (PC-R. 550). A draft of the sentencing order found in

the State Attorney's files had notations on it in handwriting which "certainly looked like it could be" his writing. (PC-R. 542)(EX. 2). The circle notation on the draft resembles the way in which Mr. Whitson makes corrections or suggestions for corrections. (PC-R. 543)(EX. 2). Mr. Whitson also stated: "there's high likelihood that I had a chance to look at it before it ended up in final form." (PC-R. 546). He explained that the notations on the draft found in the State Attorney files were consistent with the way he "would look at something and grade the paper." (PC-R. 550). Thus, although Mr. Whitson states that he did not actually "draft" the document, he believes he did have an opportunity to read it and make notations on it. In the end Mr. Whitson thought that he did receive a copy of the draft sentencing order, had a chance to mark on it and review it prior to it being filed. (PC-R. 550). Reviewing a document and making suggestions and corrections is part of the drafting process.

In its answer brief, the State contends that the presence of a draft of the sentencing order in the State Attorney's files is irrelevant because the Judge may have sent a copy of the order to both sides. In order to conduct an analysis of this argument it is important to examine three issues: 1)when did the State receive the draft order; 2) who supplied the draft to the

State; and 3) what was the typical course of conduct of the Judge in preparing orders and sending them to both sides.[1]

1. The timing of the receipt of the draft by the State

Mr. Whitson cannot remember receiving the unsigned draft of the sentencing order which was found in the State's possession. (PC-R. 550). In order to analyze when the State received a copy of the proposed sentencing order it is necessary to examine the evolution of the order through subsequent drafts and the final order. Thus, one can tell at what point in the drafting process the State received their copy of the draft.

The draft found in the State Attorney's file is an incomplete version of the final order. (EX. 2). Another draft identified by Judge Perry's law clerk, Pamela Koller, is an exact copy of the draft found in the state file except it

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[1] In Card v. State, 652 So. 2d 344 (Fla. 1995), this court found that in light of an affidavit from the judge stating that the state attorney prepared the sentencing order, an evidentiary hearing was necessary to address whether or not the judge engaged in an independent weighing of the aggravating and mitigating factors. Specifically, this court suggested that the following factors be evaluated at the hearing: the nature of the contact between the judge and the prosecutors; when the judge received the sentencing order from the state; at what stage of the proceedings the judge gave copies of the order to defense counsel. Card at 346. Unfortunately, an analysis along these lines cannot be performed in Jones' case because the judge and defense counsel are deceased, the state attorney cannot remember when he received a copy of the draft, and the law clerk cannot recall distributing the order. (PC-R. 550-556).

contains handwritten notations which Ms. Koller recognized as her handwriting. (PC-R. 555)(EX. 4). The final sentencing order, on record with the clerk and read into the record by Judge Perry, incorporates the law clerk's handwritten notations in final typed form. (R2. 681-692). Thus, the evolution of the order dictates that Mr. Whitson had a draft of the sentencing order in his possession prior to the law clerk making her notations and inserting them into the final order.

2. The supplier of the draft to the State

Judge Perry's law clerk does not does not recall giving a copy of the draft to either party. (PC-R. 556). If the only persons involved in the preparation of this draft of the order were the Judge and his law clerk, and the law clerk did not provide the copy to the State, the logical conclusion is that the Judge provided it to the State.

3. The course of conduct of the Judge in providing copies of orders to the respective parties

The State argues that because Assistant State Attorney Whitson stated that it was not unusual for orders to be provided to both sides in other cases, the order in this case may have been provided to both sides. If the Judge's course of conduct in other cases is relevant as to the distribution of proposed orders, it stands to reason the Judge's course of conduct in the preparation of other sentencing orders in death penalty cases is

relevant.

There was no evidence presented in the evidentiary hearing regarding whether the judge distributed orders to both sides in this case. However, there was evidence, through the testimony of Assistant State Attorney McLeod, that Judge Perry in at least two cases asked the State Attorney to prepare a death penalty sentencing order with no input from himself.[2] (PC-R. 572). Thus, this analysis supports the position that the State Attorney had some input on drafting the order and is evidence of ex-parte contact between the judge and the State.

B. THE STATE'S ARGUMENT THAT THE 1988 SENTENCING ORDER IS IRRELEVANT TO THE 1991 ORDER FAILS TO CONSIDER THAT PORTIONS OF THE ORDER WHICH WERE DRAFTED BY THE STATE IN 1988 WERE IMPORTED VERBATIM INTO THE 1991 ORDER, THUS TAINTING THE 1991 ORDER WITH THE STATE'S ANALYSIS OF THE WEIGHT OF CERTAIN AGGRAVATING AND MITIGATING FACTORS.

It was established that after Mr. Jones' first trial in 1988, Judge Perry delegated the responsibility of writing the sentencing order to Assistant State Attorney Robert McLeod. Robert McLeod stated unequivocally that he wrote the 1988

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[2] Robert McLeod testified that he wrote the sentencing order at Judge Perry's request in both Mr. Jones' original sentencing and that of Manuel Colina. (PC-R 570). *See also*, Randolph v. State, SC93,675 (Fla. 2000), currently under review, which addresses the same issue of Judge Perry's delegation of responsibility in writing a sentencing order.

sentencing order at Judge Perry's request and that the content of the order was based exclusively on McLeod's perception of the facts and law. (PC-R. 563). The State argues, and the lower court found, the 1988 sentencing order was irrelevant to the 1991 re-sentencing order because in 1991, Assistant State Attorney Richard Whitson testified that he did not draft the 1991 sentencing order. (PC-R. 545)(PC-R. 605-607). However, such a conclusion fails to consider that some portions of the 1988 sentencing order were incorporated verbatim into the 1991 sentencing order. (See, Appellant's Initial Brief pp. 29-33).

The State argues the changes in the second sentencing order show that the judge did engage in an individualized weighing of the aggravating and mitigating circumstances. Arguably, this Court's recent decision in Morton v. State, 26 Fla.L.Weekly S429 (Fla. June 28, 2001), supports that position. However, in Morton, the second sentencing judge adopted portions of the original judge's sentencing order. In this case, the original sentencing order was not created by an impartial judge; rather, it was created by an Assistant State Attorney with the State Attorney's analysis of the aggravating and mitigating factors. (PC-R. 564). Thus, if any incorporated part of the first order is present in the second, the State Attorney drafted that part

of the order.

Judge Perry's law clerk, Pamela Koller, stated at the evidentiary hearing that part of her duties were to draft orders. (PC-R. 554). She stated she certainly would have been involved in the drafting of the sentencing order in this case. (PC-R. 553). Indeed, her handwritten notations on one draft of the order were incorporated into the final order. (PC-R. 555). She stated that if she drafted the order, she would have used the 1988 order as a template. (PC-R. 554). Thus, the independent weighing of the aggravating and mitigating factors in this sentencing hearing were adopted from the previous, illegal sentencing order. The previous order from the first penalty phase should not have been considered in the second sentencing. "The resentencing should proceed *de novo* on all issues bearing on the proper sentence which the jury recommends be imposed. A prior sentence, vacated on appeal, is a nullity." Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986).

In sum, the analysis and weighing of aggravating and mitigating factors done by Robert McLeod in 1988 were used in the 1991 order. In effect, McLeod remained the author of those parts the 1991 order. 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 and

the State's argument that the 1988 proceedings are not relevant to the improper delegation issue is erroneous.

C. THE STATE'S ARGUMENT THAT A LIFE SENTENCE IS NOT APPROPRIATE IF IT WERE SHOWN THAT THE JUDGE DELEGATED HIS SENTENCING AUTHORITY FAILS TO CONSIDER THE PLAIN LANGUAGE OF SECTION 921.142(4)(b) FLORIDA STATUTES (1990).

Section 921.142(4)(b), Florida Statutes (1990) states, in part:

> "If the court does not make the findings requiring the death sentence, the court shall impose life imprisonment ..."

Thus, if the State of Florida, through its prosecutor, was the entity determining which aggravating and mitigating circumstances applied, the court did not prepare the order and a life sentence is the appropriate remedy.[3] In the alternative, a new penalty phase hearing would be appropriate.[4]

REPLY II

THE STATE'S ARGUMENT THAT THE JUDGE'S

[3]In Van Royal v. State, 497 So.2d 625 (Fla. 1986), this court applied section 921.142(4)(b) Florida Statutes and remanded for the imposition of a life sentence. In that case the judge did not file a sentencing order until six months after the record on appeal had been certified.

[4]*See*, Riechmann v. State, 777 So.2d 342 (Fla. 2000)(remanding for a new penalty phase where there was cumulative error, including a delegation of sentencing authority to the State via an ex-parte communication).

SUMMARY DENIAL OF CLAIMS WAS SUPPORTED BY SUBSTANTIAL FACTS AND LAW FAILS TO CONSIDER THE POST-CONVICTION JUDGE PREPARING THE ORDER DENYING CLAIMS WITHOUT A HEARING WAS NOT THE SAME JUDGE WHO PRESIDED OVER THE RESENTENCING OF MR. JONES.

Although the lower court granted an evidentiary hearing on one claim, the court summarily denied all of the others. (PC-R. 505-07). "While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed absent a conclusive demonstration the defendant is entitled to no relief." Gaskins v. State, 737 So.2d 509, 516 (Fla. 1999)(quoting Roy v. Wainwright, 151 So.2d 825, 828 (Fla. 1963); "We have consistently held that a claim of ineffective assistance of counsel usually requires resolution by an evidentiary hearing where the defendant alleges sufficient disputed issues of fact." Lecroy v. Dugger, 727 So.2d 236, 242 (Fla. 1999)(Anstead, J., concurring in part and dissenting in part).

The State cites the case of Diaz v. Dugger, 719 So.2d 865 (Fla. 1998), cert. denied, 526 U.S. 1100 (1999), when it argues a summary denial of claims should be upheld as long as the judge properly applied the law and competent and substantial evidence supports its findings. In Diaz, however, Judge Amy Steele Donner was both the judge who presided over the trial and who denied

the evidentiary hearing. Id. In fact, the State in Diaz argued that Judge Donner had expressed "a very good recall of the case and could probably remember almost every day's testimony in the trial." Diaz v. State, SC81,584, Appellee's Answer Brief, pg. 10 (Fla. 2000). In this case, Judge Robert Perry presided over the original trial, and Judge A.W. Nichols III denied an evidentiary hearing on twenty-nine of the thirty claims plead at the Huff hearing.[5] A defendant is entitled to an evidentiary hearing on a post conviction relief motion unless the records in the case conclusively show that the prisoner is entitled to no relief, or the claim is legally insufficient. Freeman v. State, 761 So.2d 1055 (Fla. 2000); Marahaj v. State, 684 So.2d 726 (Fla. 1996); Hoffman v. State, 571 So.2d 449 (Fla. 1990); Gorham v. State, 524 So.2d 1067 (Fla. 1988). Considering that Judge Nichols did not take part in the original proceedings, deference towards granting an evidentiary hearing should have been great.

A. THE STATE'S ARGUMENT THAT THERE WERE INSUFFICIENT FACTS PLEAD BY MR. JONES TO WARRANT A HEARING ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OVERLOOKS NEW FACTS REGARDING MR. JONES' LIFE PRIOR TO AGE FIVE AND THE LIMITED AMOUNT OF INFORMATION PROVIDED TO DEFENSE WITNESS DR. KROP BY DEFENSE COUNSEL.

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

The State argues that insufficient facts have been plead to meet the dual test of Strickland.[6] However, many facts which were not presented at the resentencing were proffered in Jones' 3.850 motion and his Initial Brief. Jones' 3.850 motion states extensive background information including the following:

- Mother's low education level and work history from age twelve;
- Mother's involvement in many failed relationships, including an abusive relationship with Jones' father;
- Mother's social, physical and emotional neglect of Jones;
- Fears of sexual abuse from mother's paramour following divorce of Jones' parents;
- Mother's abandonment of Jones, first to be cared for by his twelve year-old sister, Trudy, second when she moved out of the state, and finally upon her death;
- Jones' difficult relationship with his stepmother characterized by stepmothers belief that many of Jones' actions were manifestations of prior sexual abuse;
- Jones' subsequent removal from his father and stepmother's home to several group home settings;
- Jones' involvement with the Church and participation in Church activities;
- Jones' academic awards;
- Jones' writings, which reflected his search for a mother's love and affection.

(PC-R. 107-115).

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[6] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

None of the foregoing information was brought out at Mr. Jones' resentencing. Mr. Jones complained to the court that defense counsel Howard Pearl was refusing to contact witnesses in his Motion to Dismiss Counsel. (R2-13). Jones stated in his motion, "Pearl further refused to call to the stand or even contact any of numerous character witnesses for the Defendant." (R2-13). The only person the defense called to testify at the resentencing was the same doctor who had testified at the first sentencing, Dr. Krop. (R2 810-921).

Dr. Krop interviewed Mr. Jones two times prior to resentencing.[7] At the time of the State's deposition of Dr. Krop, twelve days prior to the resentencing, Dr. Krop had been provided only three names of witnesses from defense counsel and had not contacted or spoken to them. (R2. 92-94). Dr. Krop testified without having any information regarding Mr. Jones' life prior to age five. (R2. 826-827). Dr. Krop was not provided with input from Mr. Jones' primary caregiver and sister, Trudy, regarding his neglect prior to age five. Dr. Krop never reviewed military psychiatric records evaluating Mr. Jones just weeks prior to the murders for either sentencing. Had Mr. Jones been allowed an evidentiary hearing on this claim,

[7] Dr. Krop also interviewed Mr. Jones twice prior to the first sentencing in 1988.

it would have been shown that the absence of the above information at trial was an omission outside the range of professionally competent assistance.

The State argues that the mitigation, if presented, is insufficient to overcome the aggravating factors in this case. The State cites Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990), to support this argument. However, Buenoano is easily distinguished from Mr. Jones' case. In Buenoano, the court stated:

> "We do not believe the unfortunate circumstances of Buenaono's childhood are so grave nor her emotional problems so extreme as to outweigh, under any view, the four applicable aggravating circumstances. This mitigation could not have overcome these factors nor the evidence that Buenoano methodically killed her husband by poisoning him, that she was suspected in killing another individual in the same way, and she attempted to poison yet a third, and that she had been convicted of killing her son."

Id. at 1119.

The extreme circumstances in Buenoano, i.e., the poisoning death of her first husband and a boyfriend, and the attempted murder by poison of her second husband, combined with the drowning death of her son are extremely aggravating circumstances. When compared to facts of this case, Buenoano's is a much more aggravated crime. Similarly, the State cites Routly v. State, 590 So.2d 397 (Fla. 1991) as an example where mitigation

could not have overcome the aggravating circumstances. In Routly, however, there were five aggravating circumstances as opposed to three in Jones' case. Additionally, the facts in Routly included kidnaping and taping the victim. Id. The facts supporting those aggravating factors are likewise more egregious in Routly.

Finally, the State cites Rutherford v. State, 727 So.2d 216 (Fla. 1998), to support its position that Jones has insufficient mitigation to outweigh the aggravating circumstances. This comparison is also ineffectual because in Rutherford there was an evidentiary hearing on the issue of mitigation, where counsel testified that he knew about all the mitigation witnesses and documents and chose not to present those witnesses strategically. Id. In addition, Rutherford did present substantial mitigation. In Jones' case, an evidentiary hearing on the issue was denied summarily and very little mitigation was presented at the trial. Establishment of prejudice is controlled by the following requirement:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694.

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). Because there was no evidentiary hearing on the mitigation issue, the facts presented by Jones in his 3.850 motion must be accepted as true. If the above information had been presented, the jury would have had more insight as to non-statutory mitigation. Given that the court ruled that there were no statutory mitigators present, and little non-statutory mitigation, evidence regarding Mr. Jones' childhood was crucial and sufficient to show a reasonable probability of a different outcome in the penalty phase.

C. THE STATE'S ARGUMENT THAT DEFENSE COUNSEL'S CONCESSION OF GUILT WAS A REASONABLE STRATEGY ADOPTED AFTER A FORCEFUL TESTING OF THE STATE'S CASE IS INCONSISTENT WITH THE RECORD.

This Court has held that prejudice need not be proved if the defendant can establish that he did not consent to trial counsel's concession of guilt. Nixon v. State, 758 So.2d 618 (Fla. 2000). 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 Cronic[8] would control." Nixon at 623.

The State argues that Mr. Jones' case is similar to this Court's recent decision in Atwater v. State, 26 Fla.L.Weekly S395 (Fla. June 7, 2001), and thus he should be denied relief. This conclusion overlooks substantial differences between Atwater and the present case.

First, Mr. Atwater was granted an evidentiary hearing on the issue of concession of guilt. Id. At the hearing, Atwater's trial counsel testified that he always explains his strategy to clients. Atwater at 396. Thus, evidence was presented regarding whether Atwater knew of the strategy of defense counsel. In Jones' case, an evidentiary hearing was summarily denied; however, if one had been granted, Mr. Jones would have testified that his counsel never addressed the issue of conceding guilt with him. (PC-R. 130).

Second, counsel in Atwater gave an opening statement with no concessions. The state contrasts this with Nixon, where defense counsel conceded guilt in opening. In Jones' case, defense counsel Howard Pearl reserved opening statement until after the State's case in chief, then waived it altogether and

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

made his closing argument. (R. 1039, 1580-1592). Defense counsel's first address to the jury conceded not only guilt for the murders, but also the other crimes for which he was charged.[9] This is more akin to Nixon, where defense counsel conceded guilt in the first address to the jury.

Third, Atwater's counsel argued during the rebuttal portion of closing argument that the evidence might support the lesser offense of second-degree murder. Atwater at 397. Atwater's counsel argued the State failed to prove robbery and thus did not prove felony murder. Id. at 397. This argument was made in response to the State's argument at the very end of the case. In Jones' case, Mr. Pearl conceded guilt in his first address to the jury for both the murders and the other offenses.

Fourth, the State argues that the concession of Jones' guilt did not occur until counsel had forcefully subjected that

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[9] Mr. Pearl's first address to the jury stated: "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." Later in his closing argument, Pearl argues, "I submit to you that beyond doubt at the time and place where these killings occurred and the other lesser crimes were committed that Randy Scott Jones did in fact evince a depraved mine regardless of human life and his conduct throughout the episode indicates a depraved and evil intent and inability to relate with other people, but I think that specifically blueprints this crime as second degree murder." (R. 1580, 1592).

State's case to an adversarial testing. This court ruled that the concession in Atwater was reasonable given "the concession was made to a lesser crime than charged, during rebuttal closing argument, and after a meaningful adversarial testing of the State's case." Id. Atwater's counsel conducted a meaningful cross-examination of fifteen of the twenty witnesses called by the State. Id. At no point during the opening statement, the testimony, or the first defense closing did Atwater's counsel concede guilt. Id. In order to compare counsel's effective performance in Atwater to that of Jones, an analysis must be done to determine whether counsel "forcefully subjected the State's case to an adversarial testing". Id.

Twenty-five witnesses were called to the stand by the State in Jones' case. Defense counsel Howard Pearl refused to perform cross examination thirteen times. (R. 1035-1505). Some of the witnesses were of great importance to the State's case. Among the people Pearl failed to cross examine were the following: Forrest Peoples, a boater who placed Jones at the murder scene even though he could not identify him; (R. 1126); Joel Geller, the FDLE fingerprint expert who testified to prints matching Jones without stating how many points were successfully compared on the prints; (R. 1238); Tammy Driggers, who identified Jones as the person in possession of the victim's truck shortly after

the murders via a line-up at the jail; (R. 1301); Larry Neff, the person in charge of the Lighthouse Children's Home where key evidence was located concerning the murders; (R. 1325); Kenneth Burns, who identified tools that were in the back of the victim's truck although there were no identifying characteristics on the tools; (R. 1075); and Jimmy Edwards, a Mississippi patrolman who witnessed Jones execute a consent to search form and could testify whether it was coerced. (R. 1343).

The limited cross-examination that did take place was ineffective. For example, the cross-examination of Martha Carbo, a State witness who identified the victims as well as the victim's truck is an example of defense counsel's ineffectiveness. Mr. Pearl did not have any questions for Ms. Carbo, but approached her with the following address on cross examination regarding an objection he had argued in front of the jury:

> "I hope you don't think that anything I said was attempting to offend you in any way. I have no questions of you, Thank you."

(R. 1057).

Another example of ineffective cross examination involves witness William Cook. Cook testified that he realized the victim was missing when he failed to appear at a court hearing the day after the murders. Mr. Pearl's one cross examination question

asked the witness what the victim was supposed to have gone to court for. The State objected on relevance grounds. The following was Mr. Pearl's response:

> "I'm going to withdraw the question. I don't think it's important either."

(R. 1067).

Likewise the cross-examination of Elliot Louis was ineffective. He testified that after the murder, he went to Christopher Reesh and Jones' house and saw a pair of shoes covered with blood. (R. 1091). Although the shoes were not identified as belonging to Mr. Jones, defense counsel did not question the witness on that issue. Rather, Mr. Pearl stated the following one point on cross examination:

> "Q: Mr. Louis, I just want to emphasize something that was brought up before. You're not a chemist, are you?"

(R. 1093).

This single line of inquiry was to show that the lay witness did not perform an analysis of the blood. Mr. Pearl missed the real issue: the witness did not identify who the shoes belonged to.

Mr. Pearl's three question cross-examination of Detective Stout regarding evidence found in a dumpster was likewise ineffective. Detective Stout testified that he located an advertisement for the sale of the victim's truck in a briefcase owned by Randall Jones. (R. 1367-1368). This testimony helped

to establish the aggravating circumstance of pecuniary gain. There was, however, no link established between Mr. Jones and the briefcase. Mr. Pearl did not cross examine on this important issue. His entire cross consisted of three questions relating to which direction the bullets traveled inside of the cab of the victim's truck. (R. 1375). The purpose of this cross is unknown.

Defense counsel's cross examination of Daniel Garner, a DNA technician, was ineffective as well. Mr. Garner testified that although he did not do the initial examination of the DNA sample, he performed the analysis of those results. (R. 1387). An obvious gap in the analysis chain provided fertile ground for cross-examination. Instead, Mr. Pearl made repeated comments about how he did not understand the testimony (R. 1430); he knew absolutely nothing regarding DNA technology (R. 1412); and the testimony is part of "a dog-and-pony show" that he cannot oppose due to a lack of knowledge. (R. 1412). Altogether, Pearl made sure the jury and judge knew he did not have a grasp on the testimony.

Other cross examination questions were focused on mitigation for Jones rather than challenging the State's evidence. For example, the State called Rhonda Morrell, Jones' ex-fiancé, to the stand to testify that the rifle believed to have been the

murder weapon belonged to her father. (R. 1097). In addition, she testified that a signature on the pawn slip pawning the rifle belonged to the Defendant, and that Jones confessed to killing the two victims. (R. 1103, 1104). Mr. Pearl's cross examination did not address any of these issues. It consisted of five questions focused around the loving relationship between Morrell and Jones as well as Jones' character as a gentle person. (R. 1106). This line of questioning was obviously focused on arguments for mitigation.

Another witness was a twelve year old boy who testified about hearing gunshots the night of the murders. (R. 1108). Pearl's cross examination included the following exchange:

> "Q: Based on what you said it sounds to me like–would you say–if you can–Now don't–I'm not trying to lead you into anything. Would you say these shots took about two seconds for three shots?"

(R. 1112).

The focus of the questioning was obviously geared toward an argument in penalty phase about how long it took to kill the victims. Mr. Pearl again did not focus on issues regarding guilt such as whether or not the boy had seen anyone.

In addition to defense counsel's ineffective cross examination challenge to the State's case, counsel repeatedly bolstered the State's witnesses' testimony. The first witness

called to the stand in Jones' case was Lieutenant Bakker. He was called for the purpose of establishing a chain of custody of certain evidence. Rather than challenging the chain of custody, or even questioning it, Mr. Pearl interrupted the direct examination with the following statement:

> "Your Honor, I know Lieutenant Bakker very well and have for a long time. It may obviate the necessity for him to go through the chain of custody if I say that I have confidence that the evidence that has been placed in his possession has been well-kept and it will not be necessary to prove up a chain in order to produce these items."

(R. 1043).

His cross examination of this first witness was also effective bolstering. He asked Lt. Bakker one question and called him by his first name:

> "Q: Good morning, Dick.
> A: Morning, sir.
> Q: You can assure me, the Defendant and this Jury that you have confidence in your chain and that your chain of custody is intact and there's nothing wrong with it?
> A: I don't see anything wrong with it at all, sir.
> Mr. Pearl: Nothing further."

(R. 1047).

Pearl bolstered the Lieutenant's credibility with the jury by automatically believing whatever he said.

Additionally, Pearl used the following description of

Bonofacio Flora, the State's forensic pathologist, in front of the jury:

> "Dr. Flora is well known to the bench and I'm happy to acknowledge that he's eminently qualified to testify in the field of forensic pathology."

(R. 1249-1250).

Although Pearl may have believed that the doctor was qualified, a simple "no objection" to the doctor being tendered as an expert would have been sufficient and would not have bolstered the doctor's credibility.

Perhaps the most blatant bolstering of the State witnesses came in Pearl's closing argument:

> "I've been a lawyer for nearly thirty years and I want to tell you that the detectives of Putnam County Sheriff's Office are among the best and the most thorough and fairest people I know. They're very, very good."

(R. 1584).

Comments such as those listed above show that defense counsel was effective only in bolstering the State's case. The argument that there was an effective and adversarial challenging of the evidence is belied by the record. Thus, the State's argument that the concession of guilt by defense counsel occurred only after a strong adversarial testing of the State's case is erroneous. Mr. Pearl did not challenge the case; rather, he bolstered the State's witnesses. The lack of

challenge of the State's case makes the concession of guilt much more egregious. An evidentiary hearing should have been granted to afford Mr. Jones the opportunity to show the concession of guilt was not agreed to by him and did not occur after a forceful testing of the State's case.

E. THE STATE'S ARGUMENT THAT INSUFFICIENT FACTS WERE PLEAD TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE IGNORES THE FACT THAT TRIAL COUNSEL KNEW OF MR. JONES MENTAL HEALTH PROBLEMS, YET DID NOT HIRE AN EXPERT TO ANALYZE MR. JONES' STATE OF MIND WHEN HE GAVE TWO CONFESSIONS. TRIAL COUNSEL ALSO FAILED TO HIRE A DNA EXPERT TO COUNTER DAMAGING EVIDENCE ALTHOUGH COUNSEL ADMITTEDLY DID NOT UNDERSTAND THE EVIDENCE.

Defense counsel Howard Pearl filed a one page, one paragraph Motion to Suppress Confession in Mr. Jones' case. (R. 156). The motion did not allege any facts, nor did it cite any law in support of a position. At the motion hearing, Mr. Jones testified that he was coerced into giving two confessions by the officers when they assured him they would help him if he just told the truth and did not speak to a lawyer. (R. 443). Mr. Pearl knew prior to this hearing that Mr. Jones had longstanding mental health problems, including a diagnosis of borderline schizophrenia. Not only did he fail to hire an expert to analyze the effect of Mr. Jones' mental health upon his ability

to voluntarily waive his Miranda[10] rights, he did not interrogate the officers at the hearing regarding the alleged coercion. At the motion hearing, Mr. Pearl called the State's witnesses for them, thereby granting the State the position to cross examine and lead their own witnesses. (R. 395-432). Mr. Pearl provided no case authority to the Court to support his position, even though the court requested it. (R. 459).

To further exacerbate his ineffectiveness, at the trial, Mr. Pearl's voir dire of the officers regarding the admission of the confessions proceeded as follows:

> "Q: Detective Hord, in the making of the statement you have there and which you are about to publish to the jury having been made and signed by Randall Scott Jones, was it made by him to you willingly?
> A: Yes, sir.
> Q: You exercised no force, no threats, no coercion to get him to sign it?
> A: Not at all.
> Q: Did you offer him any rewards or promises in exchange for him making it?
> A: No, sir, I did not.
> Q: Did he so–he made it voluntarily and did he in fact cooperate with you in the making of this statement?
> A: Yes, sir.
> MR. PEARL: Thank you."

(R. 1474-1475).

Both confessions were then published to the jury. (R. 1474). Mr. Pearl effectively assured the jury that the confessions were

[10] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

made completely voluntarily, without any coercion. Had defense counsel hired a mental health expert to show Mr. Jones' state of mind when he gave two contradictory confessions, there would have been support for coercion and the suppressing of those confessions. In addition, had the State witnesses been questioned regarding the coercion, there is a reasonable probability that those confessions would have been suppressed. The prejudice to the Defendant in the admission of the confessions is great and certainly meets the prejudice prong of the Strickland test.[11]

At the trial, Mr. Pearl stated the following in his argument against the admission of the DNA experts testimony:

> "I'm saying that I have very much respect for Dr. Garner and nothing I'm saying here today is in any way intended to diminish his standing or to criticize him. After all, he's an old ATF man and a hundred years ago I was a treasurer, so we're kind of cousins.
>
> But let me present what could be called the cornpone gambit, Chester's term.
>
> Here we are entirely unfamiliar with the science that Mr. Garner has developed and has been so instrumental in working at, and there isn't any way in the world that any of us, certainly not me, can go back and check on his work. We are just incompetent to do so.
>
> ...I have some reservations about this Defendant being the first man in Florida to be responsible for the recognition of that

[11] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

> new science about which the rest of us know absolutely nothing.
>
> We have no experience, we have no way to check whether this is right or not. I hope Dr. Garner will forgive me when I say I do not know and cannot tell myself whether the presentation he is to make on the one hand is entirely scientific, and although incomprehensible, statement concerning truth or whether it is in essence a dog-and-pony show that none of us can oppose because we do not have the evidence or the knowledge or the familiarity."

(R. 1412).

Mr. Pearl admits at trial that he cannot understand the DNA testimony, yet he does not hire an expert to explain or verify the results. An expert would have taught Mr. Pearl the weaknesses of the State's DNA analysis. Counsel would have been prepared to attack the results and possibly the veracity of the DNA testing. Given the result of the DNA test showing Mr. Jones involved in a sexual assault upon the victim, the prejudice to Mr. Jones due to the failure of counsel to attack this evidence is great. The effect of counsel's failure to understand and challenge the procedures behind DNA testing was to deny Jones "counsel" guaranteed by the Sixth Amendment. As a result, the trial was unfair; its result unreliable pursuant to the dictates of Strickland.

G. THE STATE'S ARGUMENT THAT THE CUMULATIVE ERRORS WHICH TOOK PLACE DURING THE TRIAL WERE PROCEDURALLY BARRED DOES NOT TAKE INTO CONSIDERATION THE CUMULATIVE ERRORS OF

DEFENSE COUNSEL AS IT APPLIES TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

The totality of the record, including defense counsel's performance at pre-trial motion hearings, counsel's failure to investigate and interview defense witnesses, his failure to hire experts, the poor quality of challenge to the State's case in chief, and the concession of guilt show ineffective assistance of counsel. "A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Strickland at 669. In Jones I, this Court vacated Mr. Jones' sentence and remanded for a new sentencing proceeding because of cumulative errors affecting the penalty phase. Jones v. State, 569 So.2d 1234 at 1235 (Fla. 1990). The totality of the errors made throughout the trial demonstrate a valid ineffective assistance of counsel claim.

Counsel's errors were compounded by the question of whether the judge delegated his responsibility in the preparation of the sentencing order. "The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland at 670. The cumulative effect of the errors calls into question the fundamental fairness of the trial.

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 conviction and sentence be vacated and remand the case for a new trial, new evidentiary hearing, or 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 12th day of September, 2001.

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CERTIFICATE OF COMPLIANCE

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

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