IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1

AMOS LEE KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. King's Successive Motion to Vacate Judgement and Sentence, Request for Evidentiary Hearing and Stay of Execution. The motion was brought pursuant to Fla. R. Crim. Proc. 3.850.

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

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

"PC-R." -- The post-conviction record.

"HR."-- The record of the hearing on December 10, 2001.

"Huff." -- The record of the Huff hearing December 21, 2001.

"EX."-- The exhibits attached to the Successive Motion to Vacate Judgement and Sentence file by Mr. King on December 18, 2001.

REQUEST FOR ORAL ARGUMENT

This Court has set oral argument for January 15, 2002, at 9:00 a.m.

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PROCEDURAL HISTORY

Mr. King was charged by indictment with first-degree murder, sexual battery, burglary and arson On April 7, 1977. The case was consolidated during voir dire with another case charging Mr. King with attempted murder and escape. The consolidated cases were tried before the Circuit Court Judge John Andrews. Mr. King was represented by Thomas Cole of the Public Defender's Office.

The jury found Mr. King guilty on all counts. At the penalty phase, the jury recommended death. The trial court followed the recommendation and sentenced Mr. King to death.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence of death. King v. State, 390 So.2d 315 (Fla. 1980). Mr. King sought post-conviction relief, but was denied by the circuit court. On appeal, the Florida Supreme Court affirmed the denial of post-conviction relief. King v. State, 407 So.2d 904 (Fla. 1981). Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida in 1981. The district court denied relief, however on appeal, Mr. King's sentence of death was vacated by the Eleventh Circuit Court of Appeals. King v. Strickland, 748 F.2d 162 (11th Cir. 1984); previous history, King v. Strickland, 714 F.2d 1481 (11th Cir. 1983).

Mr. King was resentenced and death was again imposed. The Florida supreme Court affirmed the conviction and sentence of

death. King v. State, 514 So.2d 354 (Fla. 1987). A Petition for Writ of Habeas Corpus was filed by Mr. King, as well as a Motion for Post-conviction Relief. An evidentiary hearing was conducted in the circuit court on the Motion for Post-conviction Relief, and relief was denied. The Florida Supreme Court affirmed the denial of post-conviction relief. King v. State, 597 So.2d 780 (Fla. 1992). The Florida Supreme Court also denied Mr. King's Petition for Writ of Habeas Corpus. King v. Dugger, 555 So.2d 355 (Fla. 1990).

In October of 1992, Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida. The District Court denied relief on May 12, 1998. An appeal of the denial was filed with the Eleventh Circuit Court of Appeals in May of 1999. On November 30, 1999, the Eleventh Circuit denied Mr. King's appeal. King v. Moore, 196 F.3d 1327 (11th Cir. 1999). During the spring of 1997, Mr. King filed a pro-se Petition for Writ of Habeas Corpus in the Florida Supreme Court. Mr. King's pro-se pleading was denied by the Florida Supreme Court in an unpublished order filed on March 28, 1997. A subsequent Motion for Rehearing on said petition was denied in an unpublished order filed on May 30, 1997.

On November 19, 2001, a death warrant was signed scheduling Mr. King's execution for January 24, 2002. Mr. King filed a Successive Motion to Vacate Judgement and Sentence on December 18,

2001. The circuit court denied Mr. King's motion on January 1, 2002. Mr. King now files this appeal of the order of the circuit court.

FACTS

1. DNA testing is a scientifically reliable procedure used to establish identity. (EX. 1).

2. Joan Wood, former Medical Examiner for Pinellas County, testified at trial that on March 18, 1977, she performed an autopsy upon the victim in this case, Natalie Brady. Wood found the presence of motile sperm in the fluid from the vagina of the victim. This vaginal fluid, or washing, was a mixture of blood and semen. (R.1797).

3. At Defendant's trial, one Marion Hill testified. (R. 1662-1672). Ms. Hill was a medical technologist employed at the Medical Examiner's Office. Hill would occasionally perform laboratory analysis for the Medical Examiner at a laboratory within All Children's Hospital. Hill testified that she received the vaginal washings from Dr. Wood and examined them for the Medical Examiner at the laboratory within All Children's Hospital. (R. 1666). Ms. Hill testified Prostatic acid phosphatase was found in the victim's vaginal washings. (R.1667). Hill testified as to the presence of type A secretor and type O blood in the vaginal washings. (R.1668). Mr. King was identified as possessing type A secretor blood, while the victim was identified as possessing type

O blood. (R. 1668-1669).

4. Mr. King, through counsel, filed a Motion for DNA Testing and a Motion to Compel Evidence for DNA Testing. (EX. 2). This Court ordered opposing counsel to respond. A response was filed December 3rd 2001, along with attached exhibits. (EX. 4). Apparently the Office of the State Attorney had begun an investigation into the DNA evidence in this case months prior, as the investigation report is dated July of 2001. It was given to the defense on December 3, 2001.

5. The State's investigation concludes that the vaginal washings of the decedent are no longer in existence. According to Marion Hill, she returned them to Dr. Wood at the Medical Examiner's office subsequent to her examination. (EX. 4). Dr. Wood is never questioned by the State Attorney investigator. Mr. King filed a motion to take a deposition of Dr. Wood, which was denied. (EX. 5).

6. Among the exhibits in the State Attorney's Response was a lab report indicating that a rectal swab was also obtained and tested positive for acid phosphatase. (EX. 4). This rectal swab is likewise unaccounted for.

7. The lab report in regards to the vaginal swab, had handwritten notations " Vag wash very bloody grossly hemolgized very difficult to read" MH". (EX. 4).

8. Section 406.13, Florida Statutes (1973), was in effect at

the time of the offense. The relevant portion reads as follows: "Any evidence or specimen coming into the possession of said medical examiner in connection with any investigation or autopsy may be retained by the medical examiner or be delivered to one of the law enforcement officers assigned to the investigation of the death." Fla. Stat. Ch. 406.13(1973).

9. This Court ordered a hearing on all pending motions on December 10, 2001.

10. One Larry Bedore testified at the December 10th hearing. Bedore, currently employed at the Medical Examiner's Office, testified that he joined the office with Dr. Wood in 1984. At the time he joined the office, there were no written evidence procedures in place. (HR. 28). Thus, the above referenced statute was the only guiding authority in regards to evidence or specimen samples.

11. Bedore further testified that the Medical Examiner's office does not retain evidence as they don't have an evidence vault. (HR. 33). The Medical Examiner turns the evidence over to the law enforcement agency investigating the case. (HR.33).

12. According to the State Attorney's investigation, there is no record of either a rectal swab or the vaginal washings being turned over to the lead detective in the case, a Detective Pandakos of the Pinellas County Sheriff's Office. (EX. 4). The report contains a chain of custody evidence log. (EX. 4). The log does

not show the presence of the vaginal washings or the rectal swab. However, the log does show that two items have been destroyed, one on March 25, 1988 and the other item was destroyed on August 11, 1987. (EX. 4). The log gives no indication as to what was destroyed on those dates, simply that a destruction was done. There is no further documentation by the Sheriff's Office showing what was destroyed.

13. Evidence and property procedures of the Pinellas County Sheriff's Office were in effect for the time periods of the destruction listed. (EX. 7). The procedures state that: Final disposition of property will require written permission (Form #226, titled Property Release Receipt/Disposition Order) from the case agent or a supervisor. A Court order can also serve as written permission. Under exigent circumstances, a verbal final release will be accepted from a supervisor; however, written permission must be forwarded to the Evidence Control and Property Unit within three (3) days of release. There is not evidence of a Form #226 being executed in this case. (EX. 7).

14. All other items of evidence to wit: vials of blood, a bloody nightgown, fingernail scrapings, knives, ambulance paper sheet, slides from the FBI, plucked pubic hairs etc. have been examined or otherwise accounted for by CCRC-Middle investigators. The only other piece of evidence not accounted for is a one dollar bill found at the scene of the murder. The one dollar bill can be

tracked as being sent to the FBI lab for analysis in 1977, but never returning to the Sheriff's Office with the other evidence. (See EX. 8). Furthermore, a search of the archives has been done and no Property Release Receipt/Disposition Order or Court order exists for the two items listed as destroyed on March 25, 1988, and August 11, 1987. (See EX. 9).

SUMMARY OF ARGUMENT

Issue I

Evidence was destroyed in this case which could have been tested for DNA. The lower court has ruled that Dr. Wood, the assistant medical examiner who performed the autopsy on victim Natalie Brady, destroyed vaginal washings and a rectal swab taken from the body of Natalie Brady between 1977-1979. Under the controlling statute at the time, Wood was permitted to keep the specimens or turn it over to law enforcement. Wood showed a complete and reckless disregard for the law governing the destruction of evidence. Furthermore, Wood demonstrated a reckless disregard for the common sense assessments of evidence reasonably expected of a medical examiner. She was a critical part of the case, she knew how important this vaginal wash was, yet she destroyed the wash during the pendency of Mr. King's direct appeal.

Issue II

Trial counsel was ineffective for not moving for an independent testing of the vaginal wash or to challenge the

findings of Dr. Wood. The lab report dated March 17, 1977, indicated the vaginal wash was "grossly hemologized, very bloody, clotted and difficult to read". This wash was the only evidence linking a type A secretor to the crime. Had trial counsel challenged the results of the blood type test, the State would have been unable to place a type A secretor at the crime. The outcome of the guilt phase of the trial would have been different.

Issue III

Trial counsel was ineffective for not questioning potential jurors on their ties to law enforcement. In a 1996 newspaper article, juror Demuth admitted she was the daughter of a police officer. This was never covered in voir dire at trial. Seating a biased juror resulted in an unreliable verdict at both the guilt and penalty phases of the trial.

Issue IV

Mr. King is actually innocent of the crime and the death penalty. Circumstantial evidence in the case was meager, and the evidence destroyed which could have exonerated him. Had the evidence been available for testing, results would have shown that Mr. King is actually innocent of the murder of Ms. Brady and the statutory aggravators would not have been proven. Thus, Mr. King is also innocent of the death penalty.

Issue V

Due process requires that claims which should have been raised

in Mr. King's original Motion for Post-conviction Relief be heard at this time. The effect of a procedural bar is to deny Mr. King due process because of the ineffective assistance of post-conviction counsel. Because the State of Florida has precluded appellate counsel from raising ineffective assistance of counsel claims on direct appeal, and found that no right exists to effective assistance of post-conviction counsel, Mr. King has been denied his rights pursuant to the United States Constitution.

Issue VI

The Florida Death Penalty sentencing scheme is unconstitutional pursuant to Apprendi v. New Jersey, 530 U.S. 466 120 S.Ct. 2348, 2355 (2000).

Issue VII

Execution by lethal injections constitutes cruel and unusual punishment prohibited by the United States Constitution.

Issue VIII

The trial court engaged in ex-parte communication with the prosecutor during which the prosecutor asked that the media be removed from the courtroom during the testimony of certain state witnesses. The prosecutor told the judge that the witnesses would not testify unless there were no media present. The judge then ordered the media not to photograph those witness, giving the state witnesses special treatment in violation of Mr. King's rights as guaranteed by the United States Constitution.

ISSUE I

THE COURT'S LEGAL CONCLUSION THAT THE VAGINAL WASH AND RECTAL SWAB WAS DESTROYED IN 1977-1979 NOT IN BAD FAITH WAS ERROR.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State , 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

ARGUMENT

In Arizona v Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988), the Court set a minimum standard regarding the destruction of possible exculpatory evidence. The facts reported in Youngblood are as follows: at trial, expert witnesses testified that the defendant might have been completely exonerated by a timely performance of a test on properly preserved semen samples. A rape kit was used, however this was evidence that sexual activity had taken place, it did not identify Youngblood as the assailant. Clothing with semen stains on it was taken into evidence but not refrigerated or frozen. This occurred in 1983. In 1985, the police criminologist examined the victim's clothing for the first time. He found one semen stain on the victim's underwear and another on the rear of his T-shirt. The criminologist tried to obtain blood group substances from both stains using the ABO technique, but was unsuccessful. He also performed a P-30 protein

molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity. The Tucson Police Department had just begun using this test, which was then used in slightly more than half of the crime laboratories in the country. Because the clothing was not properly preserved, it could not exonerate the defendant. The Youngblood Court held:

> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.
>
> Id. at 58.

In the case at bar, the circuit court ruled, "That the vaginal wash and the rectal swab were not available for testing because they were destroyed by someone in the medical examiner's office; either immediately after they were tested, or within one to two years after they were taken, as was customary in all cases in all cases where such specimens were obtained and tested in house, as was done in this case." (Order Denying Defendant's Motion to Vacate Judgement and Sentence, signed by Judge Susan F. Shaeffer, January 1, 2002, pg. 11). Such a conclusion in not valid based on the testimony received in this case. In making its ruling, the court relied upon the testimony of one Larry Bedore, an employee with the Medical Examiner's Office since 1984. (HR.44). Bedore testified that toxicology testing logs were only begun about four

or five years prior to the 2001 hearing date. Logs prior to that time did not exist. (HR.43). Thus, Bedore could not testify based upon any documentation regarding the missing evidence. Bedore testified that procedures for the keeping and destroying evidence were looser in 1977, nor did they have written evidence procedures in 1977 or in 1984. (HR.28). Although Bedore was not employed at the time in question, he testified that once serology tests were done, the fluid and test tube were discarded by Dr. Wood. (HR.31). Considering that Mr. Bedore was not even employed with the Medical Examiner's Office at the time of the testing of the vaginal fluids, such a conclusion is erroneous and not supported by competent evidence. Dr. Wood is arguably the only person who would know what happened to the missing evidence, and she has been found unavailable to testify. (*See* Circuit Court's Order Denying Defendant's Motion to Take Deposition of Dr. Joan Wood, signed by Judge Susan F. Shaeffer on December 14, 2001).

Assuming Dr. Wood discarded the evidence, she was in direct violation of Section 406.13, Florida Statutes (1977). This was the only authority at the time which covered the handling of evidence by medical examiners. The law was clear and unambiguous on this point: Dr. Wood could have kept the evidence or turned it over to law enforcement and then law enforcement could have destroyed it pursuant to their procedures. Fla. Stat ch. 406.13 (1977).

Bedore further testified that upon being contacted by a State

Attorney investigator, to the best of his knowledge, the Medical Examiner's office did not have the evidence for two reasons. First, his conjecture of what Dr. Wood used to do, to wit: throw out samples after testing regardless of the law on a routine basis. Second, the Medical Examiner's Office, "do[esn't] retain evidence. We turn the evidence over to the law enforcement agency investigating the case. So per se, we don't have an evidence vault. We don't retain things of testable nature that either the FBI in those days or FDLE today would be doing." (HR.33). His reasoning is faulty because he was not present and cannot know what Dr. Wood did in 1977, and he cannot know what the retention policy was in 1977. He was not there.

The fact that this evidence was potentially exculpatory is demonstrated by the Laboratory Report Form dated March 18, 1977. (Ex. 4). Under the test results for the vaginal wash are hand written notes stating "Vag wash very bloody grossly hemolyzed very difficult to read" with the handwritten initials, "MH" and a partially illegible 1977 date. Upon reading these notes, Wood was on notice that this may be an unreliable reading, and this sample may have to be tested again before trial. The test revealed the presence of a type A secretor mixed in with Ms. Brady's blood, type O. It was the only evidence linking Mr. King to the murder and rape of Ms. Brady. Since Mr. King was a type A secretor, it was critical for the State to place a type A secretor at the crime

scene. Based upon the handwritten notes, the probability of an inconclusive reading or even a different blood type obtained upon retesting, was great. If trial counsel had exploited the obvious difficulty that the sample was "grossly hemolyzed, very bloody, difficult to read" by independent testing, the presumption that a type A secretor raped and killed Ms. Brady would have been successfully rebutted. Since Mr. King was a type A secretor, the only evidence linking a type A secretor to the crime would have been vitiated. The likelihood that a motion for Judgement of Acquittal would have been granted is great or in the alternative, the jury would have returned a verdict of not guilty.

In State's Response to Successive Motion to Vacate Judgement and Sentence, Request for Evidentiary Hearing, and Application for Stay of Execution cites to, United States v. Vera, CR No. 00-309-BR,2001, which quotes the trial court in the Huff hearing regarding the destruction of evidence claim, "In this case there was no obvious exculpatory value to this evidence apparent to Deputy Oxford, or to the government generally, when it was destroyed." (HUFF.83). In the case at bar, Mr. King contends that this vaginal wash and rectal swab had not only apparent exculpatory value, but rather obvious value, and that Dr. Wood, as a trained medical examiner, had knowledge of the value of this evidence.

In State's Response, counsel for the state also relies on Kelley v State, 569 So. 2d 754 (Fla. 1990). In Kelley the court

held:

> "Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the destruction of the evidence in question did not prejudice Kelley's case."

Id. at 756.

In the case at bar, no court order was obtained authorizing the destruction of this evidence. In fact, the statute outlining procedures was not followed. The act of the destruction of the vaginal wash and rectal swab by Dr. Wood, when she was forbidden by law from destroying the wash and swab, demonstrate a blatant disregard for the statute, the only procedure in effect regarding evidence held by the Medical Examiner.

Counsel also relied upon in State's Response, United States v Deaner, 1 F.3d 192 200,201 (3d Cir. 1993). Deaner was a case involving a guilty plea where the actual physical weight of the contraband seized was at issue in regards to Federal Sentencing Guidelines offense levels. Due to the sheer bulk of the evidence it was destroyed after it was weighed.

The Deaner Court held:

> Finally, section 50.21(e)(4) provides that "a representative sample" of marijuana "shall be retained." It is undisputed that this was not done in the present case. The district court nevertheless decided that the evidence indicating that the marijuana weighed 23.9 kilograms was "more than sufficient for the purpose of sentencing as corroborated by the photographs of the plants..., by the certificate with respect to the scale that was used, and from the laboratory report that that was the weight found." App. At 174. The court concluded that although the regulations were"not precisely followed by not maintaining a representative marijuana sample, it really does not prejudice the defendant in this situation." Id.
>
> The fact that the government did not retain a representative sample does not affect the conclusion that the DEA complied substantially with the procedure set forth in section 50.21 for destruction of contraband evidence. Deaner does not challenge the government's explanation that the marijuana was destroyed because it was deteriorating and taking up limited space. At most, the government was negligent in failing to preserve a representative sample. *See Youngblood,* 488 U.S. at 58, 109 S.Ct. At 337-38 (failure of police to refrigerate clothing and perform test on semen samples was at worst negligent). Deaner proffers no other evidence that would preclude admission of otherwise reliable evidence on the weight of the marijuana seized from his home. We therefore conclude that this record does not show bad faith on the part of the government.

Id. at 200,201.

In the case at bar, the evidence that was destroyed consisted of one test tube and one rectal swab, very small pieces of evidence. There is no argument by the State that the evidence was destroyed because it was deteriorating and taking up limited space.

In fact, the evidence still preserved in this case consists of jackets, knives, nightgowns, fingernail scrapings, test tubes filled with blood, hair samples, etc. Thus, the State failed to preserve the most important physical evidence in the case, while keeping that which cannot serve to exonerate Mr. King. Because the destroyed evidence was the only evidence linking a type A secretor to the crime, the destruction of this small piece of evidence, while preserving other evidence which takes up much more space is suspect.

Mr. King contends that Dr. Wood was not permitted by law to destroy the evidence, she acted in a manner which was contrary to the statute in effect at the time. Dr. Wood also acted contrary to the common sense assessments of evidence reasonably to be expected of a trained assistant medical examiner or she was so unmindful of both as to constitute the reckless disregard of both.

Counsel also relies upon Holdren v Legursky, 16 F.3d 57 (4th Cir. 1994). The Holdren court held:

> Without deciding whether the physicians were agents of the prosecution, we are of opinion that even if they were agents, they did not act in bad faith by failing to preserve the semen samples in such a state that they later could be subjected to further scientific analysis. First, the physicians followed standard procedures in collecting, analyzing, and disposing of the semen. Second, at the time that the physicians disposed of the remaining semen, they did not know of any exculpatory value of the semen because the semen had not been tested for a blood grouping analysis. That test, indeed, was not one

performed at the Medical Center.

Id. at 60.

Holdren can be distinguished from the case at bar by the fact that Dr. Wood was a medical examiner, not an employee of a local medical center. Dr. Wood was aware of the exculpatory value of the vaginal wash because the vaginal wash had been tested for blood grouping analysis and was found to be very difficult to read among other problems with the wash sample. Dr. Wood did not follow the statutory procedure in disposing of the vaginal wash in that she was not permitted to destroy it. Mr. King contends that clearly, Dr. Wood acted in bad faith when she destroyed the vaginal wash.

The State, in their Response, next relies on Rogers v. State, 511 So.2d 526, 531 (Fla. 1987)(defendant's burden of establishing actual prejudice from pre-indictment delay is not met by speculative allegations of faded memories or the disappearance of purported alibi witnesses); The Rogers court held:

> When a defendant asserts a due process violation based on pre-indictment delay, he bears the initial burden of showing actual prejudice. Rogers has not met this burden through the speculative allegations made here of faded memories or the purported disappearance of alibi witnesses whose significance or existence was doubtful.

Id. at 531.

In the case at bar, the only evidence which ties Mr. King to Ms. Brady are the vaginal wash. No alibi witnesses were called and there were no allegations made of faded memories. The potential

deficiencies or problems with the original and only test of the vaginal wash is clearly noted on the Laboratory Report Form dated March 18, 1977.

The State argues that Mr. King should be denied relief on the basis of laches. This argument is not valid because Mr. King moved for DNA testing pursuant to Section 925.11(1), Florida Statutes (2002), a statute effective October 1, 2001, for making claims for DNA testing. King is well within the time period for making such claims, as the cutoff date for raising a DNA claim is October 1, 2003. The trial court found that the evidence was destroyed. To deny Mr. King relief based on laches on this issue by simply stating that the evidence was destroyed, without litigating the issues surrounding its destruction is tantamount to giving the State license to destroy evidence whenever that evidence can be used to exonerate a defendant. Mr. King has always maintained his innocence of the rape and murder of Ms. Brady. Placing a type A secretor at the crime scene was essential to the prosecution since there were no eyewitnesses. He clearly falls under the new statute allowing for a testing of DNA evidence at this time.

This questionable blood sample was known to be "very difficult to read" by an experienced medical examiner. Trial counsel was ineffective for not testing the blood sample before trial. Post-conviction counsel was ineffective for not raising this issue in post-conviction proceedings. This is a capital case, not a DUI

case, if Dr. Wood had destroyed this sample between 1977 and 1980, Mr. King's direct appeal had not even been decided. King v State, 390 So 2d 315 (Fla. 1980). Dr. Wood had provided the key piece of evidence needed to convict Mr. King. As a trained medical examiner and an agent of the State, it can be safely presumed that she was familiar with capital cases. When Dr. Wood destroyed the vaginal wash and rectal swab, she acted in a manner which was contrary to statute and she demonstrated a complete lack of the common sense assessments of evidence reasonably to be expected of an experienced medical examiner. Mr. King's case was not even affirmed on direct appeal at the time of the destruction. Mr. King contends that there is a showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test.

In the case attached to State's response, United States v. Vera, CR No. 00-309-BR United States District Court for the District of Oregon 2001 U.S. Dist. Lexis 9337 June 26, 2001, a deputy officer destroyed drug samples as a result of a housecleaning of a locked trailer used to store hazardous materials. The hazardous materials trailer was by all accounts "a mess" and very disorganized. The deputy assumed that materials stored on the left side of the trailer were eligible for destruction and, contrary to department policies, destroyed the evidence. The Vera court held:

> The Court finds no evidence of actual bad faith: Oxford had no direct connection to this

> particular investigation, and there is no dispute that Schwarz and King did everything they could to ensure all evidence seized in this case was properly preserved. While the government is responsible for the serious mishandling of these evidentiary samples, no inference of bad faith is warranted on this record.

Id. at 14.

In the case at bar, Dr. Wood had a critical connection to the investigation, she was the medical examiner, not a deputy who knew nothing about the investigation. Wood obtained the vaginal wash from the corpse of Ms. Brady and testified regarding this evidence at trial. She knew how important this vaginal wash was. Wood also knew that this vaginal wash was difficult to test, and presumably, that the test results were subject to attack by effective trial counsel. Mr. King contends that due to Wood's position as an Assistant Medical Examiner and her crucial role in the investigation of the death of Ms. Brady, Vera does not apply to this case.

In United States v Elliott, 83 F.Supp. 2d 637 (E.D. Va. 1999), the court set a standard for objective bad faith.

The District Court in Elliott held:

> Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement

> officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test.

Id. at 647-648.

In the case at bar, the only established practice which was relied upon by the Medical Examiner's Office in regards to evidence in 1977 was the governing statute. The law stated that the Medical Examiner could either keep the specimen or turn it over to law enforcement. The trial court found that Dr. Wood did neither. She destroyed it. The applicable statute did not state that destruction should have occurred. Dr. Wood was bound by law to keep the vaginal wash and rectal swab, yet she failed to follow the law. Dr. Wood also acted in a manner that was contrary to applicable policies and also to the common sense assessments of evidence reasonably expected of a trained medical examiner, an agent of the State. Dr. Wood showed a reckless disregard for the applicable policies and the common sense assessments. Mr. King contends that the necessary showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test has been demonstrated.

In Stuart v State, 907 P.2d 783 (Id. 1995). The Supreme Court of Idaho was faced with a similar situation in regards to the destruction of evidence. Stuart, like the case at bar, arose out of a post-conviction action. Stuart had raised the claim that the

calls between Stuart and his attorney were monitored by jail authorities. Logs were obtained and revealed that other inmates' calls had been taped by order of the Sheriff. The jail phone log book, after examination for the time which the defendant complained his calls were taped, revealed that portions of the log book pertaining to Stuart's calls had been torn or cut from the log book. The Stuart Court reasoned that there was no evidence in the record that anyone outside of the Sheriff's Office, such as the former employees, had any reason to destroy the evidence in such a manner. There was evidence that the log had been kept in a locked vault and was not obtainable by the general public or other employees.

The Court held on page 793:

> As discussed in the previous section, the district court's finding that the intentional destruction of evidence was not attributable to the state was unsupported by substantial and competent evidence. Accordingly, having reversed that finding as clearly erroneous, such determination constitutes an independent and adequate basis apart from the discovery violation for a finding of bad faith under Youngblood. We next proceed to analyze the consequences of this constitutional violation. **IV. Because The Intentional Destruction Of The Evidence Is Attributable To The State, Stuart Is Entitled To An Inference That The Destroyed Evidence Would Have Been Favorable To His Petition.**
>
> The district court in this case acknowledged that if the destruction of evidence was attributable to the state, the spoliation doctrine would apply in Stuart's

> favor. The spoliation doctrine is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position. See McCormick On Evidence, 4th Ed. Sec 265, ppl 189-94 (1992). In a criminal case, application of a favorable inference under the spoliation doctrine is the appropriate remedy for a Youngblood due process violation.

In the case at bar, the evidence was destroyed. It was not, as in Youngblood, improperly preserved. This evidence was in the control of Dr. Wood and then was discarded. Pursuant to the case cited above, Mr. King contends that application of a favorable inference under the spoliation doctrine is the appropriate remedy for a Youngblood due process violation and the sentence of death should be vacated.

ISSUE II

> **THE TRIAL COURT ERRED IN ITS DENIAL OF Mr. KING'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO DISCOVER WHETHER THE VAGINAL WASHINGS WERE DESTROYED, FAILURE TO REQUEST INDEPENDENT EXAMINATION OF SAID EVIDENCE, AND FAILURE TO CROSS EXAMINE THE MEDICAL EXAMINER ON THE POLICIES INVOLVED IN THE DESTRUCTION OF EVIDENCE, CHAIN OF CUSTODY AND DOCUMENTATION REGARDING THE DESTRUCTION OF SAID EVIDENCE.**

Pursuant to recent investigation, the evidence of the vaginal washings of the victim have been ruled unavailable for testing. Assuming trial counsel was provided with the report of the medical examiner, he was ineffective in not moving for an independent test

of the vaginal washings at the time of trial. It is clear that there were grounds for an independent test when the medical examiner's notes indicate that the vaginal washings were "very bloody, grossly hemologized very difficult to read." (EX. 4). Counsel was further ineffective in not moving to suppress the vaginal washings on the ground that the evidence was unavailable for independent testing. This was the only evidence which connects the Defendant with the rape and murder on Ms. Brady. Given the damning effect of such testimony linking him to Ms. Brady, the failure to make sufficient inquiry regarding the test performed constituted an unreasonable and deficient performance of counsel. Because the identification is by blood type only, an inconclusive result from an independent test would have raised a reasonable doubt as to whether a type A secretor was involved in the rape and murder of Ms. Brady. Trial counsel was ineffective for not doing this test, for not locating the evidence, and because of his ineffective actions, Mr. King's case was prejudiced. The outcome of the guilt phase would have been different had the State been unable to place a type A secretor at the scene. Strickland v Washington, 466 U.S. 668 (1984).

In Peede v State, 748 So.2d 253 (Fla. 1999) this Court addressed the issue of post-conviction claims and the procedural bar. The Court held in Peede:

> Because the new claims raised in the amended motion were not addressed specifically in his

> order, we assume that the trial judge found these issues procedurally barred or improperly pled when he wrote in his initial order that "the remaining claims are either procedurally barred or improperly pled.

Id. at 254.

In the case at bar, the trial court ruled this claim to be procedurally barred. This Court stated in a footnote in Peede:

> FN5. We are also constrained to comment on the representation afforded Peede in these proceedings. Peede's brief on appeal raised nine issues, but was only 24 pages in length. While we are cognizant that quantity does not reflect quality, the majority of the issues raised were conclusory in nature had made it very difficult and burdensome for this Court to conduct a meaningful review. In all of his postconviction proceedings, Peede has been represented by Capital Collateral Representative (CCR) and Capital Collateral Regional Council -Middle District(CCRC). His initial and amended 3.850 motions were filed by CCR attorneys in the Tallahassee office and his brief on appeal was filed by an attorney in the CCRC Tampa office. His reply brief was actually filed "pro se" with the help of a separate ghost attorney. In many respects, this brief was more helpful and comprehensive than the initial brief filed. In addition to the poor quality of the initial brief, this Court has received several complaints concerning counsel's representation, including complaints by Peede himself. We note that in this past legislative session, the legislature amended section 27.710, Florida Statutes (Supp. 1998) by adding subsection (12) which states: "The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation."

Id. at 25.

In the case at bar, Mr. King was not represented by CCR or

CCRC-Middle, but rather by a court-appointed private attorney who filed a nineteen page 3.850 motion, twelve pages of which were procedural history and a certificate of service. (PC-R. 61,406 pg. 7-24). His performance was never monitored by any court. Furthermore, recent orders by this Court regarding pending cases,(See attached orders for Happ and Fotopoulos) cites Peede, and state that although the Court condemns the practice, in an attempt to properly administer justice, and recognizing the legislature's call for judicial oversight of collateral counsel, the Court dismissed the cases without prejudice for the purpose of allowing appellant to further amend his underlying motion brought pursuant to Florida Rule of Criminal Procedure 3.850. Mr. King contends that if this Court is willing to dismiss cases without prejudice for the purpose of allowing appellant to further amend his underlying motion, in the interest of justice, a defendant whose pleadings are branded with the foreboding words "**WARRANT SIGNED, EXECUTION IMMINENT**" is entitled to equal if not more consideration by this Court. In the interest of justice, this claim should not be deemed procedurally barred.

ISSUE III

THE TRIAL COURT ERRED IN THE DENIAL OF MR. KING'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY QUESTION POTENTIAL JURORS ABOUT THEIR VIEWS AND THEIR RELATIONSHIPS WITH LAW ENFORCEMENT OFFICERS. COUNSEL ALSO FAILED TO DISCOVER AND REMOVE BIASED JURORS, AND TO PRESERVE THE ISSUE FOR

APPEAL.

On July 6, 1996, an article was published in the St. Petersburg Times newspaper regarding Mr. King's case. (EX. 10). Within the article an interview of one juror, Donna Lee Demuth. The interview states that Mrs. Demuth was the daughter of a police officer in Chicago. She states, "I was just a sheltered housewife. I had never dealt with anyone like King." During trial the voir dire questions asked of Mrs. Demuth by the prosecutor included whether anyone in her immediate family has ever been involved in the court process. (R. 1240). Mrs. Demuth replied, "No, sir." (R. 1240). Defense counsel for Mr. King performed only a perfunctory voir dire. He failed to inquire about possible law enforcement relationships despite the fact that several law enforcement officers were going to testify in the trial. Counsel never inquired of juror Demuth whether she was related to anyone involved in law enforcement. (R. 1242-44). Given her statements contained in the 1996 interview, it is clear that Mrs. Demuth was related to a person within her immediate family who had been involved in the court process. Thus, juror Demuth's answer was misleading.

"When it is known that law enforcement officers may testify, veniremen should be questioned to determine whether there is any predisposition to give greater weight to the testimony of law enforcement officers." Monson v. State, 750 So.2d 722 (Fla. 1st DCA

2000)quoting Smith v. State, 699 So.2d 629, 636 (Fla. 1997). The failure of counsel to uncover this information, resulted in the placement of at least one juror on the panel who probably had bias against Mr. King. As a result of counsel's error, Mr. King had jurors placed on his case with probable bias and the verdict is unreliable.

Counsel relies on the Peede and the Happ and Fotopoulos Supreme Court orders in addition to argument presented in Issue II as this argument is applicable to this issue.

ISSUE IV

THE TRIAL COURT ERRED IN THE DENIAL OF MR. KING'S CLAIM THAT MR. KING IS ACTUALLY INNOCENT OF FIRST DEGREE MURDER AND FELONY MURDER AND OF THE DEATH PENALTY. TO EXECUTE A PRISONER UNDER THE CLOUD OF DOUBT AS TO GUILT IS A VIOLATION OF MR. KING'S CONSTITUTIONAL RIGHTS.

The Court should vacate the judgement and sentence of death based on the destruction of physical evidence. If the Court does not do so, however, the Court should at least presume that the destroyed evidence would have been adverse to the State and favorable to Mr. King. This presumption is only fair, because the State's destruction of the evidence deprived Mr. King of the right to an examination and testing of the evidence by post-conviction counsel. If the evidence had been subjected to DNA testing it would have exonerated Mr. King. The State should bear the burden of its unlawful evidence destruction, not Amos King. Now that the

evidence destruction has precluded Mr. King from proving his innocence in any forum, this Court should recognize that it is the most appropriate forum for applying the judicial doctrine of spoliation, and should grant effective relief. The evidence produced at trial against Mr. King was almost entirely circumstantial. There were no eyewitnesses to the murder and the only physical evidence connecting Mr. King to the crime was the presence of type A secretor blood found in the vaginal washings of the victim; the presence of which is not conclusive to identify Mr. King as the perpetrator. The claims herein raised should now be considered in light of the destruction of evidence, the vaginal washings, by the State in light of the weak factual circumstances surrounding Mr. King's conviction. Mr. King asserts his innocence of the death penalty in this successive petition. In light of his actual innocence, the ends of justice require this successive petition be heard on the merits. The failure of a federal court to reach a procedurally defaulted claim creates a fundamental miscarriage of justice when the petitioner is actually innocent of the crime charged, Murray v. Carrier, 477 U.S. 478,496 (1986), or actually innocent of the death penalty. Sawyer v. Whitley, 505 U.S. 333, 339-342 (1992). Specifically, as to issued dealing with actual innocence of the crime charged, the court must determine in light of all the evidence, including new evidence, whether "it is more likely than not that no reasonable juror would have found

petitioner guilty beyond a reasonable doubt." Schllup v. Delo, 115 S.Ct. 851, 867, 868 n.47(1995).

In determining innocence of the death penalty in a weighing state, like Florida, the court must balance the mitigating evidence against the aggravating evidence to determine if a reasonable sentencer would impose death. *See* Ford v. Lockhart, 81 F.Supp. 1447, 1453(E.D. Ark. 1994). DNA testing also would have exonerated Mr. King from the aggravating underlying felonies. The first paragraphs of Mr. King's petition make evident the point relevant here: both the conviction and the death sentence constitute miscarriages of justice. Guilt of the crimes has always been denied and the State's case has been almost entirely circumstantial.

The above issue has been filed in order to preserve the issue herein for further review to address substantial issues of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Pursuant to the suggestion by this Court in Sireci v State, 773 So. 2d 34,41 N.14 (Fla. 2000), this statement is included to alert the Court of the necessity of presenting this issue in this manner.

ISSUE V

THE TRIAL COURT ERRED IN THE DENIAL OF MR. KING'S CLAIM THAT MR. KINGS DUE PROCESS AND EQUAL PROTECTION RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE COURT APPOINTED INEFFECTIVE POST CONVICTION COUNSEL WHO FAILED TO RAISE MERITORIOUS ISSUES WHICH ARE NOW FORECLOSED DUE TO PROCEDURAL BAR.

On May 14, 1981, attorney Baya Harrison was appointed by Judge Andrews of the Circuit Court to represent Amos King for purposes of his clemency proceedings, state habeas, and 3.850 motion proceedings. (PC-R. 61,406 pg. 6). On October 2, 1981, Attorney Harrison filed a nineteen-page 3.850 motion, twelve pages of which were procedural history and a certificate of service. (PC-R. 61,406 pg. 7-26). Attorney Harrison raised four issues in his 3.850 motion. Mr. Harrison did not file a State Petition for Habeas Corpus at all. On November 8, 1981, Attorney Harrison filed a Motion to Continue the evidentiary hearing set in Mr. King's case stating that he had not fully investigated witnesses, nor retained any necessary experts. (PC-R. 61,406 pg. 28-30). The Motion for Continuance was denied by Judge Andrews. (PC-R. 61,406 pg.115). Mr. Harrison failed to raise multiple claims regarding the ineffectiveness of trial counsel during the guilt phase.[1] These claims have either been raised and found to be procedurally barred,

[1]See Exhibit 11 listing claims not raised by Harrison.

or not raised at all due to the procedural bar. Thus, Mr. King was denied access to the court by the appointment of an ineffective post-conviction attorney.

The United States Supreme Court has held in Pennsylvania v. Finley, 481 U.S. 551, 551 (1987), that prisoners do not have a constitutional right to counsel in post conviction proceedings. However, as is made clear by the dissent in Coleman v. Thompson, 501 U.S. 722 (1991):

> "This Court has made clear that the Fourteenth Amendment obligates a State "'to assure the indigent defendant an adequate opportunity to resent his claims fairly in the context of the State's appellate process,'" Pennsylvania v. Finley, 481 U.S. 551,556 (1987), quoting Ross v. Moffitt, 417 U.S. 600,616 (1974), and require[s] unreasoned distinctions." Id. at 612. While the State may have wide latitude to structure its appellate process as it deems most effective, it cannot, consistent with the Fourteenth Amendment, structure it in such a way as to deny indigent defendants meaningful access. Accordingly, if a State desires to remove from the process a of direct appellate review a claim or category of claims, the Fourteenth Amendment binds the State to ensure that the defendant has effective assistance of counsel for the entirety of the procedure where the removed claims may be raised. Similarly, fundamental fairness dictates that the State, having removed certain claims from the process of direct review, bear the burden of ineffective assistance of counsel in the proceeding to which the claim has been removed.

Id. at 773-774.

Thus, by enacting Rule 3.850, Florida Rules of Criminal Procedure, the State of Florida has created a forum, separate from

direct appeal, in which to address ineffective assistance of trial counsel claims. By separating those claims from direct appeal, the State must now bear the burden of ineffective assistance of post-conviction counsel claims. To deny Mr. King effective assistance of post conviction counsel is to deny him the forum in which to raise his claims in contravention of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Constitution of the State of Florida.

In the Response, the State relies on Lambrix v State, 698 So. 2d 247 (Fla. 1996). In Williams v State, 777 So. 2d 947 (Fla. 2000) The Court held:

> As this Court stated in State *v Weeks,* 166 So. 2d 892, 896 (Fla. 1964),and reiterated in *Steele,* "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States."

Id. at 950.

In the case at bar, Harrison was clearly ineffective. Claims which should have been raised were ignored. Mr. King had been denied due process. Counsel relies on the Peede and the Happ and Fotopoulos Supreme Court orders in addition to argument presented in Issue II as this argument is applicable to this issue.

ISSUE VI

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Notwithstanding this Court's decision in Mills v. Moore, 786 So.2d 532 (Fla. 2001), Mr. King respectfully submits that considerations of Due Process require that the jury unanimously find the existence of each statutory aggravating factor before it may be used to impose the death penalty.

In Jones v. United States, the United States Supreme Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 530 U.S. 466 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi,

120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict. Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Amos King's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

The above issue has been filed in order to preserve the issue therein for further review to address substantial issues of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Pursuant to the suggestion by this Court in Sireci v State, 773 So. 2d 34,41 N.14 (Fla. 2000), this statement is included to alert the Court of the necessity of presenting this issue in this manner.

ISSUE VII

THE TRIAL COURT ERRED IN THE DENIAL OF MR. KING'S CLAIM THAT FLORIDA'S PROCEDURES FOR LETHAL INJECTION CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT AND ITS USE OF LETHAL INJECTION IS UNCONSTITUTIONAL BECAUSE OF SEVERE PAIN AND MUTILATION ARE INFLICTED ON THE CONDEMNED PRISONER.

The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the *risk* of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Gregg, 428 U.S. at 183; citing Gamble, 429 U.S. at 103).

The procedures employed by the Department of Corrections of the State of Florida in regard to lethal injection include operation behind closed doors where no witnesses are allowed to view the preparation of an inmate prior to lethal injection. The preparation of the inmate for lethal injection could include numerous cuts for placement of the intravenous lines. Such procedure, if conducted upon Mr. King, would constitute cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution and the corresponding provisions of the

Constitution of the State of Florida.

The above issue has been filed in order to preserve the issue therein for further review to address substantial issues of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Pursuant to the suggestion by this Court in Sireci v State, 773 So. 2d 34,41 N.14 (Fla. 2000), this statement is included to alert the Court of the necessity of presenting this issue in this manner.

ISSUE VIII

THE TRIAL COURT ERRED IN THE DENIAL OF MR. KING'S CLAIM THAT MR. KING'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION WERE VIOLATED BY THE STATE'S EX-PARTE COMMUNICATIONS WITH THE COURT AND THE STATE'S AND COURT'S UNDISCLOSED CONSIDERATION GIVEN TO STATE WITNESSES IN EXCHANGE FOR THEIR TESTIMONY.

Mr. King's trial was the first in which the media was allowed to photograph the proceedings. When Mr. King's counsel was not present in the courtroom, the state approached the court for an ex-parte communication. After the state conferred with the trial court, the trial court spoke with the court bailiff, and the cameras were removed from the courtroom. (Ex. 13) In a letter to the Florida Supreme Court, the trial court stated that certain state witnesses refused to testify unless the cameras were removed from the courtroom. In order to appease the state witnesses and ensure

their favorable testimony, the state and the trial court moved, ex-parte, to remove the cameras from the court. (Ex. 13)

The state and trial court's ex-parte communications violated Mr. King's fundamental due process rights to a fair trial and his Sixth Amendment right to counsel. Improper *ex parte* communications between the judiciary and single litigants violate constitutional requirements. In Rose v. State, 601 So.2d 1181 (Fla. 1992), this Court wrote:

> Noting is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.. . . The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments...

Id. At 1183.

The ex-parte deal with the state witness for their testimony also violated Mr. King's due process rights under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (U.S. 1971); Kyles v. Whiteley, 514 U.S. 419, 115 S.Ct. 1555 (U.S. 1995); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

In the Response, the State relies on Lambrix v State, 698 So. 2d 247 (Fla. 1996). However, the holding in Lambrix was abrogated in Williams v State, 777 So. 2d 947 (Fla. 2000). The Court held:

> As this Court stated in *state v Weeks,* 166 So. 2d 892, 896 (Fla. 1964),and reiterated in *Steele,* "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution

of the United States."

Id. at 950.

In the case at bar, Harrison was clearly ineffective. Claims which should have been raised were ignored. Mr. King has been denied due process. Counsel relies on the Peede and the Happ and Fotopoulos Supreme Court orders in addition to argument presented in Issue II as this argument is applicable to this issue.

CONCLUSION AND RELIEF SOUGHT

Based upon the testimony at trial, the testimony of the December 10th 2001, hearing on all pending motions, exhibits attached to the State response to Defense motion for DNA testing, affidavits submitted to this Court, and arguments presented above, Mr. King contends that his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution have been violated. Mr. King requests the following relief:

1. That the Court vacate and set aside the judgments of conviction and sentences, or in the alternative,

2. To vacate the sentence of death.

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 _____ day of January, 2002.

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CERTIFICATE OF COMPLIANCE

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

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