IN THE SUPREME COURT OF FLORIDA

WARFIELD RAYMOND WIKE,

Appellant,

vs. **Case No. SC00-2141**

THE STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT, WARFIELD RAYMOND WIKE

On Direct Appeal from a Final Order Rendered on September 27, 2000, by the Circuit Court of the First Judicial Circuit, in and for Santa Rosa County, Florida, Hon. Paul A. Rasmussen, Presiding, in Case No. 88-547-CF, Denying the Defendant's Motion to Vacate and Set Aside His Judgments and Sentences, including a Death Sentence, filed per the provisions of Florida Rule of Criminal Procedure 3.850.

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PRELIMINARY STATEMENT

Warfield Raymond Wike, appellant, was the defendant in Santa Rosa County Circuit Court Case No. 88-547-CF below. He will be referred to here as "Mr. Wike" or "the defendant." The State of Florida, appellee, will be referred to as "the state."

The record on appeal regarding the Florida Rule of Criminal Procedure 3.850 proceeding is in six volumes.

There are three numbered volumes. By "numbered" we mean that the Clerk of the Circuit Court has marked the cover page of these volumes with a Roman numeral. Numbered Volume I contains the pleadings. Numbered Volumes II and III contain the trial court's Order Denying Defendant's Motion to Vacate And Set Aside Judgments and Sentences, the exhibits (they are voluminous) attached thereto and certain other post-hearing pleadings and documents. Reference to this portion of the record on appeal will be by the symbol "R" followed by a page number appearing at the bottom right-hand corner of each page, for example, "R 12."

An unnumbered fourth and fifth volumes of the record on appeal contain the transcript of the April 19, 2000 evidentiary hearing on the defendant's Florida Rule of Criminal Procedure 3.850 motion. To avoid confusion, when

referring to those evidentiary hearing transcripts, we use the letters "EH" followed by a page number appearing in the lower right hand corner of each page, for example, "EH 40." This "EH" designation is the same used by the trial court in its order denying that Rule 3.850 motion.

A separate volume contains the transcript of the November 8, 1999 Huff hearing held in this cause.

The exhibits introduced in evidence during the evidentiary hearing are in two boxes. Each exhibit will be referenced by the number given it by the trial court when the exhibit was introduced in evidence during that 3.850 hearing, followed by a generic description of that exhibit. This will be done in order to distinguish these exhibits from those attached to the trial court's order denying the Florida Rule of Criminal Procedure 3.850 motion.

All emphasis is added by us unless indicated otherwise.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case, Course of the Proceedings Below including Disposition in the Lower Tribunal and Statement on Jurisdiction

This is a direct appeal to the Supreme Court of Florida from a final order of the Circuit Court of the First Judicial Circuit of Florida dated September 27, 2000, denying the defendant's motion to vacate and set aside his judgments and sentences, including death sentences, filed per the provisions of Florida Rule of Criminal Procedure 3.850. On October 12, 1988, the defendant was indicted by a Santa Rosa County, Florida Grand Jury and charged with the following felony crimes:

Count I - first degree premeditated murder of Sara Rivazfar;

Count II - felony murder of Sara Rivazfar;

Count III - kidnapping of Sara Rivazfar;

Count IV - kidnapping of Sayeh Rivazfar;

Count V - sexual battery of Sayeh Rivazfar;

Count VI - attempted premeditated murder of Sayeh Rivazfar; and

Count VII - attempted felony murder of Sayeh Rivazfar.

The First Trial

Jury trial commenced in Milton, Santa Rosa County, Florida on June 13, 1989, the Hon. Ben Gordon, Circuit Judge, presiding. The defendant testified in his own behalf during the trial. At the conclusion of the jury trial, the

defendant was found guilty on all counts. An advisory penalty phase proceeding per the provisions of Section 921.141, Florida Statutes, as to Counts I and II, began the day after the guilty verdicts were returned. The jury recommended the death sentence as to Counts I and II[1] by a vote of 9-3. The defendant was thereafter, on July 13, 1989, sentenced to death by the trial court as to Counts I and II (premeditated murder in the first degree and felony murder, respectively) and to terms of incarceration on the remaining counts, to run concurrently with the death sentences.

On July 14, 1989, the defendant filed a timely notice of appeal in the circuit court to the Supreme Court of Florida. Upon consideration of the appeal, this Court affirmed the convictions as to all counts, affirmed the sentences as to Counts III-VII, but reversed and remanded regarding the death sentences imposed in Counts I and II due to the failure of the trial court to grant the defendant a continuance of the penalty phase portion of the capital proceeding. See Wike v. State, 596 So. 2d 1020 (Fla. 1992).

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1 There is some confusion regarding whether the defendant was effectively given two death sentences; that is, regarding Counts I (charging first degree premeditated murder) and II (charging felony murder). See, for example, Wike v. State, 596 So. 2d at 1020 (Fla. 1992), where this Court references merely a "sentence of death." This would seem to indicate that the defendant could have only been sentenced to death as to Count I -- not Count II. Out of an abundance of caution, however, the defendant specificially sought and continues to seek to have set aside any and all convictions, judgments and sentences, including death sentences, imposed against him.

The Second (Penalty Phase Only) Trial

In December 1992, a second penalty phase trial with a different judge and jury was held in circuit court again in Milton. At the conclusion of that trial, the jury unanimously (12-0) recommended that the death penalty be imposed. The trial court, Hon. Paul A. Rasmussen, Circuit Judge, following the jury's advisory opinion, sentenced the defendant to death. After filing a timely notice of appeal of the death sentence(s) imposed in the second trial, this Court, on November 23, 1994, in Wike v. State, 648 So. 2d 683 (Fla. 1994), reversed the trial court's imposition of the death sentence(s) because the defendant had been denied the right, per Florida Rule of Criminal Procedure 3.780(c), to make the closing argument during the penalty phase of the trial. Rehearing was denied on January 25, 1995.

The Third (Penalty Phase Only) Trial

In a third penalty phase trial with Judge Rasmussen presiding, again in Milton, a new jury recommended the death penalty by a vote of 12-0. The trial court followed the recommendation and sentenced Mr. Wike to death. An appeal to the Supreme Court of Florida followed. In Wike v. State, 698 So. 2d 817 (Fla. 1997), this Honorable Court, on July 17, 1997, affirmed the death sentence. The defendant filed a timely petition for writ of certiorari in the United States Supreme Court. That petition was denied on January 12, 1998. In Supreme Court of Florida Case Nos. 82,322, 23 FLW S363 (6/25/98), and/or 92,026, 23 FLW S363 (6/25/98), the court

tolled the time for Mr. Wike to file a post conviction motion to vacate his judgments and sentences per the provisions of Florida Rule of Criminal Procedure 3.850 and 3.851 -- and the time for making a public records demand per Florida Rule of Criminal Procedure 3.852 through and until October 1, 1999.

The Postconviction Proceedings in the Trial Court

On January 8, 1999, the defendant filed with the trial court a complete, 15-claim (R 12-57) Motion to Vacate and Set Aside Judgments and Sentences per the provisions of Florida Rule of Criminal Procedure 3.850.[2] (R 1-105) On January 14, 1999, the trial court ordered the state to file a response. (R 106) On April 13, 1999, the state served a response to the 3.850 motion. (R 107-122) On November 8, 1999, the trial court conducted a Huff hearing in order to determine which of the 15 claims set forth in the 3.850 motion required an evidentiary hearing. On March 6, 2000, the trial court rendered an order determining that six of the claims required an evidentiary hearing. The six claims were:

§ Claim VII -- Failure to move to suppress illegal search and seizure;

§ Claim VIII -- Failure to investigate witnesses and present alibi witnesses;

§ Claim IX -- Failure to move for change in venue;

§ Claim X -- Failure to object to absence of Defendant at critical stages of trial;

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2 Claim XV is mislabeled on pages 56 and 57 of the 3.850 motion as Claim XIII.

§ Claim XI -- Failure to have the defendant present at side bar conferences; and

§ Claim VIX -- Failure to present a proper case with regard to the third penalty phase trial.

(See Exhibit A attached to Order (R 195-389) denying 3.850 motion.)

On April 19, 2000, the trial court presided at an all-day evidentiary hearing regarding those claims. On September 27, 2000, the trial court rendered a final order denying the 3.850 motion on the merits. (R 195-537) On that same day, within just a few hours after the Order denying the 3.850 motion was rendered, the defendant filed a timely notice of appeal in the circuit court to this Honorable Court. (R 538)

Statement on Jurisdiction

This is a direct appeal from a final order of the Circuit Court of the First Judicial Circuit of Florida rendered on September 27, 2000 (R 195-389), Hon. Paul A. Rasmussen presiding, which denied the defendant's Florida Rule of Criminal Procedure 3.850 motion to vacate the judgments of guilt and sentences, including the death sentence(s), rendered against him. This Honorable Court has jurisdiction per the provisions of Article V, Section 3(b)(1), Florida Constitution; and Florida Rule of Criminal Procedure 3.850(g), which provides, in part, that

> "(a)n appeal (from the denial of a 3.850 motion[3]) may be taken to the appropriate appellate court from an order entered on the motion as from a

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3 Words in parentheses added.

final judgment on application for writ of habeas corpus."

See Demps v. State, 515 So. 2d 196 (Fla. 1987).

The Basic Facts of the Case as Reported in part by the Supreme Court of Florida in Wike v. State, 596 So. 2d 1020 (Fla. 1992)

The facts as found by the Supreme Court of Florida in Wike v. State, 596 So. 2d 1020 (Fla. 1992), reflect that, at approximately 6:30 a.m. on September 22, 1988, a couple found eight- year old Sayeh Rivazfar alongside a rural road in Santa Rosa County. Sayeh was waving one hand and held the other to her throat. The couple noticed that Sayeh's throat was cut and immediately drove her to a store to call for help. During the drive, Sayeh told the couple that a man had cut her. She said that the man had taken her and her sister from their home and to the woods where he cut her throat and killed her six-year old sister, Sarah. After the couple questioned Sayeh about the vehicle, Sayeh was asked if she knew anyone with that type of car, and Sayeh told them that it belonged to a man named Ray. Later at the hospital, it was determined that Sayeh suffered a cut throat and two lacerations to her vagina which were consistent with forced penetration.

A search for Sarah Rivazfar began shortly after Sayeh was found. Sarah's body was found in the woods about seventy-five feet from the dirt road where Sayeh was picked up. Sarah's hands were tied behind her back and her throat had been cut. Crime scene technicians recovered several

items of evidence from three separate locations near the area where the body was found. These included pieces of shirt material, tire tracks and blood stains. Based upon the information investigators gathered from Sayeh and her mother, they determined that the man named Ray was a suspect. Officers immediately went to the residence of Alice Ober, Mr. Wike's mother. From neighbors, they learned that an elderly couple, a thirty-year old man, and a child lived in the house. They also learned that the elderly man was confined to a wheelchair. Parked in front of the house was an older model green Dodge automobile with a dent on the side, which fit the description given by Sayeh and her mother as being Wike's car. A computer check revealed that the car was registered to Raymond Wike. Although no one answered when an officer rang the front doorbell, another officer heard movement inside. The officers had the dispatcher call the house. A man named "Ray" answered. He was warned to come outside with his hands on his head or else. When he did, the officers arrested him on the spot. Then the officers conducted a sweep of the house to determine if there were other occupants. After the sweep, the officers obtained a search warrant, searched the house and the car, and seized several items of evidence from each. The automobile was also seized.

Mr. Wike was indicted for murder, attempted murder, sexual battery, and kidnapping. Counts I and II charged premeditated murder and felony murder, respectively, for the

death of Sarah. Counts III and IV charged the kidnapping of Sarah and Sayeh. Count V charged sexual battery of Sayeh, and Counts VI and VII charged attempted premeditated murder and attempted felony murder of Sayeh.

At trial, Patricia Rivazfar, the girls' mother, testified that she and her children had known Ray Wike for a little over a year. Evidence seized from Wike and his vehicle established that:

§ Semen stains from a type "A" secretor were found on the torn pink bathing suit found in the car;

§ A child's sock found on or in the car had type "O" blood stains, matching Sayeh's type;

§ The car seat material had type "O" blood stains, as did the underpants that Sayeh wore;

§ Other blood stains matching Sarah's type "O" blood were found on the pine needles obtained from the scene where Sarah's body was located, on a tennis shoe (a single drop), and on a blue blanket seized from the carport at the defendant's parents' residence; and

§ Wike, being a type "A" secretor, could have contributed to the semen stains found on various items in the car.

Further DNA testing of the blue blanket identified the type "O" blood found as coming from Sayeh. Additionally, a hair expert testified via videotape that, from a piece of torn material found at the scene, she found two head hairs that were consistent with Wike's hair. She also testified

that two pubic hairs consistent with Wike's were found, and that other head hairs were found consistent with the hair of Sarah and Sayeh, on the blue blanket. An unidentified bleached hair was found clutched in one of Sarah's hands. A single head hair consistent with Wike's was found on both Sarah's and Sayeh's underpants.

Fingerprint evidence was presented that established that two palm prints matching Sayeh's were found on the trunk of Wike's car. One of these prints was made in blood or a substance of a high protein content. Two palm prints (in the position that hands would be expected to make in closing the trunk) matching Wike's were located on the edge of the trunk. These prints were also made in a substance of high protein content. An expert in tire track comparisons testified that plaster casts and photographs of the tire tracks found at the scene matched the tires from Wike's car.

Sayeh testified that she and Sarah went to bed on September 21, 1988, around 8:00 p.m. She explained that they both wore their clothes to bed since they were sometimes late for the bus in the morning. She stated that she woke up in a car parked in front of her house and that she thought she recognized the man's voice as her mother's friend, Ray. Since she was not fully awake, she went back to sleep. Furthermore, she stated that the man put Sarah in the back seat of the car and, when she asked for her mother, he told her that her mother was coming. Sayeh remembered traveling on a paved road which then turned into a dirt road. Sayeh

also stated that when they stopped, the man raped her on the trunk of the car. Afterwards, they got back into the car and proceeded to a different location, where they stopped again and walked in the woods. At that point, the man pulled a knife with finger grips on it, told Sayeh to say a prayer, then cut her throat with the knife. She explained that Sarah was screaming and that the man cut her throat and left.[4]

Sayeh untied herself and walked along the road. She was found and the nature of her injuries discovered. She also said that "Ray" had cut her. With this information, the police soon went to Wike's house where they arrested him. He denied the kidnappings, the sexual battery, the attempted murder, and the murder.

The Defendant's Version of His Whereabouts and Activities on the Night of September 21, and the Morning of September 22, 1988

Mr. Wike's version of his whereabouts around the time of the homicide and associated crimes of conviction are set forth on pages 10-12 of his Florida Rule of Criminal Procedure 3.850 motion. (R 010-012) In essence, Wike stated that he got off work at about 4:00 p.m. on September 21 and went to his mother's residence, where he stayed until about 6:00 p.m. He then went to the RaceTrac convenience store and bought gas. From there he went to Frank Freeman's residence in Milton, Florida. Some time between 9:00 p.m. and 10:00 p.m., the defendant went to the residence of Bob Smith in

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[4] Under no circumstances does the defendant agree with the facts as set out in the Court's decision referenced above.

Pace, Florida. The defendant next went to a bar between Pace and Milton, had a few beers, and left there around 11:00 p.m. or 11:30 p.m. The defendant then went back to the Racetrac convenience store and gas station, where he spoke with one Tara Leonard. Ms. Tanza Raye Smith, 8728 Lynn Road, Milton, Florida, saw the defendant buy gas there and talking with Ms. Leonard. Thereafter, the defendant stopped at a bar ("Fred's") in Milton, Florida, and spoke with Ms. Glenda Hilliard. The defendant next went to the Silver Eagle Lounge in Pensacola until about 1:30 a.m. on the morning of September 22, 1988. While at the Silver Eagle Lounge, he made several (three) phone calls and finally contacted Ms. Angela Faulk Cooper. He then drove his car a short distance down the highway to the Scenic Hills Lounge. At about 1:15 a.m. on the 22nd, Ms. Faulk Cooper picked him up from the Scenic Hills Lounge parking lot and took him to her residence in Pensacola, Florida, where he stayed until about 5:45 a.m., at which time she took him back to the Scenic Hills Lounge where he got his car and then drove back to his parents' residence in Milton. (R 10-12)

Statement of the Facts Presented during the Florida Rule of Criminal Procedure 3.850 Evidentiary Hearing

The first witness to testify during the 3.850 hearing was Mrs. Alice Ober, the defendant's mother.[5] She testified that in September of 1988 she was living in Santa Rosa County with her husband, Mr. Dallas Ober. (EH 10, 11) She advised

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5 By agreement of the parties and with the permission of the court, Ms. Ober testified by telephone.

that she was not present when law enforcement officers came to their residence with a search warrant and asked Mr. Ober for permission to search the premises. (EH 11) She added that Mr. Ober could not read or write. (EH 11, 12) She offered, as an example, the fact that she would have to write out checks for him, and he would print his name. (EH 13)

Mrs. Ober indicated that Mr. Wike's trial counsel, Mr. (now Circuit Judge) Terry Terrell, was aware of Mr. Ober's inability to read because, for example, when they (Mr. Terrell, Mr. Ober and Mrs. Ober) were at the Ober residence, Mr. Ober would hand her legal papers Mr. Terrell had for them and she had to read them to Mr. Ober. (EH 13, 14)

Mrs. Ober clarified her testimony on direct by stating that, prior to the hearing on the motion to suppress some of the evidence seized at her residence, she did not inform Mr. Terrell that Mr. Ober could not read. As indicated above, that fact came out only much later, when the Obers were at Mr. Terrell's house prior to the trial and Mr. Ober was not able to read and sign the papers Mr. Terrell had for him. (EH 13) She stated that Mr. Wike had asked Mr. Ober to be present at the hearing on the Motion to Suppress Evidence; however, the state had asked Mr. Ober to stay at home by the phone and that they would call him if they needed him. (EH 21)

Mrs. Ober testified that she was not able to attend the original trial because she had a nervous breakdown. (EH 14) She indicated that the only discussion they (she and her

husband) had with Mr. Wike's attorney was a long meeting (of 10 or 11 hours) just prior to the trial. (EH 14) She stated that there was no discussion regarding Mr. Wike's alibi during that meeting. (EH 15)

Mrs. Ober testified that the child victims and her mother and sister were on a friendly basis with her and her family and visited their residence on several occasions. (EH 15) She added that Ms. Rivazfar and Mr. Wike were dating. (EH 16) She added that Ms. Rivazfar told her that she was in a contested custody battle with her ex-husband, and was afraid of losing her children to him. (EH 19) She said that Ms. Rivazfar told her, "I'd rather see my kids dead before that happens." (EH 19) She stated that she relayed that information to Mr. Terrell. (EH 19)

On cross examination, Mrs. Ober stated that Mr. Ober told her that the evening after the search of their residence by law enforcement, he was not given a search warrant by law enforcement, and that he was only handed a search warrant later that night when he went to the jail to visit Mr. Wike. (EH 23)

The next witness called was Mr. Warfield Raymond Wike, the defendant. As to Claim X of the 3.850 motion, the defendant testified that he was not present during certain critical stages of the proceedings (EH 27), including the following:

§ At the arraignment hearing. (EH 27)

§ At the docket calls on January 19, 1989, March 23, 1989, and April 4, 1989. (EH 28) In this regard, Mr. Wike testified that he wanted to be present at his docket calls, never waived his right to be present and did not give his attorney permission to waive his right to be present. (EH 28);

§ When the trial began on June 12, 1989, and at the beginning of each trial day thereafter. (Instead, according to Mr. Wike, he was brought in to the courtroom about lunch time). (EH 29) Mr. Wike testified that he based his testimony in this regard on his reading of the trial record. (EH 30)

§ For a major part (the morning sessions) of the proceedings held on June 17 and 18, 1989, during the actual trial. Mr. Wike stated that he was only present after the lunch break on these dates. (EH 31) Again, Mr. Wike testified that he did not waive his right to be present on these occasions and did not give his attorneys permission to waive that right on his behalf. (EH 31)

As to Claim XI of the 3.850 motion (that Mr. Wike was not present at certain sidebar conferences), Mr. Wike testified that there were at least 10 occasions during the first trial -- and several other occasions during the third penalty phase trial -- that he had wanted to be present at sidebar but was prevented from doing so. (EH 32) He added that he never waived his right to be present at these sidebar

conferences, nor did he give his attorney permission to waive that right. (EH 32)

As to Claim IX as set forth in the 3.850 motion (regarding the issue of pretrial publicity and the claim that his trial counsel was ineffective for not seeking a venue change), Mr. Wike stated that, during the time he was held at the Santa Rosa County Jail, there was a substantial amount of local television news about the crime he was charged with committing and his alleged culpability for same. (EH 33, 34) He further stated that the news stories were quite inflammatory. (EH 35) Mr. Wike stated that, notwithstanding the pretrial publicity, his attorney never filed a motion to change the venue of the trial from Santa Rosa County. (EH 43)

As to Claim XV, regarding alleged exculpatory evidence allegedly kept from him and his counsel, Mr. Wike testified that there were about 25 rolls of film which he felt should have been introduced at trial. (EH 44) He stated that the pictures would show that he was on friendly terms with Ms. Rivazfar and her children, and that there were pictures of his alibi witness, Ms. Angie Faulk Cooper. (EH 44-46) As indicated above, Mr. Wike claimed that Ms. Faulk Cooper could testify that she picked him up at the Scenic Hills Lounge early in the morning on the day of the crime and spent that night with him. (EH 12)

Kathy Desmond was the next witness. (EH 81-85) She knew Mr. Wike before the date of the offenses committed in this case. (EH 81) She indicated on direct and cross-

examination that she did not know whether Mr. Wike was familiar with the Allentown area. (EH 83) However, on redirect examination, she indicated that "he had gotten lost" when attempting to find the Point Baker area of the county. (EH 84)

Ms. Angela Faulk Brown Cooper was the next witness. (EH 85-91) Mr. Wike asserted in the 3.850 motion that she was an alibi witness for him. (EH 12) Ms. Cooper indicated that she was living in Pensacola on or about September 22, 1988. (EH 86) She acknowledged that she had known Mr. Wike before the crimes were committed, but insisted that she had told him, some three weeks before the incident, that he could not come to her residence. (EH 87) She added that he had come over to visit her until she told him not to return. (EH 90) She admitted that their relationship had been an intimate, albeit brief, one. (EH 90) Ms. Cooper stated that she had been interviewed by law enforcement agents after the crimes in this case were committed, and advised the officers that she could not offer Mr. Wike an alibi. (EH 87) She insisted that, on September 22, 1988, the defendant was not with her. (EH 90, 91)

Jim Spencer is a deputy with the Santa Rosa County Sheriff's Office. (EH 92) He is one of the officers who served the search warrant at the residence owned by Dallas Ober. (EH 92, 93) Deputy Spencer testified that he obtained Mr. Ober's consent for the search. (EH 93-95) In particular, he deputy stated that he read the search warrant to Mr. Ober

and that he (Mr. Ober) then gave his consent for the search of the residence. (EH 93) Deputy Spencer also obtained a written consent-to-search statement from Mr. Ober. (EH 93) On cross-examination, the deputy was presented with testimony he had given in a pre-trial hearing. (EH 96, 97) In the course of that testimony, Deputy Spencer was asked, "Did Mr. Ober, did you read that form to Mr. Ober or allow him to read the form?" (EH 96) Mr. Spencer answered by stating, "I allowed him to read the form." (EH 96) Nevertheless, the deputy insisted that Mr. Ober had the ability to read. (EH 97, 98)

James Martin, an investigator with the public defender's office, was the next witness. (EH 102) He testified that Mr. Wike was represented at the first trial by Randy Etheridge and Hon. Terry Terrell. (EH 104) He noted that he interviewed Mr. Wike several times early on in the proceedings, that they discussed a possible alibi defense and that Mr. Wike did not tell him that he had been with Ms. Faulk Cooper on the night of the abduction of the young girls. (EH 109, 110) However, shortly before trial, Mr. Wike indicated that Ms. Cooper might be an alibi witness for him. (EH 110, 111) A September 27, 1988 audio tape of one of Mr. Martin's interviews with Mr. Wike was made a part of the record. (See State's Exhibits 3A and 3B in evidence in the 3.850 hearing.) During the interview, Mr. Wike describes his activities on the night before the children were abducted, as well as his activities the next day. (EH 208-

226) He does not reference any contact with Ms. Cooper during that time period.

Mr. Martin testified that he tried to locate witnesses to support the client's alibi witness to no avail.[6] (EH 112) In particular, Mr. Martin was able to corroborate Mr. Wike's presence at the Cove Tavern from about 10:00 p.m. until about 11:00 p.m., and at the Silver Eagle Saloon from around midnight until around 1:15 a.m. (EH 112, 113) However, he could not find anyone to verify Mr. Wike's whereabouts after about 1:15-1:30 a.m. (EH 114) Later, in September of 1992, Mr. Martin located Angie Faulk Cooper. (EH 115) Ms. Cooper advised Mr. Martin that prior to the "incident," she told Mr. Wike that she did not want to see him and that if he persisted, she would contact law enforcement. She insisted that she was not with Mr. Wike on September 21 or 22, 1988. (EH 115, 116)

Hon. Terry Terrell was the next witness. (EH 131) He represented Mr. Wike during his first trial in his capacity as the circuit's Chief Assistant Public Defender. (EH 132) He was questioned on direct examination regarding several issues, including the venue issue. (EH 132) He acknowledged that in most high profile cases, his normal practice was to seek a venue change. (EH 133) He also acknowledged that, prior to trial, he obtained some 50 affidavits in support of a venue change. (EH 133) On March 23, 1988, he met with Mr.

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6 As we show below, both Mr. Martin and Judge Terrell, Mr. Wike's trial counsel, were mistaken about the true nature and extent of the alibi defense.

Wike to discuss the venue issue, and met with him again regarding same on May 18, 1988. (EH 134) According to Judge Terrell, Mr. Wike told him that he (Wike) did not want to waive venue. (EH 134) Judge Terrell met with Mr. Wike again on June 2, 1988, and found that Mr. Wike had not changed his mind about keeping the case in Santa Rosa County. (EH 134) Thus, no change of venue motion was filed. (EH 135) Judge Terrell added that, given the defendant's decision, he was careful to voir dire the potential jurors carefully as to the extent that they might be impacted by pretrial publicity. (EH 136)

As far as whether Mr. Wike was present for various court appearances, Judge Terrell indicated that he would rely on what the clerk's notes indicated. (EH 136, 137) He added that he made sure that Mr. Wike was kept informed of what was going on as they proceeded. (EH 137) He said that he presumed that Mr. Wike was present for major hearings in the case. (EH 138) As far as the trial itself was concerned, Judge Terrell indicated that he was confident that Mr. Wike was present for all trial sessions, and that he would have objected had he not been. (EH 139)

Judge Terrell noted that Mr. Wike was the only witness called on behalf of the defense at trial. (EH 141) It was felt, according to the witness, that this was the best strategy, given the lack of alibi witnesses who could account for Mr. Wike's whereabouts at the time the crimes were

committed and the desire to have rebuttal closing argument. (EH 140-143)

Judge Terrell added that he met with the Obers at some length on Good Friday in 1989. At no time did the Obers indicate that Mr. Ober was illiterate. (EH 144)

On cross-examination, Judge Terrell stated that it was his recollection that the abduction of the children occurred at some time substantially after 1:15 a.m. on the morning of September 22, 1988. (EH 147) With regard to the venue issue, he stated that Santa Rosa County was a small one (EH 148); that the affidavits he obtained were to the effect that it would be difficult for Mr. Wike to get a fair trial in that county (EH 149); that he had attended death penalty legal educational programs which emphasized the need for a venue change in high profile murder cases (EH 150); that Santa Rosa County was a "very conservative law and order community" (EH 151); and that he had an obligation to try to convince Mr. Wike that he was making a mistake about not seeking a venue change. (EH 151) However, according to Judge Terrell, Wike "had a very clear, a desire to try the case in Santa Rosa County." (EH 154) Judge Terrell indicated that Wike told him that he (Mr. Wike) had "something up his sleeve." (EH 155) From what Judge Terrell could determine, this had something to do with the fact that on "May 25 he (Wike) filed a Motion to Discharge." (EH 155)

Judge Terrell testified that Wike was not present at the various sidebar conferences which took place during trial.

(EH 156) He added that either Wike or his mother, Mrs. Ober, may have told him that the children's mother had made a statement to the effect that she would wish her children dead if she lost custody of them to their father, although he had no independent confirmation of such a conversation. (EH 157)

Deputy Larry Bryant was the lead investigator in the case for the Santa Rosa County Sheriff's Office. (EH 160) He acknowledged that, prior to the first trial, Mr. Wike requested that he be provided with several rolls of film which were found in his car at the time of his arrest. (EH 162) Mr. Bryant stated that he received the request and that the film was available but that no one from the defense team bothered to come by and pick it up. (EH 162, 163) Mr. Bryant had the film developed. (EH 163) Mr. Bryant denied that he had been advised of allegations of abuse by the parents of the victims until after Mr. Wike filed his 3.850 motion. (EH 164)

B. B. Boles, Esq. represented Mr. Wike in 1992 in the first retrial of the penalty phase (EH 171) and in the second retrial of the penalty phase in 1995. (EH 171) He stated that he traveled to Pennsylvania and Ohio, engaging in an extensive effort to discover mitigating evidence on Mr. Wike's behalf, but few members of his family and acquaintances were willing to be of any assistance. (EH 173-175) In fact, Mr. Wike's ex-wife expressed a great deal of animosity toward the client. (EH 180) He added that Mr. Wike made it difficult to get help from mental health experts

regarding his mental condition at the time of the crimes, since the client took the position that he did not commit the crimes. (EH 177)

Mr. Boles indicated that he filed a motion for a venue change in the 1992 case but the trial court denied it. (EH 181) He did not do so in the 1995 case since he felt that there was little chance that the trial court would grant it, especially since the court afforded the parties individual voir dire of prospective jurors. (EH 181, 182) Mr. Boles added that they had little difficulty in selecting what seemed to him an impartial jury. (EH 182, 186)

Mr. Wike testified on redirect. He insisted that he did not tell Judge Terrell that he wanted to keep the trial in Santa Rosa County. (EH 197) He said that he would have preferred a venue change regarding the third penalty phase trial. (EH 198)

SUMMARY OF THE ARGUMENT

Issue I:

The trial court erred when it denied Mr. Wike's venue argument set forth in Claim IX of the 3.850 motion. (R 205-208) This is so because, during the 3.850 hearing, defense counsel admitted that there was a tremendous amount of detrimental, prejudicial pretrial publicity generated against his client during the first trial in Milton. Defense counsel also acknowledged the existence of a very hostile "law-and order" community, understandably quite upset due to the brutal nature of the crimes Mr. Wike allegedly committed. Defense counsel went so far as to obtain some 50 affidavits from local residents to support a venue change motion (R 205, 206; EH 132, 133), yet he never even filed the motion. (R 206) Defense counsel's justification for not seeking a venue change was that Mr. Wike insisted on the case being tried in Santa Rosa County (R 206), an assertion that Mr. Wike emphatically denied. The trial court should have credited Mr. Wike's testimony in this regard and granted the 3.850 motion on this basis. It was reversible error (R 205-207) not to do so.

Issue II:

Defense counsel failed to present a viable alibi witness on behalf of Mr. Wike during his original state court trial. This issue is raised in Claim VIII of the 3.850 motion. Defense counsel knew or should have known that the children

were abducted shortly after midnight on September 21, 1988 or in the first few hours thereafter in the early morning of September 22, 1988. Several witnesses were available to testify that Mr. Wike was somewhere else during that period of time. Defense counsel knew about these witnesses who were available to testify. It was clearly prejudicial for defense counsel to ignore this critical, exculpatory evidence which, had it been presented to the jury, more than likely would have resulted in an acquittal on all charges. The court erred in not granting Mr. Wike's 3.850 motion (R 202) on this basis.

Issue III:

Defense counsel was ineffective for failing to assure that Mr. Wike was present at all critical stages of the legal proceeding in the case below. This included certain pretrial events as well as some of the proceedings during the jury trials themselves. The trial court erred (R 211) in not granting Mr. Wike postconviction relief on this basis.

Issue IV:

Mr. Wike's right to be present at side-bar conferences were violated during his third penalty phase trial. Defense counsel failure to protect the defendant's rights in this regard were violated since the error was not harmless. This is so in part because defense counsel agreed to allow at least one venire person who indicated opposition to the death penalty to be challenged for cause.

Issue V:

When considered in their totality, defense counsel's errors and omissions as described herein were so numerous, serious and measurably below the standard of conduct of competent criminal defense lawyers in the Santa Rosa County community, this state and the United States of America, that the defendant was denied his Sixth Amendment right to counsel and Fifth Amendment right to a fair trial. It was error for the trial court to deny Mr. Wike postconviction relief (R 218) in this regard.

ARGUMENT

Constitutionally Ineffective Assistance of Counsel Generally

This record supports Mr. Wike's contention that, for a variety of reasons, he was denied constitutionally effective assistance of counsel during his original jury trial, as guaranteed by Amendments VI and XIV, United States Constitution, and Article I, Declaration of Rights, Sections 2, 9, 16, 17, 21 and 22, Florida Constitution, and within the meaning of ineffective assistance of counsel in capital and other criminal cases as defined in Strickland v. Washington, 466 U.S. 668 (1984), Cherry v. State, 659 So. 2d 1069 (Fla. 1995), Garcia v. State, 622 So. 2d 1325 (Fla. 1993), Roberts v. State, 568 So. 2d 1255 (Fla. 1990), and Williams v. State, 673 So. 2d 673 (Fla. 1st DCA 1996). The evidence shows that the acts and omissions of trial counsel were far more than negligent acts. Instead, these acts, omissions, errors and deficiencies were so serious and significant that defense counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution. These deficiencies were well outside and significantly and measurably below the broad range of reasonably competent performance under the then prevailing (and today's prevailing) professional standards for attorneys in the First Judicial Circuit of Florida, this state and the United States of America. Furthermore, the evidence establishes that the deficient performance so affected the fairness and

reliability of the proceedings that the confidence in the outcome of same was seriously undermined and eroded. Under these circumstances, the Order of the trial court denying Mr. Wike's 3.850 motion must be reversed. See Strickland v. Washington, 466 U.S. 668 (1984).

Issue I: DID THE TRIAL COURT ERR WHEN IT DENIED MR. WIKE'S INEFFECTIVENESS CLAIM REGARDING TRIAL COUNSEL'S FAILURE TO SEEK AND OBTAIN A VENUE CHANGE FROM SANTA ROSA COUNTY (Claim IX of the 3.850 Motion)?

It did because, with regard to the venue issue, Mr. Wike had a fundamental constitutional right, per the provisions of Amendments V and XIV, United States Constitution, and Article I, Declaration of Rights, Sections 2, 9, 16, 17, 21 and 22, Florida Constitution, and a statutory right, per the provisions of Section 941.141, Florida Statutes, to a fair trial by a panel of impartial, indifferent jurors regarding the guilt and penalty phases of his capital trials and the advisory verdicts to be rendered by those jurors. Failure to accord Mr. Wike a fair trial by a panel of impartial, indifferent jurors would deny him a fair trial and due process of law, and did in fact deny him a fair trial in all three of his trials. See Irvin v. Dowd, 366 U.S. 717 (1961). If juror prejudice in Santa Rosa County would make it unlikely that he would obtain a fair trial by an impartial, indifferent jury there, Mr. Wike was entitled to have his trial held in another, impartial county. Such prejudice requires a change of venue when widespread public knowledge of the case in Santa Rosa County would cause prospective

jurors to judge the defendant with disfavor because of his character or the nature of the offenses. When that prejudice is shown, the remedy is a change of venue moving the trial from the proper, but partial county, to an impartial one. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979), where this Court held:

> "A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived opinions are the natural result."

See also Murphy v. Florida, 421 U.S. 794 (1975), and Oakley v. State, 677 So. 2d 879 (Fla. 2d DCA 1996). In Copeland v. State, 457 So. 2d 1016 (Fla. 1984), the defendant was convicted of first degree murder and sentenced to death. On appeal, he argued that, due to pretrial publicity, the trial court should have granted his motion for change of venue. The Court held that:

> "Appellant's motion was based on a showing that there was widespread public knowledge of the crimes throughout Wakulla County. Public knowledge alone, however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity. The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors, that may accompany the knowledge. It has long escaped strict definition:
>
> > 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient artificial formula.'"

See id. at 1016. The Copeland court, relying on language in Murphy v. Florida, 421 U.S. 794, 800 (1975), which quoted from Irvin v. Dowd, 366 U.S. 717, 723 (1961), held that

> "(i)t is the defendant's burden 'to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'"

See Copeland, 457 So. 2d at 1017. This Court held that the presumption of partiality is established by "showing that the general atmosphere of the community is deeply hostile to him." Id. at 1017. In this regard, this Court held,

> "Two ways to establish that such hostility exists are by showing that there was inflammatory publicity and by showing great difficulty in selecting a jury."

Id, at 1017. However, this Court found that Copeland failed to establish hostility by either of these methods because:

> "As was the case in Murphy, the pretrial publicity here was largely factual, rather than emotional, in nature and mainly occurred around the time of the crime and the investigation, several months before the trial. Also as in Murphy, here there was no great difficulty in selecting a jury. In Murphy the Supreme Court noted that (in contrast with Dowd where 268 of 430 veniremen were excused because they were inclined to believe the accused guilty) only '20 of the 78 persons questioned were excused because they indicated an opinion as to the petitioner's guilt.' 421 U.S. at 803, 95 S. Ct. at 2037, 44 L.Ed.2d 589. Similarly, in the present case only seventeen of the seventy potential jurors questioned were excused for possible bias either because they were related to the victim or because they had formed an opinion as to the defendant's guilt."

Id. However, this Court in Copeland found that the trial court did not err in denying the defendant's motion to change venue because he failed to meet the burden of raising a presumption of partiality through one of the above mentioned

methods. In the case at bar, however, the evidence of massive, prejudicial, emotional, inflammatory and hostile pretrial publicity was overwhelming. And, as the record in this cause clearly demonstrates, there was great difficulty in selecting a jury. However, defense counsel failed to present the obvious to the trial court, and instead played right into the hands of the prosecution by failing to even file a motion for change of venue.

These acts and omissions constitute ineffective assistance of counsel which deprived the defendant of a fair trial and due process of law.

The murder of a young girl and the attempted murder and sexual battery of her older sister constituted one of the most horrific events in the history of Santa Rosa County, Florida. One regional newspaper stated, "...officials say (it) is the most gruesome in Santa Rosa history." (See defendant's Exhibit 2 in evidence, Pensacola News Journal, June 12, 1989 p. 1B.) From the day that the crimes were discovered, the grisly facts of these senseless crimes as reported by the media shocked the Santa Rosa County community to the point of disbelief. For example, the same paper quoted the state attorney as saying, " 'We're not talking about a routine murder here, we're talking about a vicious murder,' Assistant State Attorney Kim Skievaski said." It quoted him further, saying that, "...the dead girl's throat was 'literally ripped open and her head almost decapitated.'"

(See defense Exhibit 2 in evidence, Pensacola News Journal, June 12, 1989, p. 1B.)

The pain and outrage of the community was constantly fanned on practically a daily basis by every development in the case, as in the superficially unemotional report that, "An 8-year-old girl who was injured in an attack last week was released from Santa Rosa Medical Center Tuesday, the day her younger sister - who was killed in the attack - was buried in Escambia County." (See defense Exhibit 2, Pensacola New Journal, September 25, 1988, p. 2B.) When the reality of the atrocities sank in, shock was replaced by intense, heartfelt pain for the children, and hatred, anger and loathing for the perpetrator. For example, an article written as if it was an editorial, entitled, "Newsman puzzled at brutality of Thursday morning killing," the reporter wrote, "I saw the Polaroid photographs Sheriff's deputies took of the girl; saw the ugly red gash on her neck; saw her lifeless eyes that will never witness another Christmas tree, never sparkle with her first prom dress, or wedding gown....I noticed...the deputies and corrections officers watching us (journalists, taking pictures of Wike), as if witnessing a sacrifice or a pack of jackals feeding on carrion, getting drunk on the blood." (See defense Exhibit 1, Press Gazette, September 26, 1988, p. 3A.)

When Wike was arrested and charged with the murder and related crimes, that shock, pain, and fear became focused squarely on him, and turned into community-wide contempt,

disgust, hatred and loathing against him -- as well as a virtually unanimous demand for swift, merciless justice. Calls by members of the Santa Rosa County community for the death penalty for Wike saturated the relatively small Santa Rosa County, Florida media coverage area. "Many people, having already tried and convicted him in their minds, want to bypass the legal process and hang him from the nearest oak tree." (See Defense Exhibit 1, Press Gazette, September 26, 1988, p. 3A.) The communal sense of outrage created by the events themselves, constantly fueled by the media reports, grew steadily from the time of the defendant's arrest and intensified markedly during the weeks surrounding his original trial. In this regard, we ask the Court to review in its totality the media coverage evidence introduced at the 3.850 hearing in Milton. (See for example, Defense Exhibits Composite 1, Composite 2, 3 and 4, in evidence in the 3.850 hearing.)

The media's coverage of the murder and associated crimes and Mr. Wike's culpability for them was overwhelmingly pervasive, inflammatory, often inaccurate, and one-sided against the defendant and prejudicial. Id. These included scores of television, radio and newspaper accounts of the gory details of the homicide. Id. Especially detrimental, as it would most likely not be allowed into the trial proceedings per the Williams Rule, was the defendant's prior criminal history. In sealing his presumed guilt, the Santa Rosa newspaper, the Press Gazette, reported for example:

> "The suspect...has been arrested on several charges in Ohio, Pennsylvania, Texas and Florida that include robbery, narcotics violations, drunk driving, assault, criminal mischief and trespassing. Ironically, authorities said, Wike has also been arrested on charges of sexual abuse of a child and indecency with a child in Texas, but that the charges were dropped."

(See Defense Exhibit 1, Press Gazette, September 26, 1988, p. 3A) The same article reported, "At the time of his arrest,...Wike was wanted for a violation of probation in Florida." Id. The Pensacola News Journal went into more specifics regarding the prior child abuse and indecency charges, writing:

> "In 1983, Wike was arrested in Harris County (Houston), Texas, on charges of sexual abuse of a child and indecency to a child. In February, 1984, prosecutors dropped the sexual abuse charge, but Wike was sentenced to 10 years probation on the indecency count. Later, he was arrested in Galveston County, Texas, on charges of indecency with a child, a case involving a preteen girl."

(See Defense Exhibit 2, Pensacola News Journal, September 24, 1988, p. 14A.)

As mentioned, many television and radio broadcasts and newspaper reports went far beyond conveying the facts of the tragedies and Mr. Wike's alleged involvement in them (which themselves were almost too horrible to imagine). The result was that the citizens eventually summoned for jury duty had been a captive audience of the media for many months, and therefore held very strong feelings of hostility, anger, hatred, fear and bias regarding Mr. Wike. See for example, defense Exhibits 1-4 referenced above.

Under the facts of this case and state of the law as outlined above, Mr. Wike's defense counsel had a fundamental legal obligation and duty, per the provisions of Amendments V, VI and XIV, United States Constitution, and Article I, Declaration of Rights, Sections 2, 9, 16, 17, 21 and 22, Florida Constitution, to insure and protect their client's right to a fair trial by a panel of impartial, indifferent jurors regarding the penalty phase of his capital trial -- by aggressively doing all those things reasonable, proper and necessary to obtain a change of venue. This included trial counsels' duty to

§ Understand and appreciate the obvious need for a change of venue;

§ Thoroughly research and understand the law in Florida regarding the defendant's right to a change of venue in appropriate circumstances, including the importance of establishing the presumption of prejudice based upon inflammatory pretrial publicity and difficulty in selecting a jury as a result thereof;

§ Diligently investigate the facts and circumstances related to this issue in this case;

§ Discover and gather the available evidence to establish the need for a change of venue in court;

§ Formally move the trial court for a change of venue in a proper and timely manner; and

§ Argue convincingly for the change of venue to the trial court, citing the appropriate evidence and legal authority.

Failure to perform these duties amounts to constitutionally ineffective assistance of trial counsel as a matter of fact and law. See Oakley v. State, 677 So. 2d 879 (Fla. 2d DCA 1996) in which a properly pled claim of "...ineffective assistance of counsel for failing to move for a change of venue..." was an appropriate subject for a post conviction motion filed per the provisions of Florida Rule of Criminal Procedure 3.850. See also Manning v. State, 378 So. 2d 274, 276 (Fla. 1979); Robinson v. State, 659 So. 2d 444, 446 (Fla. 2d DCA 1995) ("...trial counsel may be found to be ineffective for failing to object to the state's action during voir dire," and an allegation that a juror "...tainted the jury with racially biased statements" is enough to show prejudice); Williams v. State, 673 So. 2d 960 (Fla. 1st DCA 1996) (allowing a biased juror to remain on the jury was a proper basis for an ineffective assistance of counsel claim); and Wright v. State, 675 So. 2d 1009 (Fla. 2d DCA 1996) (failure to investigate facts of the case constituted a ground for postconviction relief based upon ineffective assistance of counsel).

Ineffectiveness Regarding Venue

In this case, trial counsel utterly and profoundly failed in the duty to protect the defendant regarding the need for a change of venue. That is, defense counsel:

§ Never filed a motion for a change of venue. (EH 135)

§ Failed to introduce in evidence the available data that existed to support such a motion. (EH 135)

§ Failed to contact experts who could have conducted surveys and testified to the court that there was such overwhelming prejudice in the Santa Rosa County community against the defendant that a venue change was necessary in order to insure Mr. Wike a fair trial by an impartial, indifferent jury. (EH 135)

Prejudice Regarding Venue

Trial counsels' ineffectiveness in not seeking a venue change was prejudicial. Mr. Wike's lead trial counsel, Hon. Terry Terrell, essentially admitted during the evidentiary hearing that a venue change was clearly necessary regarding the original trial. (EH 133-150) He acknowledged that in most high profile cases, his normal practice was to seek a venue change. (EH 133) He admitted that his files contained "numerous articles from the Pensacola News-Journal, Milton Press Gazette, and other papers in the region" about the case. (EH 133) His files also contained a "video tape" about the case. (EH 133) He also acknowledged that, prior to trial, he obtained some:

> "...50 affidavits from individuals that we obtained in anticipation of filing the motion which claimed or asserted individual opinions that Mr. Wike could not receive a fair trial."

(EH 133) Thus, as documented above, the evidence to prove the necessity of a venue change was available but, unfortunately for Mr. Wike, not utilized by trial counsel.

The United States Eleventh Circuit Court of Appeals, reviewing a Florida case, identified what constitutes prejudice when the alleged deficient performance is failure to protect the defendant's right to a venue change. In Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000), the court noted that "(t)he law on pretrial publicity as it relates to the necessity for a change of venue is clear. The standards governing this area:

> 'derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by a panel of impartial indifferent jurors. The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion for a change of venue.'"

citing Coleman v. Kemp, 778 F.2d 1487, 1489 (11th Cir. 1985). The Meeks court then stated, at 961:

> "In order to satisfy the prejudice prong of Strickland's ineffective assistance analysis, Meeks must establish that there is a reasonable probability that, but for his counsel's failure to move the court for a change of venue, the result of the proceeding would have been different. This requires, at a minimum, that Meeks bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if Meeks had presented such a motion to the court."

In other words, the test is not whether, had trial counsel effectively pursued a venue change and been granted one, the jury would have acquitted Mr. Wike or, upon conviction,

recommended a life sentence regarding the capital offense (and the trial court would have concurred in the advisory recommendation). That would be pure speculation and impossible to prove one way or the other. Instead, the test in this case is whether, had trial counsel properly prosecuted the venue change motion, there is a

> "...reasonable probability that the trial court would have, or at least should have, granted..."

such a motion. See Meeks, 216 F.3d at 961.

As far as presumed prejudice is concerned, as the 11th Circuit stated in Coleman, jury

> "(p)rejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held."

See Coleman, 778 F.3d at 1487, *citing* Rideau v. Louisiana, 373 U.S. at 726-7 (1963). The Coleman court added, citing Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), that

> "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, (jury) prejudice is presumed and there is no further duty to establish bias."

In the Wike case, as the record clearly shows, the pretrial publicity was extensive to the extent that it saturated the tightly-knit, conservative, "law and order" Santa Rosa County community. (EH 151) It was extremely inflammatory. Judge Terrell acknowledged with regard to the 50 venue affidavits that he had obtained:

"Q. And isn't it true that all of those affidavits were from pretty average people throughout the community? And they all indicated that it would be very difficult if not impossible for Mr. Wike to get a fair trial in Santa Rosa County?

A. Yes Sir."

(EH 149) When that highly inflammatory publicity was combined with the fear and loathing that Mr. Wike allegedly created by the very nature of the alleged unspeakable acts, Santa Rosa County became the worst place to try the case, and trial counsel were obligated not to let that happen. Thus, prejudice has been established in this case.

The Claim that Mr. Wike Waived His Right to a Venue Change

The trial court credited the testimony of Judge Terrell, who stated that, on March 23, 1988, and May 18, 1988, he met with Mr. Wike to discuss the venue issue. (EH 134) According to Judge Terrell, Mr. Wike told him that he (Mr. Wike) did not want to waive venue. (EH 134) Judge Terrell stated that he met with Mr. Wike again on June 2, 1988, and found that Mr. Wike had not changed his mind about venue. (EH 134) For this reason, no change of venue motion was filed. (EH 135) Judge Terrell added that, given the defendant's decision, he was careful to voir dire the potential jurors carefully as to the extent that they might be impacted by pretrial publicity. (EH 136) Mr. Wike, as indicated above, strongly denied ever giving his trial counsel permission to waive this remedy. (EH 196-198)

This Court is asked to reverse the trial court's finding in this regard and determine that Judge Terrell was mistaken because:

§ The state declined to put in evidence the notes upon which Judge Terrell relied in stating that his recollection was that Mr. Wike insisted on trying the case in Santa Rosa County. Thus, there is nothing to corroborate Judge Terrell's recollection that Mr. Wike insisted on being tried in Santa Rosa County; and

§ Common sense suggests that, in the interest of self-preservation alone, Mr. Wike would not have wanted to be tried in a county where there was so much public disdain and animosity directed against him.

For the reasons set forth above, this Honorable Court should reverse the trial court for its failure to grant Mr. Wike a new trial due to the constitutionally ineffective mishandling of the defendant's legitimate venue issue and the resulting denial of his right to be tried by a fair and impartial jury.

Issue II: DID THE TRIAL COURT ERR IN REJECTING MR. WIKE'S CLAIM THAT HIS TRIAL COUNSEL FAILED TO DEVELOP AND PRESENT A VIABLE ALIBI DEFENSE (Claim VIII of the 3.850 motion)?

Yes, the trial court did, because in Florida and the federal courts, it is undisputed that a defendant is entitled to a new trial when his or her counsel fails to investigate and present evidence of a viable alibi where one is available. See Torres-Arboleda v. Dugger, 636 So. 2d 1321

(Fla. 1994) (recognizing that failure to call an alibi witness could constitute ineffective assistance of trial counsel, but finding that there was no prejudice under the facts of the case); Chambers v. State, 613 So. 2d 118, 119 (Fla. 2d DCA 1993) ("The failure to call an alibi witness can constitute ineffectiveness"); Anthony v. State, 660 So. 2d 374 (Fla. 4th DCA 1995); Smith v. State, 481 So. 2d 988 (Fla. 5th DCA 1986); Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985) (failure to conduct meaningful pretrial investigation satisfies first prong of Strickland test); and Code v. Montomery, 799 F.2d 1481, 1484 (11th Cir. 1986) ("We conclude that, in this case, Stacy's failure to adequately investigate and present Code's alibi defense deprived Code of a fundamentally fair trial.")

As noted above, Mr. Wike has always maintained his innocence. (EH 47; R 010, 011) He claims that he specifically advised his counsel, prior to the original trial, that he had an alibi for the night of September 21, 1988 and the early morning hours of September 22, 1988. (EH 47)

According to Mr. Wike, on September 21, 1988, he was living out of his car near his mother and stepfather's residence in Milton. (R 110) He got off work that day about 4:00 p.m., central standard time, went to his mother's residence for awhile, and remained there until about 6:00 p.m. (R 011) Thereafter, he drove to the Racetrac convenience store and bought gas. (R 011) Next, he went to

Frank Freeman's residence in Milton, Florida. (R 011) At some point between 9:00 p.m. and 10:00 p.m. on the 21st, the defendant drove to the residence of Bob Smith in Pace, Florida. The defendant then went to a bar between Pace and Milton, had a few beers, and left there around 11:00 p.m. or 11:30 p.m. (R 011) The defendant then drove back to the Racetrac where he spoke with Tara Leonard. (R 012) Mr. Wike claimed that Tanza Raye Smith saw him there buying gas and talking with Ms. Leonard. (R 012)

Shortly thereafter, the defendant stopped at a bar ("Fred's") in Milton and spoke with Glenda Hilliard. (R 012) The defendant recalled that he next went to the Silver Eagle Lounge in Pensacola until about 1:30 a.m. on the morning of September 22, 1988. (R 012) While at the Silver Eagle Lounge, he made several phone calls and finally contacted Angie Cooper (then Angie Faulk, EH 46), a young lady whom he had been dating. (R 012) He then drove his car a short distance down the highway to the Scenic Hills Lounge. According to Mr. Wike, Ms. Cooper picked him up from the Scenic Hills Lounge parking lot and took him to her residence in Pensacola where he stayed with her until about 5:45 a.m. (R 012, EH 46) Ms. Cooper then took Mr. Wike back to the Scenic Hills Lounge, where he got his car and then drove back to his parents' residence in Milton. (R 012, EH 46) Mr. Wike was especially interested in Ms. Cooper testifying regarding his alibi, noting in this regard:

"Q. All right. And now, what would Angie Faulk[7] have testified to that would have supported your theory of innocence?

A. That she picked me up at Scenic Hills Lounge early in the moring after I had called her. She brought the van down, picked me up, my car was left at Scenic Hills Lounge.

We went to her place. She moved the kids, her two boys from her bedroom to the couch. And we went to bed. And we got up that morning. She dropped me off back at my vehicle at the lounge. And I was running late."

(EH 46)

As indicated above, Ms. Cooper acknowledged during the evidentiary hearing that she had known Mr. Wike before the crimes were committed. (EH 86) However, she stated that, some three weeks before the homicide, she told Mr. Wike that he could not visit her residence any longer. (EH 87) She admitted that their relationship had been an intimate, albeit brief, one. (EH 90) Ms. Cooper stated that she had been interviewed by law enforcement agents after the crimes in this case were committed, and advised the officers that she could not offer Mr. Wike an alibi. (EH 87) She insisted that on September 22, 1988, the defendant was not with her. (EH 90, 91)

Mr. Wike contends that his trial counsel should have been more aggressive in terms of questioning Ms. Cooper about his whereabouts in the early morning hours of September 22, 1988. This is so because it is apparent from her 3.850 hearing testimony that she was very embarrassed about being

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7 Mr. questioner (the undersigned) is referring to Ms. Cooper by her former last name.

associated with the defendant and, more than likely, was not being candid. But even if trial counsel could be forgiven for not calling Ms. Cooper as an alibi witness, it is clear that there were other witnesses who could have testified that Mr. Wike was somewhere other than the crime scene (the Rivazfar's residence) at the time of the initial abduction.

During his testimony at the 3.850 evidentiary hearing, Judge Terrell stated (when asked about the specifics of a possible alibi defense) that "...the relevant timeframe in this case..." was "...after midnight. And in the hours of the, after midnight, 1:00 somewhere in that timeframe." (EH 143, emphasis added.)[8] This is critical. Trial counsel can be excused for not calling Ms. Cooper as a witness regarding Mr. Wike's whereabouts at around 5:00 or 6:00 a.m. on the morning of September 22, 1988, which is about the time that the actual attacks on the child victims occurred, since she apparently would have denied that Mr. Wike was with her then. However, as referenced above, there were several witnesses who could testify as to Mr. Wike's whereabouts shortly after midnight on September 21, 1988, which, according to Judge Terrell, was the "timeframe" during which something harmful to the children initially took place. (EH 143) Stated differently, Mr. Wike would not have needed an alibi (from Ms. Angie Cooper) for his whereabouts at about the time that the children were assaulted (shortly before they were

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8 In fairness, Judge Terrell indicated that he had not had much of an opportunity to review his notes re. this matter.

discovered at about 6:30 a.m.) if he could establish an alibi for the earlier time during which they were kidnapped from their home.

It stands to reason in this regard that, when Judge Terrell referenced the time of 1:00 a.m. on the 22nd, he was alluding to the time when the children were abducted, not the later time when the murder and sexual assaults occurred. In other words, although admittedly the testimony of Judge Terrell is somewhat vague on the issue, it appears that defense counsel may have been concerned only about the time that the traumatic injuries to the children occurred, which must have been much later than 1:00 a.m. on the morning of September 22, 1988[9], not the much earlier time that morning (shortly after 1:00 a.m.) when they were abducted, with regard to the presentation of an alibi defense. Trial counsel should have realized that, if he could show the jury that Mr. Wike was somewhere else when the children were first abducted, reasonable doubt of his guilt would have been established and his client would have had an excellent opportunity for an acquittal on all charges.

Mr. Wike's alibi defense is strengthened by the facts and circumstances surrounding the manner in which the children were initially abducted. This is so, in part,

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9 The children were discovered at about 6:30 a.m. on September 22, 1988 along an isolated road several miles from their home. (EH 147) One of them, Sayah, although bleeding, was still alive, although she had been severely injured. She had been raped and her throat cut. See Wike, 596 So. 2d at 1021 (Fla. 1992).

because it appears that whoever abducted the children did not immediately take them from their residence and physically assault them. On the contrary, according to Sayeh, she was first taken from the house and placed in the abductor's car where she fell back to sleep. Her sister, Sarah, was later brought to the car. At some point in time thereafter, they were driven in the abductor's car from the residence. See Wike, 596 So. 2d at 1022. It is, therefore, quite possible that a significant amount of time passed between the initial abduction (that is, when they were taken out of the house) and the assaults. If that is the case, then it is clear that Judge Terrell was right when he indicated that the crimes commenced (that is, the abductions first occurred) shortly after 1:00 a.m. on September 22, 1988. And if that is true, Mr. Wike had a very credible alibi since, as noted, he was seen by Glenda Hilliard at "Fred's" Bar as late as 11:50 p.m. on September 21, 1988 (EH 112), and, after that, was seen by Tammy Osborn at the Silver Eagle Lounge (EH 146) as late as 1:15 a.m. on September 22, 1988.

The defendant suffered prejudice in this regard because, by Judge Terrell's own admission and as stressed above, he knew that his investigator, Mr. James Martin, had interviewed several witnesses, including Glenda Hillard and Tammy Osborn, who could place Mr. Wike at "Fred's" Bar and/or the Silver Eagle Saloon after midnight on the 21st and until around 1:15 a.m. on the morning of September 22, 1988. (EH 112, 113, 146, 147) Yet he did not call Ms. Hillard or Ms. Osborn as

alibi witnesses. When asked about this on cross-examination, Judge Terrell indicated that, upon reflection, his best recollection was that both the abduction and the assaults took place much later than 1:00 a.m. on the morning of September 22, 1988. (EH 147) Judge Terrell must have been mistaken in this regard since according to his own investigator, Mr. Martin, the children were kidnapped "around 2:00," according to what he (Martin) was told by law enforcement authorities. (EH 120, 122.)

Mr. Martin added that Angela Jones could place Mr. Wike at the Cove Tavern until 11:00 p.m. on the night of September 21, 1988. (EH 112) Ms. Jones did not testify either. As referenced above, Mr. Martin also contacted Glenda Hillard, who told him that Mr. Wike was still at Fred's Lounge when she left that establishment right before ("...at 2350...") midnight on the 21st. (EH 112) Ms. Hillard was not called to testify. Carolyn Neal told Mr. Martin that Mr. Wike arrived at the RaceTrac at midnight on September 21, 1988. (EH 113) She was not called as a witness. Finally, as stated above, Mr. Martin interviewed Tammy Osborn, who told him that Mr. Wike had come into the Silver Eagle Saloon at about 11:45 p.m. on the 21st and stayed there until about 1:15 on the 22nd. (EH 120) Thus, Mr. Martin admitted:

> "Q. Isn't it true that by your own investigation you had witnesses such as Tammy Osborn who said that he was still at the Silver Eagle Saloon at 1:15 A M on the morning of the 22, right?
>
> A. That's the last time that she saw him."

(EH 120) She was not called to the stand by the defense.

In Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986), the defendant claimed that, at the time of the robbery for which he was convicted, he was a two and one half hour's drive away, and that he had at least one alibi witness to prove it. Although trial counsel knew that Code was relying on an alibi defense, he never asked the defendant's mother about his whereabouts on the day of the crime. The court found in this regard that, "...although Code's mother had no personal knowledge of Code's whereabouts on April 1, she could have provided him with leads regarding alibi witnesses." Id at 1483. Mr. Code's mother later contacted Ms. Estella Taylor, a person who said that she was with the defendant on the day of the crime. However, since Mr. Code's mother had not been told by trial counsel of the date of the robbery, she did not advise Ms. Taylor accordingly. In reversing Mr. Code's conviction, the court found that trial counsel was ineffective for not fully investigating the possible alibi defense, stating, in part:

> "...we conclude that a competent attorney relying on an alibi defense would have asked Code's mother if she could corroborate the alibi, would have subpoenaed a reluctant witness whom he thought could provide an alibi and would have asked either the witness or the defendant if there were other alibi witnesses."

Id.

In the case at bar, trial counsel should have been more thorough in terms of interviewing Ms. Cooper who, although admittedly a reluctant witness, probably knew more than she

was willing to tell regarding Mr. Wike's whereabouts in the early morning hours of September 22, 1988. Of much greater relevance to this proceeding, trial counsel should have concentrated on the time of the abduction (shortly after 1:00 a.m. on September 22, 1988) rather than the time the children were discovered (around 6:30 a.m. that morning). Had trial counsel done so, he would have realized that Mr. Wike had a strong alibi, he would have called called Tammy Osborne, Glenda Hillard, Angela Jones and Carolyn Neal as alibi witnesses, and, as a result, there is a distinct likelihood that Mr. Wike would have been acquitted. Failure to do so undermined the confidence in the outcome of the proceeding. Therefore, it was reversible error for the trial court in the 3.850 proceeding to set aside Mr. Wike's judgments and sentences.

Issue III: DID DEFENSE COUNSEL FAIL TO ASSURE THAT THE DEFENDANT WAS PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS DURING HIS ORIGINAL STATE COURT TRIAL AND DURING THE THIRD PENALTY PHASE TRIAL (Claim X of the 3.850 motion)?

Yes, counsel failed the defendant in this regard. Florida Rule of Criminal Procedure 3.180 expressly provides that the defendant "shall" be present at first appearance, when a plea is made, at any pretrial conference unless waived, at the beginning of trial including all aspects of jury selection, when the jury is present and when evidence is presented. Mr. Wike testified during the 3.850 evidentiary hearing that he was not present at arraignment on October 13, 1988, at docket calls on January 19, 1989, March 23, 1989 and

April 4, 1989, for at least part of jury selection on June 13, 1989, and for part of the jury trial on June 4, 1989, and June 15, 1989. (R 209) The trial court found, based upon the record, that some of Mr. Wike's assertions were refuted by the record. However, it was also judicially determined that Mr. Wike:

§ was not present for three docket calls (R 209);

§ may not have been present during the preliminary proceedings to qualify the venire (R 209);

§ was not present immediately after the general qualification of the jury and prior to jury selection (see Exhibit E3 attached to the trial court's order denying the 3.850 motion and R 210), during which time defense counsel raised an in-court identification issue and a request to sequester the jury[10]; and

§ may not have been present "...at the opening of trial on either June 14th or the second day of trial on June 15th."[11] (R 211) In this regard, see Savino v. State, 555 So. 2d 1237 (Fla. 4th DCA 1989). (Defendant's absence during presentation of witness testimony was reversible error.)

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10 The trial court acknowledged that it was error to exclude Mr. Wike from this proceeding. (R 210; see also Exhibit E3 attached to the trial court's order denying the 3.850 motion.)

11 The trial court includes a footnote at the end of this quote, to the effect that "(t)he record also does not indicate the Defendant's absence." (R 211) The trial court added: "However, a witness identified him in the courtroom sometime during the presentation of the evidence on June 15th."

Despite what clearly appears to be the mandatory requirements of Rule 3.180, the trial court denied Mr. Wike's relief, finding essentially that he had not suffered prejudice. (R 211) This was error because the trial court used a flawed analysis in arriving at its legal conclusion. That is, the trial court considered each occasion where Mr. Wike was absent from a certain court proceeding (or may have been absent from that proceeding) separately, not in their totality, citing Garcia v. State, 492 So. 2d 360 (Fla. 1986) and Coney v. State, 653 So. 2d 1009 (Fla. 1995). (R 210, 211) Furthermore, the trial court considered the prejudice which resulted in the context of what happened at that particular proceeding, not the importance of the trial proceeding itself. The trial court should have considered the occasions where the record clearly shows that Mr. Wike was absent (and where it was not certain that he was present) in their totality. It also should have considered the nature of the proceeding itself. Had the trial court used this analysis, it would have been clear that Mr. Wike, charged with first degree murder and a host of other serious felonies, was absent (or may have been absent) from his own trial on a substantial number of important occasions.

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court held that a defendant has a constitutional right to be present at all stages of his trial where his absence may thwart fundamental fairness. Surely, that would include the the actual trial (that is, where evidence is

being taken) itself. In Francis v. State, 413 So. 2d 1175 (Fla. 1982), solely on the basis of the fact that the defendant was absent (excused to use the restroom) during a portion of the jury selection process, the judgment and death sentence were reversed. During his absence, Francis' trial attorney, without the defendant's consent, waived the client's right to be present during the remainder of jury selection. In reversing, this Court stated:

> "Francis asserts that the exercise of peremptory challenges is an essential part of a trial and was particularly significant here where many of the potential jurors had expressed knowledge of his case and where a number of these prospective jurors actually knew that he had been convicted and sentenced to death previously for the same charge that they might be called upon to consider. He contends that he was not voluntarily absent from the selection process and that because this was a capital case, his counsel's waiver was not binding on him since he neither consented to this waiver beforehand nor acquiesced to it afterward. In fact, he maintains, a defendant cannot waive his right to be present in a capital case."

Id. at 1176. This Court agreed, stating,

> "Francis has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence....Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where a defendant's presence is mandated.

Id. at 1177.

In the case at bar, the state has not contended that Mr. Wike waived his right to be present at any stage of his

trial. However, if the state does so, we note these additional comments from the Francis decision:

> "Francis was absent during a crucial stage of his trial and his absence was not voluntary... His counsel had not obtained his express consent to challenge peremptorily the jury in his absence. His silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present... We are not satisfied beyond a reasonable doubt that this error in the particular factual context of this case is harmless.... The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant.... It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations....(W)e are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial."

Id. at 1178-9. It is clear, then, that there were far too many occasions where Mr. Wike was not present during various critical portions of his trial -- and that Mr. Wike's trial counsel was simply too cavalier about making sure that the client's right to be present at all stages of his trial was scrupulously preserved. Thus, the convictions, judgments and sentences must be reversed.

Issue IV: DID TRIAL COUNSEL FAIL TO ASSURE THAT THE DEFENDANT WAS PRESENT AT SIDE BAR CONFERENCES DURING THE THIRD PENALTY PHASE TRIAL, AND THEREBY RENDER INEFFECTIVE ASSISTANCE OF COUNSEL (Claim XI of 3.850 motion)?

Yes, he did. The trial court in the 3.850 proceeding conceded that the decision in Coney v. State, 653 So. 2d 1009 (Fla. 1995) was applicable to Mr. Wike's third penalty phase trial. (R 211) Coney holds that a defendant has a right to be present at bench conferences during jury selection. Defense counsel must advise the defendant of this right. See for example, Lee v. State, 744 So. 2d 539 (Fla. 1999), wherein this Court stated:

> "Lee alleges that his trial counsel was ineffective for failing to inform him of his right to be physically present at bench conferences during which pretrial juror challenges were exercised and for failing to object to Lee's exclusion therefrom. We reverse as to this issue only..."

Id. at 539. The constitutional right to be present is not a token right. Instead, the essential purpose of the right is to afford meaningful participation by the defendant in the jury selection process. See Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996).

In the case at bar, the trial court determined that any Coney violation that might have occurred was harmless, in part, because it appeared to the court from the record that Mr. Wike was absent only when challenges for cause, as opposed to peremptory challenges, were being exercised. (R 213) Be that as it may, the trial court committed reversible

error by not granting Mr. Wike's 3.850 motion based upon a Coney violation.

An examination of the record reveals, for example, that prospective juror Jones and his fellow jurors were asked whether they could be fair and impartial. (See the first page of Exhibit F-3[12] attached to the court's order denying the 3.850 motion.) Mr. Jones was given permission to approach the bench whereupon he told the court that his religious convictions prevented him from sitting in judgement of Mr. Wike. Id. Mr. Jones stated in part:

> "...the Bible -- the Bible tells me, I can't, Matthew 7:1 says I am not to judge and I can't judge this man because I don't know him. If I sit up there and bring a charge of guilty and you send him to prison and they kill him in prison he will go to hell if he has not repented for his sins."

(See Exhibit F-3, page 1, attached to the Order denying the 3.850 motion. Mr. Jones' comments appear to have been recorded on pages 43-45 of the original record on appeal of the third penalty phase trial.) Defense counsel made only a very cursory effort to rehabilitate Mr. Jones. Then, inexplicably, on the basis of Mr. Jones' comments, defense counsel, in Mr. Wike's absence, agreed that he (Jones) could be excused for cause.

The trial court must allow defense counsel to attempt to rehabilitate jurors who express opposition to the death

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12 These exhibits, attached to the trial court's order denying the 3.850 motion, are sometimes difficult to locate. They may also have been mistakenly mislabeled. For example, the trial court refers to this exhibit as D-3.

penalty on religious grounds. See, e.g., Willacy v. State, 640 So. 2d 1079 (Fla. 1994); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993); and O'Connell v. State, 480 So. 2d 1284 (Fla. 1985). This is so because the decision of whether a person deserves to live or die must not be entrusted to a tribunal organized to return a "verdict of death." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). Clearly, it was defense counsel's obligation to insist that he be allowed to agressively exercise this right (of rehabilitation) on behalf of Mr. Wike. Had Mr. Wike been present, surely he would have insisted that defense counsel protect him in this regard.

Issue V. WAS THE CUMULATIVE EFFECT OF DEFENSE COUNSEL'S INEFFECTIVENESS SUCH THAT THE RESULTING PREJUDICE REQUIRES A NEW TRIAL?

It was and it does. When one steps back and takes a hard, objective look at Mr. Wike's original jury trial, two very disturbing facts are self-evident:

§ The trial was held in an atmosphere of extreme community hostility in Santa Rosa County, yet no venue change motion was filed.

§ There were many witnesses available to shore up Wike's alibi defense (which is the only defense he had) yet none of them was called to the stand.

Defense counsel's excuse for his inaction is equally perplexing. According to Wike's trial counsel, a venue change motion was forfeited, not because counsel was unaware of the degree of community outrage over the crimes, but

because the client insisted upon it. (EH 134) Counsel offered nothing but his own testimony to corroborate this bald assertion. And defense counsel called no alibi witnesses, ostensibly, for the strategic reason that he could be assured of the right to rebut the state's closing argument.[13] (EH 141)

These explanations are just too pat. They lack the ring of logic. As Judge Shevin noted in his dissenting opinion in Lanier v. State, 709 So. 2d 112, 120 (Fla. 3 DCA 1998), the deficient actions of trial counsel cannot be sanitized by merely labeling them "tactical" or "strategic." On the contrary, those actions must be "...based on reasonable professional judgment." The judge added:

> "While an attorney's tactical and strategic decisions are entitled to deference, these decisions must originate from a basis of information, not ignorance."

Id. In the case at bar, the lack of effort made by defense counsel to protect Mr. Wike during the innocence/guilt phase of his original trial is obvious and similar to the ineffectiveness of defense counsel during the penalty phase of the capital trial referenced in King v. Strickland, 714 F.2d 1481 (11th Cir. 1983).

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13 That is, so that defense counsel could have the first and last opportunity to address the jury during the closing arguments regarding the innocence/guilt part of the first trial.

CONCLUSION

For the reasons set out above, this Honorable Court is requested to reverse the circuit court and its order of September 27, 2000, grant the defendant's 3.850 motion, reverse all of the defendant's judgments and sentences including the death sentence(s), order that the defendant is entitled to new trial, and grant the defendant such other and further relief as is deemed appropriate in the premises.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief has been provided opposing counsel listed below;

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CERTIFICATE OF COMPLIANCE

It is further certified that this initial brief of appellant was prepared using a Courier font, 12 point, not proportionally spaced. Microsoft Word software was used on a Performa Macintosh computer. I do not have a Courier New font on my Performa 600, nor do I have Word Perfect software. The Courier font is quite similar to the Courier New font. The hard copy of the brief will be scanned by a commercial company onto a disk that is compatible with the software utilized by this Honorable Court.

Respectfully Submitted,

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