IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON
Appellant,

vs.

CASE NO: SC02-1426
Lower Tribunal No.: 94-150-CF-1

STATE OF FLORIDA
Appellee.
_____/

AMENDED BRIEF OF APPELLANT

Submitted by.

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IV. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

Appellant was arrested near Brookhaven, Mississippi on April 28, 1994, following a shoot out and an automobile chase with members of the Mississippi highway patrol. (R/T.V. 2671) Appellant was injured and treated for gunshot wounds and abrasions from an automobile accident. Shortly after his arrest reports were published near his family home in Greenville, North Carolina. Almost immediately members of his family, to include his father, mother, and sister immediately traveled to Brookhaven Mississippi to be of assistance.(R/H.VI.24) Appellant initially indicated that he did not wish to speak without the presence of counsel on his behalf.

The family members testified that they were aware that the Appellant was induced to speak about the missing murder victim by Mississippi law enforcement authorities who indicated that the Appellant can avoid the death penalty by cooperation with law enforcement.(R/H.VI.23-63; 78-115) Various law enforcement officials from Columbia County, Florida, had arrived in Brookhaven, Mississippi. The Appellant began to make incriminating remarks after being told that he could avoid the death penalty by cooperating.(R/H. VI.90);(R/T. XVIII. 144-145) These incriminating remarks originated in Brookhaven Mississippi and continued with Florida Sheriff's Department, Detective Russ Williams was permitted to take the Appellant, under escort, back to the crime scene and surrounding areas in order to look for the victim's remains and other items of evidence.

Appellant's mother recalls being contacted by Detective Russ Williams, who would telephone her in the presence of the Appellant. (R/H.VI.90) Detective Russ Williams would use the influence of Appellant's mother to further induce the Appellant to speak to law enforcement. Prior to Appellant's trial his trial defense counsel made a motion to suppress these pretrial statements. A hearing was scheduled and conducted relating to this issue in March, 1995.(R/T.XVII.2407-2481) The State of Florida presented all of the relevant law enforcement officers together with rights waivers forms executed by the Appellant. The Appellant then presented no evidence

other than his own testimony. None of the Appellant's family members who had been present for the initial waiver of rights and were familiar with the circumstances were called to testify at the March 13,1995, suppression hearing. Suppression of the statements was denied.(R/T.XXIV.3507)

Shortly before the Appellant's original trial date, on March 15, 1995, Appellant's trial defense attorney consulted a mental health professional with respect to the condition of the Appellant and the potential existence of a mental responsibility defense for potential mitigating factors. No previous evaluation and consultation with a mental health professional had been accomplished. In fact, Appellant's trial defense counsel did not first make a motion for appointment of a psychological expert until March 13, 1995 (R/T.XXIV.3487-3489) with the trial set to begin on March 27, 1995.(R/T.XIX.2482-2670) The mental health professional, Umesh Mhatre, M.D., rendered a report based upon a single meeting with the Appellant in which he offered the opinion that the Appellant was competent to stand trial, that he could not ascertain the existence of any mental responsibility defense, and that he could not substantiate the existence of any "statutory" mitigating factors relating to the potential sensing of the Appellant.(R/H.VII.140-146) He was not furnished with the extensive family history nor was he asked about non-statutory mitigation factors.(R/H.VII.141-146)

During the trial of the Appellant and immediately before the State of Florida

began to offer into evidence the statements and derivative evidence against the Appellant, the Appellant's trial counsel renewed the motion to suppress his pre-trial statements and offered the discovery depositions which had been taken of the Appellant's mother, father, and sister by the State. (R/T.V.546-575) The depositions had been taken as discovery by the State of Florida shortly before the trial and there had been no questioning of the witnesses by Appellant's lawyer relating to these issues. The trial court indicated that the depositions would be considered but that the ruling would not be changed. The trial court still had heard no live testimony from these witnesses nor any defense oriented examination of these witnesses with respect to the suppression of Appellant's pre-trial statements.

At the evidentiary hearing on this issue the Appellant's trial defense attorney offered that these witnesses had not been presented in person at the suppression hearing in order to avoid their availability to the State of Florida as witnesses at trial or to prevent potential contradictions between their deposition testimony and live testimony.(R/H. VII.170-173) No other valid tactical reason was offered for excluding their testimony at the suppression hearing. It was made clear from the evidentiary hearing that the family member testimony was relevant and supportive of the Appellant's motion to suppress his pre-trial statement.(R/H.VI)

Appellant was indicted for four separate crimes relating to these

events.(R/T.XX.) In one count Appellant was charged with first-degree murder of Carmen Gayhart. In another count Appellant was charged with the kidnaping of Carmen Gayhart. In another count Appellant was charged with the sexual battery of Carmen Gayhart. In a fourth count the Appellant was charged with an armed robbery of Carmen Gayhart. Each and every one of the four counts, with respect to venue, alleged that the offenses had occurred in "Columbia and/or Hamilton County" Florida. There was never a time when Appellant was ever advised of his right to elect venue by either his counsel or the court.(R/H.I.115-116)

Prior to his trial both Appellant and his co-defendant sought to sever their trials from each other and also to sever various counts of the trial from other counts charged in the indictment.(R/T. XXIV.3463-3468) All of these motions to sever either the Appellants or the various offenses were denied.(R/T. XXIV. 3601) An effort was first made to select jurors for a joint trial of both defendants and all counts in Hamilton County, Florida. It soon became clear that there was very little chance of selecting two qualified juries in Hamilton County, Florida.(R/T. XIX. 2655-2670) Ultimately, all counsel and the court came to an agreement that no effort would be made to pick a jury in Columbia County, Florida, and that another venue would be used. The trial court selected and, with the approval of the Florida Supreme Court, moved the venue of the trial to Clay County, Florida.(R/T. XXV.3676)

At no time did the Appellant's trial defense lawyer make a specific request for severing the offenses from each other or his trial from that of his co-defendant based upon either Art. I, §16 of the Florida Constitution or Florida Statute §901.305 relating to venue. Additionally, Appellant's trial defense lawyer never informed the Appellant of his right to severance of the offenses from each other based upon the venue allegations used in his from indictment. All parties thereon proceeded to trial in Clay County, Florida.

Two juries were selected from Clay County, Florida, and a joint trial with the two separate juries was commenced on May 15, 1995.(R/T.I) Each of the two juries were to be kept separate from the other so that potential violations of the Bruton Rule could be avoided. The juries were managed by Thomas Slattery and Mark Lowe as bailiffs.(R/H.VII.157-159) Slattery was a reserve deputy and Lowe has been a corrections deputy. Neither had ever served as a courtroom bailiff before.(R/H. VI.199; R/H.VII.156)

On the day of the trial the Appellant's trial defense attorney had renewed the motion to suppress Appellant's pretrial statement as described above.(R/T.V.546) The juries were excused to the deliberation room and an evidentiary hearing was conducted. Following the hearing the juries were brought back in to the court room and the trial continued. On the following day the Appellant's jury was again excused

to the deliberation room for an additional evidentiary hearing. As had occurred with the motion to suppress hearing, additional matters were presented which were both inadmissible and prejudicial to the Appellant's case.

On the fifth day of trial it was again necessary to excuse the jury to the deliberation room for the conduct of proceedings out of their presence. The trial court inquired of the Bailiff as to whether the jury could hear courtroom events while in the deliberation room. The record reflects that a Bailiff responded that they could hear when the court room microphones were turned on.(R/T.VII.771-772) Accordingly, the trial court directed that the microphones be turned off during such hearings in the future. No inquiry was made by Appellant's counsel or by the court with respect to what had been overheard by the jurors (in particular the jury of the Appellant) during the two previous hearings in which the jury was in the deliberation room and to be excluded from courtroom proceedings. During the evidentiary hearing the State sought to excuse this by establishing the wealth of legal experience in the room at the time and by theorizing that so many experienced lawyers would not have allowed the Appellant to be unfairly prejudicial.(R/H.VII.210-211)

Early in the case the State of Florida presented a Mississippi Highway Patrol Trooper Leggett.(R/T III.450) Trooper Leggett was also effectively adopted as a witness by the co-defendant, Wainwright regarding an incriminating statement by

Appellant. Prior to eliciting this testimony both counsel for the State and counsel for the co-defendant called a bench conference for the purpose of warning Appellant's counsel that Trooper Leggett would be asked questions which would result in prejudicial answers to the Appellant. Appellant's trial defense attorney chose to allow Appellant's jury to remain in the courtroom Accordingly, Appellant's jury was exposed to testimony relating to the Appellant making of statements consistent with guilt and acknowledgment of the likelihood of a death sentence. There was no material or evidence of benefit to the Appellant presented by Trooper Leggett either in his direct examination or in any cross-examination by either defense counsel

Following the testimony of the medical examiner utilized in the Appellant's trial the Appellant's Uncle, Donnie Simmons, overheard at least two of Appellant's jurors discussing the qualifications of the medical examiner.(R/H VI.116-27) Appellant's trial defense attorney raised this issue with the court but did not request any individual inquiry of the members of the Appellant's jury in order to discover or ascertain whether premature deliberations of the Appellant's case had been occurring during the presentation of the State's case. Accordingly, the record does not document to what extent premature deliberation had occurred. Accordingly, from the record it can only be clearly ascertained that such premature deliberation had been taking place. The extent of such premature deliberation cannot be ascertained.

During the charge conference the Appellant had sought a special jury instruction with respect to the defense of withdrawal. After substantial argument and presentation of numerous authorities on this issue the trial court determined that the withdrawal instruction was not appropriate and would not be given.(R/T XIV.1912-3) During argument the State of Florida offered that the "independent acts" instruction would have been appropriate and agreeable to the State of Florida.(R/T XIV.1912) The trial defense attorney did not accept the invitation of the State of Florida to have this instruction given even after it had become clear that the trial court would not give the "withdrawal" instruction. Consequently, no instruction was given to the jury from which they could have understood the possibility that the co-defendant, Anthony Wainwright, may have been solely and independently responsible and guilty of the homicide of Carmen Gayhart.

Following the conviction of the Appellant to all of the counts of the indictment a sentencing phase was conducted.(R/T.XVI) Appellant only presented the testimony of a former employer and two family members, Appellant's brother, and Appellant's uncle. The Appellant's mother, father, and sister were not presented. There was no testimony offered from Dr. Umesh Mhatre. It was known to Appellant's trial counsel that Appellant had suffered from a dysfunctional childhood and family life.(R/T.VIII.189-195 and referenced exhibits) It was also known that Appellant had

suffered from recurring mental health problems and had been involuntarily hospitalized for mental health illnesses on more than one occasion during his life. It was also known that Appellant had been on prescription painkillers for several years during his childhood. None of this was presented to the jury.

Prior to deliberating in the penalty phase, Appellant's jury was instructed regarding the law and their decision. They were instructed that their verdict was merely advisory.(R/T.XVI.2140-7) They were not instructed that their decision must be unanimous nor that they had to specifically determine that some single aggravating factor had been proven beyond reasonable doubt and by unanimous vote. By an apparent vote of 10 - 2 (although this was incorrectly published by the Clerk) the jury recommended death (R/T XVI.2148) and this was ultimately the sentence of the Court.

Shortly before Appellant's evidentiary hearing was to be conducted Appellant learned that Linroy Bottoson had been granted a stay of execution by the United States Supreme Court, Bottoson v. Moore, 234 F.2d 526 (11th Cir.,2000) Appellant's counsel initially believed that the stay may have been for reasons which had previously been the subject of Bottoson's appeal to the Eleventh Federal Circuit. These were similar to some issues in the Appellant's case. Appellant requested to continue the proceeding pending this decision. The State of Florida offered that the reasons for the stay granted to Linroy Bottoson were related to the case of Ring v. Arizona, 122

S.Ct. 2428,153 (R/H) Appellant offered that, under either circumstance, his hearing should be postponed and also that any final decision in his case at the trial court should be postponed pending resolution of these matters. The trial court declined any continuance and proceeded to the evidentiary hearing. Following the evidentiary hearing the trial court directed the submission of proposed orders within 75 days of receipt of the record. Appellant renewed the request for a continuance until the matters raised by Ring v. Arizona, 122 S. Ct. 2428,153 (2002) had been fully resolved. This was again denied and a final order was rendered. The final order is essentially that proposed by the State. (R/H.II. 291-296) This appeal is taken from that order.

B. PRIOR PROCEEDINGS.

The Appellant was charged by indictment with four separate criminal acts. Such included kidnaping, violent sexual assault, armed robbery, and murder in the first degree.(R/T. XXX. 2671-2672) The indictment with respect to each count alleged that the criminal acts occurred in Columbia and/or Hamilton County Florida. The Appellant was to be tried with his co-defendant, Anthony Wainwright, in a joint trial with the separate juries for each defendant in Columbia County, Florida. When a jury could not be selected in Columbia County, Florida, the trial was moved to Clay County, Florida, and was conducted between May 15, 1995 and June 1, 1995.

Appellant and his co-defendant were each convicted of all counts of the

indictment. Appellant Hamilton's jury, apparently by a vote of 10-2 , recommended that the death penalty be imposed on June 1, 1995. (R/T.XXVII.4106) the trial court, upon consideration of all evidence and argument of counsel, sentenced the Appellant to death on June 12, 1995. (R/T.XXVII. 4132-4146)

Appellant appealed the judgment and sentence of this court to the Florida Supreme Court which denied the Appellant's appeal. Appellant timely appealed to the United States Supreme Court and his petition for a *writ of certiorari* was denied on June 26, 1998.

Appellant's case was first assigned to the Capital Collateral Representatives for post-conviction representation. The case was next transferred to a first private counsel to represent the Appellant in post-conviction proceedings and, following the withdrawal of first counsel, the case was assigned to the undersigned of Clearwater, Florida, who entered an appearance in March, 1999.(R/H. I.42-55) Reasonable requests for extension were granted and Appellant filed a petition pursuant to Fla.R.Crim.P. §3.850 on June 28, 2000.(R/H. I.13-34) Such petition was amended once due to information which was unavailable to Appellant on the first filing.(R/H .I. 112-137)

A Huff hearing was conducted on April 25, 2001.(R/H. V.) It was determined that certain matters warranted evidentiary hearing. Certain other matters, most notably

including the Appellant's complaint with respect to his counsel's failure to advise him of his venue options, the failure to request the "independent acts" instruction, and the failure to request tailored penalty phase instructions based upon his family situation were denied summarily. (R/H. I. 177-182) The evidentiary hearing was originally scheduled for October, 2001, but due to witness unavailability the hearing was continued until February 19 - 20, 2002. (R/H. I. 231)

Appellant had two pending claims concerning circumstances wherein it was alleged that his jury engaged in improper premature deliberation discussions of the case and in which it was alleged that the Appellant's jury was exposed to evidence during the trial from which they should have been excluded. Appellant sought to subpoena the appearance of his trial jurors in order to inquire of these events. This request was denied.(R/H. I. 183-189; 190-200; 229-230); and (R/H/ II. 249-251)

Appellant on February 11, 2002, requested a final amendment and continuance based upon the recent decision of the United States Supreme Court in Ring v. Arizona, 122 S.Ct. 2428, 153 (which also resulted in the granting of *certiorari* in the case of State v. Bottoson from Florida).(R/H. II. 252-256) This request for continuance and amendment was denied.(R/H. II. 257-258)

An evidentiary hearing was conducted on February 19 and 20, 2002. Appellant presented as witnesses his mother, Ms. Jewel Neal, his father, Eugene Hamilton, his

sister, Ms. Tina Edwards, his brother, Mr. Timothy Hamilton, his Uncle, Mr. Donnie Simmons, the two bailiffs from his trial, Thomas Slattery and Mark Lowe, and a psychiatrist, Dr. Umesh Mahtre. Appellant also called the Honorable Jimmy Hunt, now County Judge of Columbia County, Florida, as a witness. Judge Hunt had been the Appellant's original trial defense counsel.(R/H. VI,VII) The State of Florida presented Judge Hunt as counsel for the Appellant and also introduced certain of his trial preparation notes and materials. The matters raised at this evidentiary hearing will be addressed herein.

References to the record of trial will be identified by R/T and references to the evidentiary hearing will be identified by R/H.

V. SUMMARY OF THE ARGUMENT

Appellant will show that there was no acceptable reason for failing to present the testimony of his family members who had been present in Mississippi at his suppression hearing. In particular, the reasons offered by his trial defense attorney are without merit. The State of Florida was well aware of the existence and knowledge of Appellant's family members and could have investigated them and secured their attendance at trial whether disclosed by the defense or not. Their testimony corroborated the testimony of the Appellant. There is reasonable likelihood that the trial court would have suppressed at least some of Appellant's pre-trial statements if

it had been presented with live testimony which corroborated Appellant's position.

Appellant will further show that the interviews conducted with Appellant's family members prior to his trial were such that, under any standard of competence and efficiency, a mental health professional should have been consulted relating to mental health factors bearing upon a sentencing and the guilt phase of the Appellant's trial. To not consult with any mental health professional until less than two weeks before the original trial date and less than two months before the trial actually occurred cannot be considered adequate or proper representation under any analysis. Further, this oversight was prejudicial to the Appellant's trial preparation, especially the penalty phase. This will be developed more during the discussion of the penalty phase.

Appellant will further show that, although venue may have been statutorily permissible in Hamilton County, the wording of the Appellant's indictment was such as to conclusively entitle the Appellant to elect venue for each count between either Columbia and Hamilton Counties. This would have allowed him to sever of the various counts of the trial from each other as well as to severance of his trial from that of this co-defendant. It will be seen that Appellant was prejudiced by the joint trial.

Appellant will further show that the matter of venue is a fundamental state constitutional right. This right has been further explicitly defined and clarified by statute. Appellant was never informed of his venue options. Accordingly, he never

had the opportunity to exercise this right. Consequently, Appellant was forced to experience a joint trial with a co-defendant that could have been avoided and to the taint of additional offenses in his murder trial which could have also been avoided simply because of the venue language selected by the State to charge the offenses. Substantial prejudice resulted. there is at least a reasonable likelihood that Appellant may have received a more favorable verdicts in both the guilt and penalty phases if he had known of the absolute right to sever the offenses based upon venue allegations.

Appellant will show that the existence of juror irregularities (overhearing improper testimony and evidence and engaging in premature deliberation) was clear and cannot be reasonably disputed. It is clear that Appellant's trial counsel took no corrective or curative action. The only defense offered to these jury violations at the evidentiary hearing by the State of Florida was simply to speculate that surely something would have been done by the numerous experienced attorneys in the room. In other words, they conceded that nothing was done. It is clear from the record of the evidentiary hearing and from the record of trial that substantial improper matters were overheard by the jury. It is also clear that a most complicated and sensitive jury procedure (separate juries in a single trial) were being handled by two bailiffs who had absolutely no prior experience serving as court bailiffs. Accordingly, Appellant submits that the Honorable Trial Court should either have granted the relief of a new

trial outright or have permitted Appellant to present the testimony of the jurors in order to establish the extent of the prejudice to his case. It cannot be disputed that the incidents occurred.

Appellant will also show that the "independent acts" instruction offered by the State and declined by his trial defense counsel would have benefitted him. Further, from the facts of this case, he was entitled to such instruction. To have turned down such an instruction, even if not the defense instructions which was requested, was without any tactical or strategic benefit to the Appellant. Refusing the "independent acts" instruction denied the Appellant the possibility of an explanation by the judge to his jury about the possibility of guilt of his co-defendant alone to one or more of the alleged offenses, including that for which the Appellant now faces execution. Accordingly, it was error to have neither granted relief nor to have allowed an evidentiary hearing on this issue. Prejudice must be presumed when it is clear that the jury decided the case without the benefit of instruction on all of the law bearing on this case.

Appellant will also show that he was denied the effective assistance of counsel in his sentencing phase. As previosuly described, Appellant's trial counsel failed to adequately examine Appellant's mental health status, Appellant's trial counsel additionally failed to present a wealth of family history evidence showing that he had

been raised dysfunctionally, that he had been on prescription painkillers for several years before puberty, that he had been introduced to drugs and crime by an older brother in the absence of an appropriate male role model, and that he had experienced several mental health institutionalizations as a child. He also failed to tie this together with the mental health professional, who could have explained the cause and effect relationship and could have expertly mitigated the Appellant's behavior. Appellant's trial counsel stated that he did not present Dr. Mhatre because Dr. Mhatre would have presented a diagnosis of antisocial personality disorder. Since antisocial personality disorder has actually been recognized as a non-statutory mitigating factor, it is clear that the representation was ineffective and prejudicial and that there is a reasonable likelihood that Appellant's jury would have rendered a different verdict if they had been presented with the evidence. Since even without this evidence, two of the jurors recommended life over death it is clear that there is a reasonable likelihood that reasonably effective representation would have produced a different outcome.

Appellant will further show that, had he been permitted to amend his petition to include the matters raised by the case of Ring v. Arizona, he would have had the opportunity to show his absolute entitlement to a commutation of his death penalty based upon the fact that his jury was instructed in a manner which was in violation of the Florida and United States Constitution. These Constitutional infirmities preclude

Appellant from being sentenced to death. Such request was timely made and was denied by the trial court.

VI. ARGUMENT

This is an appeal of the trial court's decisions relating to the Appellant's Petition pursuant to Fla.R.Crim.P. §3.850. Most of theclaims alleged the ineffective assistance of the Appellant's trial counsel. Because of the nature of post-conviction relief. Matters which were properly raised or addressed by trial counsel could have been the subject of appeal. However, if oversight of counsel has both denied a fair trial and further has prevented the legal issue from being reviewed on appeal, then a Petition may be filed to ensure that no conviction stands and that no sentence is carried out against one who has not received a fair trial or who has been denied important and fundamental constitutional rights. Accordingly, it is helpful to begin with a discussion of the standards relating to the ineffective assistance of counsel and then later discuss how such might be applicable to each claim.

A. STANDARD GOVERNING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Post-conviction claims of ineffective assistance of counsel are governed pursuant to the standard set forth in the case of Strickland v. Washington, 466 U.S. 668 (1984). Pursuant to this standard a Petitioner has a burden of showing first, that

his trial defense attorney performed below the standard of reasonably effective counsel, and second, there is a reasonable likelihood that, but for the deficient representation the outcome of his trial may have been different.

Another way of stating the test is to say that the deficiency of counsel was of sufficient magnitude to undermine confidence in the verdict that was achieved at trial. This standard was established and has prevailed since the Strickland decision and is consistently applied in Florida courts. Accordingly, this standard should be the basis for each of the decisions made in the present case. (Also please see the recent cases of Spencer v. State, No. SC00-1051 (Fla. 04/11/2002) and Gorby v. State, No. SC95153 (Fla. 04/11/2002).)

Stated another way, the Appellant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial, Rutherford v. State, 727 So. 2d 216, 220 (Fla. 1998). Applying these standards to the facts of the present case, the Appellant will be shown to be entitled to a new trial in which he will not be required to face the possibility of the death penalty and which is free of the described prejudice which occurred in his first trial.

B. ANALYSIS OF ISSUES PRESENTED

Appellant will now develop each of the issues presented in the appeal. It should also be noted that there is contemporaneously filed a petition for extraordinary relief. Appellant will present several of the same or similar claims in both actions. This is done first to ensure that no meritorious claim is not heard and second, to provide this Honorable Court with the ability to determine each such matter in the most appropriate and efficient proceeding. It is also true that one aspect of a given claim may be more appropriately raised by *habeas corpus*, whereas another aspect of such claim may be restricted to the appeal of the Fla. R. Crim. P. §3.850 decision. It is not the desire or intention of Appellant to have the same claims heard more than once. Appellant will now present argument on each individual claims.

1. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE PETITIONER'S TRIAL COUNSEL TO WAIT UNTIL TWO WEEKS BEFORE THE TRIAL WAS ORIGINALLY SCHEDULED TO CONSULT A MENTAL HEALTH PROFESSIONAL, DID NOT ASK THE MENTAL HEALTH PROFESSIONAL TO EXPLORE NON-STATUTORY MITIGATING FACTORS, NOR TO ARRANGE AN INTERVIEW BETWEEN THE MENTAL HEALTH PROFESSIONAL AND PETITIONER'S FAMILY MEMBERS WHEN IT WAS CLEAR THAT PETITIONER HAD BEEN RAISED IN A DYSFUNCTIONAL

FAMILY AND HAD BEEN PSYCHIATRICALLY HOSPITALIZED THROUGHOUT HIS YOUTH.

Appellant is entitled to have his death penalty set aside because his penalty phase was not adequately prepared. The Appellant's trial counsel was aware of the fact that the Appellant's medical history included prescriptive exposure to psychotropic medicine at a very early age. Appellant's trial counsel was also aware that the Appellant's family life was extraordinarily distressed and dysfunctional. Appellant's trial counsel did not consult with a mental health professional until only a few days before his trial was scheduled to begin.

When Appellant's trial counsel did finally consult a mental health professional, there was insufficient time to properly evaluate the case. This likely explains why the family history of Appellant was never shared with him.(R/H. VI. 169) The mental health professional, Dr. Umesh Mahtre, was not informed of the vast majority of the Appellant's childhood problems. The Appellant's known mental health history and medical history and family member interviews were not shared with him.

The examination of Appellant by Dr. Mahtre comprised only a single session on March 15, 1995, or within two weeks of the time that the trial was then scheduled to begin. (R/H. VII. 139). Upon having the opportunity to examine his family members and medical and mental health reports from the Appellant's childhood, Dr.

Mahtre was able to offer explanations for the Appellant's personality abnormalities. (R/H 139-157)

Dr. Mahtre testified at the evidentiary hearing that he had not been made aware of these matters at the time of rendering his original opinion with respect to the condition of the Appellant with respect to his psychological health and well-being. In particular, Dr. Mahtre had not been made aware of the problems with the Appellant's mother, which included her extensive mental health history, and the divisiveness within the Appellant's childhood household. (R/H 137-157) Additionally, Dr. Mahtre was unaware of the Appellant's early exposure to both prescribed and illegal controlled substances. Appellant had suffered for several years with an eye injury resulting from a BB gun incident through which he experienced continuous pain and was frequently prescribed painkilling medication. He was also unaware that the Appellant's brother, Timothy Hamilton, had led him into early drug abuse and criminal activity.

While Dr. Mahtre may still had diagnosed Appellant with a serious personality disorder, the knowledge and exposure to these other facts would have permitted him to have offered the Appellant's jury explanations for this antisocial behavior other than that the Appellant was an inherently bad person. It is clear that the imposition of the death penalty, as instructed by the court to the jury, is to be reserved for the most atrocious of crimes and the most atrocious of perpetrators.

At the evidentiary hearing, Appellant's trial defense counsel stated that Dr. Mhatre had deemed that Appellant was "sociopath".(R/H. VII.185) in fact, Dr. Mhatre determine that Appellant suffered from "antisocial personality disorder"(R/H/VII.148), a malady which has, in fact been recognized as a mitigating factor (Please see) The significance of this will become apparent later.

2. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE PETITIONER'S TRIAL COUNSEL TO FAIL TO PRESENT TESTIMONY FROM PETITIONER'S FAMILY MEMBERS WHO WERE PRESENT IN BROOKHAVEN, MISSISSIPPI, AT THE TIME THAT THE PETITIONER WAIVED HIS MIRANDA RIGHTS WHEN SUCH FAMILY MEMBERS WOULD HAVE CORROBORATED THE PETITIONER'S POSITION THAT HE WAS OFFERED IN TO MAKE HIS STATEMENT AND THAT SUCH INDUCEMENT WAS CONTEMPORANEOUSLY COMMUNICATED TO SAID FAMILY MEMBERS AND WHEN THE STATE OF FLORIDA COULD HAVE SUBPOENAED, INTERVIEW, OR INVESTIGATED SAID FAMILY MEMBERS AT ANYTIME UP TO TRIAL AND COULD HAVE SECURED THEIR ATTENDANCE AT TRIAL IF DESIRED.

Appellant's trial defense attorney was prejudicially ineffective in failing to call

Appellant's family members to testify at the suppression hearing and a new trial must be granted. Appellant's trial defense attorney made a pretrial motion to suppress the pretrial statements of the Appellant.

The Appellant had first encountered law enforcement in Brookhaven, Mississippi, where he was apprehended. Immediately before his apprehension the Appellant had been involved in a gunfight and an automobile collision. Accordingly, he had needed immediate medical attention. Prior to engaging law enforcement in any conversation the Appellant's family traveled down from their home near Greenville, North Carolina, to be with the Appellant. His first response to any attempted questioning was to request counsel. The State acknowledged that Appellant refused to sign the rights waiver, but denied that there had been a request for counsel.(R/T. XVII. 2227-2392)

His family members Eugene Hamilton, Jewel Neal (parents) and Tina Edwards (sister) were present at the time of the earliest meetings of the Appellant with law enforcement officers, most of whom were with the State of Mississippi from the Brookhaven, Mississippi area. Such included Brookhaven Sheriff Lynn Boyte. Appellant's father and mother were personally aware of offers made by law enforcement in Brookhaven, Mississippi, that the Appellant would be spared the death penalty if he were to cooperate with law enforcement. Such offers were, in fact,

relayed to Appellant through them.(R/H.VI. 23-60; 78-115) Based upon these representations made to them, as well as their observation of these offers being made to the Appellant in their presence, Appellant's parents prevailed upon the Appellant (who was still injured and under the influence of medication) to make a statement concerning the present offense to law enforcement officials in Brookhaven. Such statement was incriminatory and was later used against the Appellant at trial. Additionally, the statements made in Brookhaven, Mississippi, led to additional incriminatory statements made to law enforcement officials in Columbia County, Florida, and Hamilton County, Florida.

At the suppression hearing regarding these statements the State of Florida presented testimony from virtually all of the law enforcement officers who were present in Brookhaven, Mississippi, at the time that the first statements were made by the Appellant. The State of Florida also presented the testimony of local detectives who took subsequent incriminating statements from the Appellant. Such subsequent statements were made as a result of the initial statements made in Brookhaven, Mississippi.

The Appellant had presented no evidence other than his own testimony at the suppression hearing. This Court accepted the testimony of the law enforcement officials that the Appellant had been fully advised of his rights, had not been

improperly induced, to make the statements, and had made a knowing, intelligent, and voluntary waiver of his rights against self-incrimination. The Appellant did not present the testimony of Appellant's family members which were present at the time of the statement.

During the trial and immediately before the State of Florida began to offer the evidence of the statements to the jury, the Appellant renewed his motion and asked the Court to consider deposition testimony taken at the instance of the State of Florida of the family members who had been in Brookhaven, Mississippi. (R/T.III.546) This Court again denied the suppression of the statements and permitted the statements to be introduced at trial. The Court was never presented with live testimony of the Appellant's family members, who were eyewitnesses and participants in the Appellant's initial waiver of his right to counsel, prior to ruling the pretrial statements and derivative evidence admissible at his trial. The Court only saw the depositions of these witnesses' response to the State's deposition questions.

These witnesses were always available to testify regarding this matter and, in fact, offered such testimony at the evidentiary hearing on February 19, 2002. In particular, Ms. Jewel Neal had clear recollection of the statements made by Sheriff Lynn Boyte that the Appellant's life could be spared if he were to cooperate with law enforcement. She not only heard the statements made but relayed them to the

Appellant prior to his waiver of his right to counsel. (R/H. VI. 83-94) The Appellant's father, Eugene Hamilton, similarly overheard and relayed the statements to the Appellant. (R/H. VI. 45-62) These events were also witnessed by the Appellant's sister, Ms. Tina Edwards (R/H.VI. 24-42).

Appellant's defense counsel offered that he did not present these witnesses out of concern that their testimony may later be harmful to the Appellant at trial. An inherent and improper assumption of this position is that the knowledge and availability these witnesses were otherwise not known or not available to the State of Florida. In fact, the State of Florida was well aware of their participation and would have had little trouble obtaining their appearance at trial if they had so desired. (R/H. VII. 44, 62, 92) In fact, these witnesses were or could have been present for trial proceedings and indicated at the evidentiary hearing their willingness to participate, although Ms. Neal may have needed some time accommodation (R/H. VI. 92). In fact, it was also the State's depositions of these witnesses which were offered in the renewed effort to suppress the statements during the conduct of the trial.

This strategy is not reasonably excusable for a number of reasons. First, their testimony concerning the issue of suppression clearly benefitted Appellant and could have caused no harm. Second, there is no possibility that their testimony could have hurt Appellant's case at the trial either. They were not present at the time of place of

the time or place of the offenses. Appellant had made no incriminating statements to them nor had be expressed any words of intent or motive to them prior ro the offense. The failure to call them as witnesses was to forsake a critical benefit with no risk of danger. Pursuant to Strickland, this was ineffective as a matter of law. Pursuant to Rutherford, this decision casts doubt upon and undermines the integrity of the trial.

It must be considered that the suppression decision turned on the determination of whether of not Appellant had actually invoked his right to counsel. It is uncontroverted that he had not signed a written waiver of his rights. Appellant testified that he had made an oral request for counsel, but this was denied by law enforcement. Appellant's testimony at the suppression hearing could have, and should have, been corroborated by his family members who could have corroborated that the inducements had been made, that Appellant was aware of them, and that his cooperation began thereafter, and not before. There is more than a reasonable likelihood that this would have made some difference in their determination.

There is at least a reasonable likelihood that the decision with respect to permitting the use of the Appellant's pretrial statements would have been different if these witnesses had been presented to the court in person at the time that this decision was actually made. The Appellant's trial defense attorney obviously knew that such testimony would have been beneficial to the Appellant because the testimony was

offered through depositions during the conduct of trial. Of course, at this point several years have passed and the recollection of these witnesses is still clear. The State of Florida did not produce the investigating officer to rebut the allegations of Tina Edwards, Jewel Neal, and Eugene Hamilton that the statements made to induce the Appellants pretrial statement were not made to them. There is no contradiction to the position of the Appellant that the inducement for him to testify was not communicated to have and he stated that the statements were made to him at his original suppression hearing.

In evaluating a challenge to a pretrial statement pursuant to the Fifth Amendment of the United States Constitution, Fl. Const. art. I, §9, and the decision of Miranda v. Arizona, 384 U.S. 436 (1966), the State has the burden of demonstrating that the statements were made pursuant to a knowing, intelligent, and voluntary waiver. The testimony of Eugene Hamilton, Jewel Neal, and Tina Edwards set forth that the Appellant would have never begun to speak with law enforcement but for the inducement which were made by law enforcement and relayed to the Appellant through his family members. Accordingly, it was not voluntary

At the time that this original decision to admit all statements was made the Court had not been made aware of the fact that these inducements had, in fact, been relayed to the Appellant. The testimony of these witnesses would have established that. In

the absence of any denial of this by the State of Florida at the evidentiary hearing this Court has no option other than to reconsider this issue and to grant the Appellant a new trial in which these pretrial statements are not used against the Appellant.

3. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE PETITIONER'S TRIAL COUNSEL TO FAIL TO ADVISE THE PETITIONER OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO ELECT VENUE IN EITHER OF TWO CONJUNCTIVELY CHARGED COUNTIES AND TO AGREE TO A CHANGE OF VENUE TO A THIRD COUNTY WITHOUT SEEKING A PANEL IN ONE OF THE TWO CONJUNCTIVELY CHARGED COUNTIES AND FURTHER WHEN SUCH ELECTION WOULD HAVE CLEARLY AFFORDED THE PETITIONER THE OPPORTUNITY TO SEVER HIS TRIAL FROM THAT OF HIS CO-DEFENDANT AS WELL AS TO SEVER PREJUDICIAL COUNTS AGAINST THE Appellant ALONG FROM EACH OTHER.

The Appellant included within his petition for post-conviction relief a complaint that he was not adequately advised of his options with respect to the venue of his trial, that the failure to advise him of these options was ineffective assistance of counsel, and that the apprisal of these rights by his attorney would have unquestionably changed the outcome of this trial. The trial court denied this relief and denied an

Evidentiary Hearing on this matter.

Appellant respectfully submits that this Honorable Court misapprehended the true nature of the Appellant's claim. This is because it would appear that the ruling of this Honorable Court to deny an evidentiary hearing was based solely on the fact that the trial court had jurisdiction over the case and that the parties agreed to the change of venue to Clay County, having been unable to panel a jury in Hamilton County. The trial court did not engage in any analysis of the Appellant's venue options and how they may have impacted on this trial.

In particular, the Appellant had a state constitutional right to trial in the venue in which the crime is alleged to have been committed. If a crime begins in one county and ends in another so that portions of the crime are committed in more than one venue and the State is aware of this fact, the State may allege that a crime was committed in Hamilton and Columbia County and the State may select the venue.

If, on the other hand, the State is aware that criminal acts have taken place in either Hamilton or Columbia County, but is not sure of which county, the State may allege that the crime occurred in Hamilton or Columbia County. In that case, the Appellant is entitled to select the venue for the trial. The case of Leon v. State, Case No. 95-3683 (4th DCA, 1997) sets forth that the use of the conjunctive "and/or" is a "barbarism" of the language and should be avoided. However this case does find that

this conjunctive is legally permissible but gives the Appellant the venue option.

Of critical importance here is the case of State v. Katz, 417 So.2d 716 (2d DCA, 1982) in which the court moved a trial from Pasco to Hillsborough County, Florida, when the venue allegation was exclusively Pasco County, Florida. It was held that the allegation was controlling and that it was unlawful and an improper to move the appellants trial in the face of the allegation.

In the present case the allegation is "and/or" and that must control. Appellant, had he been properly advised, would have been able to move the venue of his trial and to separate from that of this co-defendant as well as to sever the various counts in a strategic manner for his own benefit.

It is further pointed out that the Appellant had a right to at least attempt the seating of a jury in Columbia County, Florida, and that it was fundamental error to move his trial to a different venue without having at least make an effort Tuesday a jury in Columbia County, Florida. In the case of Sailor v State, 733 So.2d 1057 (1st DCA, 1999) it was ruled improper to move a trial from its Constitutional venue without at least attempting to panel a jury within the proper venue. Accordingly, the trial court's in denial of any relief or hearing on this issue is based upon two erroneous assumptions. One is that the Appellant is alleging that the court did not have jurisdiction to try the case. Appellant's argument is not one of propriety or

jurisdiction. The court certainly had jurisdiction. (Please see Copeland v. State, 457 So.2d, 1012 (Fla., 1984).) It is rather one of failure to take advantage of a clear right of election which would have made a difference in his trial.

The second erroneous assumption was that it was acceptable for the trial court to predetermine the inability to panel a jury in Columbia County, Florida, without at least having made an effort to do so. It must be remembered that the venue of a criminal trial, while there are certain statutory authorities which helped define the application of venue, is a matter of the State Constitution. Accordingly, to move venue to a County in which there is no relation to the offense amounted to the denial of a constitutional right with no advise to the Appellant that he was waving such a right.

In the present case the State used the "and/or" conjunctive and it is clear that the Appellant had the right to select venue. Since the State is this "and/or" conjunctive for each of the four counts the Appellant's option should have extended to each separate count. This allegation controlled the Appellant's venue rights pursuant to the Florida Constitution and his trial defense counsel failed to avail himself of the opportunity to move and sever the trial from that of the co-defendant Wainwright as well as to sever the various counts from each other strategically.

The significance of this is that the Appellant, had he been properly informed of his venue options, could have severed the murder count from the remaining counts of

his trial and, depending upon the venue options exercised by his co-defendant, Anthony Wainwright, who was also charged with the same "and/or" conjunctive, could have also severed his trial from that of Mr. Wainwright. It does not require discussion to see that the ability to avoid the prejudice of association with Mr. Wainwright as well as to limit the collateral prejudice from the other counts of his indictment during his trial produce at least a reasonable likelihood of achieving a different trial result.

To this end, it is appropriate to consider the cumulative nature of the irregularities resulting from the joint trial/dual jury scenario. These will be developed throughout this brief. The irregularities include the jury's exposure to improper testimony, the prejudicial testimony of Trooper Leggett, the association with the co-defendant Wainwright, and the spin off prejudice from Wainwright's independent misconduct. All of these were improper and could have been avoided because of the venue allegations. Even if no single one of these conditions alone would warrant relief (and Appellant does not make such a concession), the cumulative prejudice, which could have simply been avoided, does warrant post-conviction relief.

4. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT NO PREJUDICE OCCURRED TO THE APPELLANT AS A RESULT OF TRIAL COUNSEL'S FAILURE TO OBJECT OR REQUEST INQUIRY AND THAT NO

FURTHER INQUIRY OF JURORS WAS REQUIRED FOLLOWING CIRCUMSTANCES WHICH MADE IT CLEAR THAT THE JURORS HAD BEEN EXPOSED TO TESTIMONY PREJUDICIAL TO THE PETITIONER FROM WHICH THEY WERE MEANT TO BE EXCLUDED BECAUSE THE ATTORNEYS INVOLVED IN THE TRIAL WERE A SUFFICIENT EXPERIENCE AND RESPONSIBILITY TO HAVE TAKEN ACTION IF THERE WAS REALLY A PROBLEM, and

5. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT NO PREJUDICE OCCURRED TO THE APPELLANT AS A RESULT OF TRIAL COUNSEL'S FAILURE TO OBJECT OR REQUEST INQUIRY AND THAT NO FURTHER INQUIRY OF JURORS WAS REQUIRED FOLLOWING CIRCUMSTANCES WHICH MADE IT CLEAR THAT THE CERTAIN JURORS HAD ENGAGED IN PREMATURE DELIBERATION.

a. Common Issues

Because the two points regarding juror irregularities concern many of the same principles govern the determination of the required juror inquiry, Appellant will respectfully request that the Court permit him to present argument on these points together. In particular, since the error complained of is, at least in part, the denial of inquiry, the points of law are nearly the same.

The Appellant, shortly before the evidentiary hearing was initially scheduled in October, 2001, indicated his intent to subpoena his jurors with respect to the claims regarding improper deliberation by the jury and that his jury had been improperly exposed to prejudicial evidence from which they were meant to be excluded. The record of trial makes it clear that the Appellant's jurors were, in fact, exposed to such improper evidence. It is also made clear that at least two of his jurors engaged in improper premature deliberation. These issues were never developed in the trial court because the Appellant's trial defense attorney did not, as any standard of reasonable representation would have required, request any individual *voir dire*, any factual development of the issues, nor any curative instruction when these matters were brought to his attention.

Appellant sought to have the jurors testify, under oath, with respect to their recollections of these events. The State of Florida argued, and the trial court apparently accepted, the proposition that these matters were such as which would "inhere in the verdict" and did not permit such testimony.

Appellant respectfully requests that this Honorable Court reconsider the Appellant's representation that the inquiry of these jurors through testimony was never intended to be nor would have ever been expanded to include matters which did "inhere in the verdict". The protection of the jurors from this was, in fact, the reason

for bringing them to court for this inquiry rather than to do so through some other informal means.

Rather, the Appellant simply wanted to inquire of the jurors with respect to whether they had, in fact, overheard courtroom proceedings while sequestered in the jury room (as reported by the trial bailiff) or whether they had engaged in discussion of the evidence prior to formal deliberation.. This was a reasonable request in light of the condition of the record and the significance of the matters heard that trial and discussed while the jurors were meant to be excluded and clearly in the jury room. It is particularly reasonable in light of the fact that both of the trial bailiffs had never before served as trial bailiffs and were charged with responsibility of serving as bailiffs in among the more complicated and complex courtroom situations, namely that of a dual jury death penalty trial.

Appellant further respectfully represents that no means of inquiry other than sworn courtroom testimony would be adequate. The jurors were clearly and properly instructed that they did not have any obligation to discuss the case with any other person except pursuant to court order. Accordingly, there is no other means of making any inquiry with assurance of receiving full and honest answers to the inquiry. As the cases will show, neither of these inquiries are matter which inheres the verdict, instead they concern prejudicial irregularities.

b. Appellant's Jury Was Exposed To Impermissible Evidence While They Should Have Been Sequestered.

The trial of Appellant and his co-defendant was moved to the Clay County Courthouse in Green Cove Springs, Florida, following the inability to select two juries in Hamilton County, Florida. Neither the participating counsel nor the Court had ever tried a case there before.

The trial was assigned two courtroom bailiffs from the Clay County Sheriff's Department, Mr. Slattery and Mr. Lowe (R/T.III.289). Deputy Mark Lowe was a full-time Sheriff's deputy (R/H. VII. 157-163) and the other was reserve Deputy Thomas Slattery (R/H. VI. 18-22) Neither had previously served as a courtroom bailiff (R/H. VI. 19; VII. 158).

Several court hearings were conducted which were intended to be out of the presence of the jury. On one occasion there was an extensive proffer concerning events which had transpired while the Appellant was incarcerated in the state of Mississippi. On another occasion there was discussion of the Appellant's request for suppression of Appellant's pretrial statements. In each of these occasions the Appellant's jury was intended to be in the deliberation room and not able to hear the evidence relating to the trial court's determinations of these matters.

The Court had the occasion to inquire about conditions of the jury deliberation

room on May 22, 1995, during the morning session and the following colloquy occurred with respect to this issue. (R/T. VII. p. 771, line 19 - p. 772, line 6) .

THE COURT: Is the courtroom secure, Mr. Bailiff?

THE BAILIFF: Yes, sir.

THE COURT: Okay. This sound does not carry into the jury room?

THE BAILIFF: Yes, sir, it does. When you're talking into the mike, it does.

THE COURT: And how is that?

THE BAILIFF: That's good. It doesn't carry into there now.

THE COURT: There are no speakers in there, are there?

THE BAILIFF: No, sir.

It is clear from the record that the Appellant's jury was in the deliberation room when at least two substantial hearings concerning the Appellant's case were conducted from which they were meant to be excluded and before it was discovered that the sound carried into the jury room when the courtroom microphones were on. Accordingly, it is clear that the Appellant's jury had the ability to overhear these statements made in the courtroom while they were in the jury room prior to notice of this problem. When this came to the attention of the court and defense counsel no effort was made to ascertain whether or not the jury had overheard these hearings and,

if so, no curative instruction or other corrective action could have been undertaken.

On May 19, 1995, during the morning session the suppression motion was renewed and Appellant's defense counsel presented the depositions of Eugene Hamilton and Tina Edwards. The State of Florida offered additional testimony from Sheriff Lynn Boyte from Brookhaven, Mississippi and Deputy Russ Williams from Hamilton County, Florida. (R/T. V. p. 546-575). The matters in testimony at this hearing concerned prejudicial testimony, at least some of which was not subsequently presented to the jury. Also included were arguments of counsel and rulings by the Court which were, as overheard by the jury, prejudicial. These included references to plea negotiations by Appellant's trial counsel (concession of guilt) (R/T. VI. P. 565) and a ruling by the Court that a letter written by Appellant from jail would be admissible as "consciousness of guilt" (R/T. VI. P. 573-574).

Later, in the afternoon of May 19, 1995, Defendant Wainwright called Sheriff Lynn Boyte as a witness in order to present evidence relating to his defense which highly prejudicial to Appellant. This testimony concerned a potential escape by the Appellant from Lincoln County, Mississippi and further included the association of Appellant with a hacksaw blades and acts of jail violence which were not admissible in the trial as evidence against the Appellant. (R/T. VI. P. 730-741).

This hearing was intended to be out of the presence of the jury. It is also clear

from the record that the Appellant's jury overheard these remarks. It is finally clear from the record that the Appellant's counsel took no action to either ascertain to what extent the jury overheard such remarks or to even attempt curative instructions, although he later safeguarded against recurrence of this error (R/T.XI.1381).

It must be considered that the bailiffs who were assisting the court testified at the evidentiary hearing that they had no experience prior to this trial as serving as court bailiffs. This might explain why they were unaware of the importance of excluding improper testimony from the jury at this time. While it is the responsibility of all parties to a trial to protect the record, it was in comment on counsel for the Appellant to protect the legal rights of his client. It is clear that, once the situation was brought to the attention of the defense counsel, he protected future improper hearings from the hearing of the Appellant's jury. No reason was given at the evidentiary hearing for failing to make inquiry of the jury's extent of knowledge and exposure to these two prejudicial hearings.

Because no issue was made of this during the trial there was no record permitting the Appellant to make an appeal based upon this occurrence. It is clear that the facts of the allegation relating to the is in the post-conviction petition are true and that the testimony to which the jury was exposed was prejudicial to the Appellant's case and that there is at least a reasonable likelihood that this testimony affected the

outcome of the Appellant's trial.

At the evidentiary hearing the State of Florida tried to excuse this oversight by asserting that the numerous years of cumulative experience of the lawyers within the room would have never let anything prejudicial occur. Unfortunately, only one of the attorneys in the room and the responsibility for protecting the rights of the Appellant. The State of Florida's position seems to be that this Honorable Court should excuse such an oversight because the party opponent would have certainly corrected anything unfair. Additionally, it is uncontroverted that nothing was actually done about the problem. There was not even a request for a curative instruction.

Concerns of the presentation of improper testimony or evidence to the jury normally arise during voir dire as a result of pre-trial publicity in the news and media. When this is known in advance individual voir dire is always allowed. In the case of Bolin v. State, 736 So.2d 1160 (Fla., 1999) the pre-trial publicity was in the form of a newspaper article generally describing the events of an earlier trial and containing inadmissible evidence. It was error not to allow individual voir dire of those jurors who acknowledged exposure to the article.

As was held in the Strickland case, "The question of prejudice is tied to a reasonable probability that: 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome.' " Strickland, 466 U.S. at 688. The error of permitting prejudicial and improper testimony to a jury is well known. This was a death penalty case. However much accumulated experience the various counsel in the room may have had, it was simply not enough to simply turn off the microphones for future situations and hope that no prejudice had occurred.

In Smith v. State, 762 So.2d 969 (3rd DCA, 2000) it was even error to fail to appeal the introduction of inadmissible hearsay which was critical to the issue of credibility by the correct standard of harmless error. Accordingly, it was ineffective assistance to fail to either probe or cure the exposure to the jury to the improper testimony to which they were exposed from these hearings.

It was up to Appellant's counsel and Appellant's counsel alone to protect Appellant from prejudice and to protect the record. This was not done and the resulting prejudice and the reasonable likelihood that the jury may have been swayed by this Court's remarks (unintended for their ears) about the Appellant's consciousness of guilt, the circumstances surrounding his pre-trial statement, and the inadmissible portions of the escape episode cannot be denied. It is particularly noted that the Appellant's trial counsel has stated his intention during the penalty phase to rely upon the Appellant's voluntary cooperation with law enforcement as the primary mitigating factor. Accordingly, the exposure of the jury to the suppression argument

could only have undermined this to the jury. Appellant would be seen to be resisting and regretting the effects of his confession on one hand, and then asking the jury to credit him for his genuine "confession" and cooperation on the other.

Counsel for the Appellant at the post-conviction hearing sought to bring the jurors into court regarding this matter. In light of the fact that the record is clear that the improper testimony was overheard by the jury and in light of the fact that the record is clear that no corrective or curative action was taken, this court has no choice other than to set aside his conviction and order a new trial for the Appellant Hamilton based upon this matter. If this relief is not granted, Appellant should at least be afforded the opportunity to make the minimum inquiry.

c. Appellant's Jury Engaged In Premature Deliberation Of The Appellant's Case.

At the evidentiary hearing Mr. Donnie Simmons provided testimony (R/H. VI. 116-127) substantially in accordance with the testimony he had rendered at the trial (repeated under cross-examination during the evidentiary hearing). This concerned that Mr. Simmons had overheard at least two of the Appellant's jurors discussing the qualifications of the medical examiner who testified at the Appellant's trial. Mr.

Simmons, at the time of the event, immediately reported it and provided sworn testimony for the record.

Appellant's counsel, as with the microphone incident, did not request any individual *voir dire* of the jurors and no record was made to ascertain to what extent the jurors may have either impermissibly begun to deliberate regarding certain material matters of the trial and to ensure that such improper and premature deliberations would be disregarded and discontinued in the event that it was still possible to salvage a fair trial.

Review of the instructions given to the Appellant's jury reflects that they were told at the beginning of the trial that they should not discuss the case among themselves prior to final submission of the case. However, as demonstrated above, prior to recesses they were normally told only not to discuss the case with "anyone" but not specifically that they could not discuss the case among themselves. In other words, the jurors were alternatively instructed not to discuss the case with "each other" and with "anyone" (R/T III.289; IV.540; V.629; and V.651). While this would ordinarily be adequate, it is clear that the Appellant's jury was confused since they did, in fact, engage in premature deliberation during the State's case-in-chief. The situation here is similar to the other jury problem. Since no record was made sufficient to ascertain to what extent such deliberation's had taken place Appellant was unable to

either appeal this issue or to have sought appropriate correction and cure prior to this post conviction hearing.

There is no Florida authority on this specific issue. In the adjacent jurisdiction of Alabama, however, the matter arose in the case of Hayes v. State, 647 So.2d 11 (Ala. Cr. App., 1994) it was held:

> Upon being placed on notice, the court was required to inquire as to whether some jurors had stated how they would decide the case before they had heard all the evidence. We remand this case so that the court can hold a hearing to determine whether these jurors actually had entered into premature deliberation, and, if so, whether they had expressed fixed opinions as to the appellant's guilt before the Conclusion of the evidence and before the case was submitted to them. The court should make written findings of fact concerning this issue.
>
> As this court stated in Holland v. State, 588 So.2d 543 (Ala. Cr. App. 1991):
>
> "In cases involving juror misconduct, a trial court generally will not be held to have abused its discretion 'where the trial court investigates the circumstances under which the remark was made, its substance, and determines that the rights of the appellant were not prejudiced by the by the remark.' Bascom v. State, 344 So.2d 218, 222 (Ala. Cr. App. 1977). However, the trial Judge has a duty to conduct a 'reasonable investigation of irregularities claimed to have been committed' before he concludes that the rights of the accused have not been compromised. Phillips v. State, 462 So.2d 981, 990 (Ala. Cr. App. 1984). His investigation should include a 'painstaking and careful' inquiry into the alleged misconduct. Lauderdale v. State, 22 Ala.App. 52, 54, 112 So. 92, 93 (1927). 588 So.2d at 576.
>
> If it is found that any of the jurors had formed opinions due to any conversations before the jury retired to deliberate, the appellant was denied an impartial jury and is entitled to a new trial. Hartley v. State, 516 So.2d 802 (Ala. Cr. App. 1986).

Appellant depended upon his trial counsel to invoke this clear minimal requirement of a fair trial on his behalf. It was not a matter which should have required even a moment's hesitation to have requested the Court to immediately conduct individual *voir dire* of the suspect jurors. No other action could determine the extent to which the instruction against premature deliberation had been breached and whether the prejudice to Appellant was curable..

In light of this matter and this omission by trial defense counsel (which precluded appeal on the issue) this court should remand the case to the trial court to grant the Appellant a new trial. It is not necessary or proper to inquire of the jury as to matters which "inhere in the verdict" because when it is clear that improper deliberation has occurred no other remedy is available. If a new trial is not ordered herewith, Appellant submits that the matter should be at least be remanded for appropriate inquiry.

d. Relief is Required

Under the analysis of these principles, it is clear that relief must be provided. That the jury was placed in a position to overhear impermissable evidence by inexperienced bailiffs is not a matter subject to dispute nor is it a matter which "inheres in the verdict". That the jury, while under the supervision of unsupervised bailiffs, engaged in premature discussion of prosecution witnesses is also a matter which is

neither subject to dispute nor one which "inhere" in the verdict.

Appellant's trial counsel allowed each of these situations to occur without either requesting sufficient inquiry to test for prejudice or to even ensure that the jury was instructed to disregard potentially prejudicial activity. A jury is instructed that they need not ever discuss their participation with anyone except by court order. Accordingly, the only way Appellant could have been sure to get the matter resolved was to subpoena their testimony. Appellant expressly asked that this be done under judicial supervision to avoid any excessive or improper inquiry. Appellant respectfully asks that either that his case be remanded for a trial free of such juror irregularities or that the inquiry be done now.

6. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE PETITIONER'S TRIAL COUNSEL TO HAVE PERMITTED THE PETITIONER'S JURY TO REMAIN IN THE COURTROOM TO HEAR THE TESTIMONY OF TROOPER LEGGETT WHICH WAS PREJUDICIAL TO THE PETITIONER AFTER THE PETITIONER'S COUNSEL HAD BEEN WARNED BY BOTH THE STATE ATTORNEY AND THE COUNSEL FOR THE CO-DEFENDANT THAT PREJUDICIAL TESTIMONY WOULD BE OFFERED BY TROOPER LEGGED AND, IN FACT, PREJUDICIAL TESTIMONY WAS

OFFERED BY TROOPER LEGGETT WHICH WAS EXCULPATORY TO THE CO-DEFENDANT WAINWRIGHT BUT INCULPATORY TO THE PETITIONER.

The Appellant was tried jointly with his co-defendant, Anthony Wainwright, under a restriction that each defendant was to have a separate jury which was to be protected from evidence relevant only to the other defendant and which would have been prejudicial it used against the protected Appellant. The Appellant had made a comment to Mississippi Highway Patrol Trooper Leggett which was incriminatory and for which there was no exculpatory benefit. The record is clear that prior to the cross-examination of patrolmen Leggett the Appellants counsel was offered the opportunity to have the Appellant's jury excused during the cross-examination. (R/T.III.444-447) The Appellants trial defense attorney determined to permit the Appellant's jury to be present and be exposed to the incriminatory statement made by the Appellant to Mississippi Highway Patrol Trooper Leggett.

In particular, the statement appears at the record of trial at R/T.III.450, lines 6-12. The testimony was as follows:

> Q. Did he make any comments about his situation at that time?
> A. Yes, He told me he had shaved his head, that he was ready to meet the consequences of his actions.
> Q. Did he indicate he had found anything or anybody?
> A. Yes. I advised him that the only one who could help him was the Lord. He told me that he had turned to him yesterday.

This statement evidences a guilty mind of the part of the Appellant with respect to both the Mississippi shootout as well as the allegations from Columbia and Hamilton Counties Florida. It also amounts to a concession to the propriety of the death penalty. It was offered by his co-defendant to try and show that Appellant, rather than Wainwright, was the truly guilty party.

At the evidentiary hearing the Appellants trial counsel did not offer a reasonable strategic or tactical reason for permitting the jury to hear this statement during the guilt phase. It is clear that the Appellants trial defense attorney exposed the Appellant's jury to evidence which was harmful to the Appellant's case under circumstances where an he not only had an opportunity but was warned about the prejudicial evidence about to be presented. The reason offered for this was to evidence "cooperation with law enforcement". This is not a satisfying strategy when this discussion had immediately followed a high speed shootout that ended in a crash and in which shots were fired at law enforcement officers.

Strategic and tactical decisions of counsel should not be reviewed lightly. Second-guessing decisions made during trial can be improper because, upon review, an opportunity exists to see the net of fact and knowledge exists which was not available at the time of the decision. However, when it is clear that a tactical or strategic decision is totally unwarranted by any positive consideration and is known to include

harmful and prejudicial defects, such a decision can and should be reviewed.

The very reason for the decision of Bruton v United States, 391 US 123 (1968) was to ensure protection of one defendant from unfairly prejudicial evidence presented in the defense of a co-defendant. This is not limited to merely the statements of a co-defendant, but has been extended to any contradictory and prejudicial co-defendant evidence which would not otherwise be admissible. This was the whole reason for taking the trouble to try and select and isolate two separate juries. In this case, the statement elated for the benefit of co-defendant Wainwright related to the collateral acts of the Mississippi pursuit and had no interpretation other than to corroborate both Appellant's guilt and his worthiness for the death penalty.

To the extent that there was any conceivable benefit to the Appellant by this testimony at all it would have been limited to a very narrow penalty phase issue. To the extent that such testimony had anything to do with the guilt phase, it concerned a matter which was improper for guilt phase consideration, namely a feeble attempt to evoke sympathy for the Appellant. The jury is instructed to not consider such matter.

What it did do, however, was expose the Appellant to prejudicial evidence which could have never been offered against him over objection. Furthermore, such was done only after Appellant's counsel was warned by all other counsel. When the reason given for such a harmful decision is devoid of any reasonable justification it affords a basis

for relief under Fla. R. Crim. P. §3.850. Such is the case here.

Accordingly, Appellant should be granted a new trial in which the testimony of Trooper Leggett relating to the statement made by the Appellant reported above is excluded from his trial and in which the trial is further protected from Bruton violation. As a side bar, it is pointed out that this matter would have been precluded if the trial had been severed from the co-defendant's trial.

7. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE PETITIONER'S TRIAL ATTORNEY TO DECLINE THE OFFER OF THE STATE THAT THE PETITIONER SHOULD RECEIVE THE BENEFIT OF AN "INDEPENDENT ACTS" JURY INSTRUCTION WHEN THE PETITIONER HAD BEEN ACTIVELY SEEKING A "WITHDRAWAL" JURY INSTRUCTION AND NO OTHER STRIPE INSTRUCTION WAS AVAILABLE WHICH WOULD PERMIT THE JURY TO BE CONSTRUCTED BY THE COURT OF ANY THEORY BY WHICH THE PETITIONER COULD HAVE BEEN PRESENT AT THE SCENE OF A MURDER WITH HIS CO-DEFENDANT AND NOT CRIMINALLY LIABLE FOR THE ACT OF HIS CO-DEFENDANT.

Appellant separately made a claim that his trial counsel was ineffective for failing to have accepted the offer of the State of Florida to have an "Independent Acts"

instruction given to the jury during the death phase of his trial. The trial court denied any relief based upon this and did not grant an evidentiary hearing with respect to this issue.

It is clear from the Appellant's entire presentation of his defense as well as the theories boarded by his trial defense attorney during closing argument that the Appellant's only hope of avoiding conviction was to separate his activity from that of his co-defendant Wainwright and to convince the jury that the Defendant Wainwright, at least with respect to the murder of Carmen Gayhart, was a separate and independent act of Anthony Wainwright with which the Appellant had no association nor shared intent.

Appellant's trial defense attorney argued strenuously and zealously for requesting that this Honorable Court give the similar "withdrawal" instruction to the jury. Such instruction would have been appropriate only if the trial court had determined that the Appellant had, having once shared the intent of co-defendant Wainwright to effect the murder, renounced such shared intent and separated himself from it prior to the condition of the crime of murder. Appellant had not testified in his trial and the trial court could not find sufficient evidence of any renunciation of intent, even enough to satisfy the minimal standard for a defense instruction.

The "independent acts" instruction is a similar defense theory in which one

defendant seeks to disassociate himself from the criminal activity of another defendant. The "independent acts" instruction differs from the "withdrawal" instruction in that the "Independent Acts" instruction is based upon the proposition that the Appellant never shared such intent. As long as there was some chance that the jury may predicate its decision based upon the theory of premeditated murder rather than felony murder and as long as there was any evidence to show that the Appellant may have never shared the intent of co-defendant Wainwright to commit the murder the Appellant was clearly entitled to this instruction. It is for this reason that the State of Florida offered to allow this instruction to be given by the trial court.

Generally, when two or more individuals act in concert to commit an offense, the law of principals applies to render each equally culpable for the actions of the other. However, in order for each person to be considered a principal, he or she must have had a conscious intent that the criminal act be done, and he or she must have done some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually commit or attempt to commit the crime. (Florida Jury Instruction In Criminal Cases §3.01)

In contrast, the defense of independent acts applies when, "after participating in a common plan or design to commit a crime, one of the co-defendants embarks on acts not contemplated by the other defendants or participants in the crime, and commits

additional criminal acts beyond the scope of the original collaboration." Barfield v. State, 762 So.2d 564, 566 (Fla. 5th 2000). Although an independent acts instruction is the antithesis of the principals instruction, "both can and should be given in a proper case." Id. at 567. After all, "whether there is evidence to support an instruction which goes to a key defense or element of a crime, the instruction must be given. Failure to do so is reversible error." Id. The standard of evidence required is, and should be, minimal.

Several years ago, the Florida Supreme Court adopted the following standard instruction for the defense of independent acts:

> 3.04(h) INDEPENDENT ACT
>
> If you find that the crime alleged was committed, an issue in this case is whether the crime of (crime alleged) was an independent act of a person other than the defendant. An independent act occurs when a person other than the defendant commits or attempts to commit a crime.
>
> Elements
>
> 1. which the defendant did not intend to occur, and
> 2. in which the defendant did not participate, and
> 3. which was outside of and not a reasonably foreseeable consequence of the common design or unlawful act contemplated by the defendant.
>
> If you find the defendant was not present when the crime of (crime alleged)occurred, that does not, in and of itself, establish that the (crime alleged) was an independent act of

another.

> If you find that the (crime alleged) was an independent act of [another] (name of individual)], then you should find (defendant) not guilty of the crime of (crime alleged).

Fla. Stand. Jury Instr. in Crim. Cases 3.04(h) (1997).

This instruction substantially followed the instruction which had been developed through the years of case law and was well known and accepted at the time of the present trial.

Appellant's trial counsel failed to comprehend the difference between the two instructions as well as to comprehend the importance of the Appellant's jury receiving some instruction that would highlight for them at least some theory pursuant to which they could acknowledge the possibility that the Appellant may have had no role in at least the death of Carmen Gayhart.

There was ample evidence that the murder of Carmen Gayhart was an "Independent Act" of co-defendant Wainwright. In particular, the Appellant's trial counsel presented evidence from several inmates who had overheard or conversed with co-defendant Wainwright concerning this murder. They testified that co-defendant Wainwright had taken full credit for the murder and had even belittled the Appellant for failing to take part in the murder and for disassociating himself from the murder.

This was enough to have required that the instruction of "independent acts" be given to the Appellant's jury and such instruction would have corroborated the

credibility of Appellant's theory with a judicial instruction. Accordingly, the Appellant's trial defense attorney should have been given an opportunity to explain why this instruction was not accepted and, if such reason was not within the acceptable standard of reasonable and effective representation, the Appellant should have been afforded a new trial.

The present condition of the record requires that Appellant be afforded a new trial based upon the record and the failure of his trial defense lawyer to request an obvious and significant defense jury instruction. To have a jury properly instructed of the law is a fundamental matter. At the least there should be a hearing in order to ascertain whether the failure to accept this instruction had any tactical basis.

8. IT WAS ERROR FOR THE TRIAL COURT TO DETERMINE THAT IT WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF THE PETITIONER'S TRIAL TO FAIL TO PRESENT THE PETITIONER'S MENTAL HEALTH EXPERT AND THE PETITIONER'S FAMILY MEMBERS WHO WERE MOST AWARE OF THE DYSFUNCTIONALITY OF THE PETITIONER'S CHILDHOOD FAMILY UNIT.

While the presentation of these mitigating factors to the jury through a competent and credible mental health professional (such as Dr. Mahtre) may not have resulted in a successful insanity defense, there is more than a reasonable likelihood that the

presentation of these facts would have caused the jury to understand that the Appellant was not inherently evil and that the crime was not committed in the absence of psychological mitigation. They would have had the opportunity to consider that the Appellant could have been a quite ordinary young man, but was also one who was exposed to a variety of unhealthy development factors. In particular, they would have learned that the Appellant's father was virtually absent from the household and that the Appellant's male "role model" was his older brother, Timothy Hamilton, himself a troubled adolescent who led the Appellant into criminal activity and drug abuse. (R/H.64-77)

They would have also learned that the Appellant began his experience with drugs in the form of prescribed painkillers over a period of several years resulting from the BB gun eye injury. After several years of chronic pain and suffering this injury finally resulted in the loss of this eye to the Appellant. The loss of vision in an eye is not an insignificant event to a young child. Such an injury (especially when not effectively treated for several years) prevents normal and healthy recreation in the form of sports and the stress of years of pain and the necessity of early chemical dependence must not be overlooked either. The jury was given no professional analysis of these events and was presented with only this background witnesses, neither of which were asked to give significant testimony, to try and relate these facts and circumstances to the jury.

It is clear that the Appellant's mother was the primary influence on the Appellant's upbringing and that she constantly was at odds with the Appellant's father (and was largely absent) during these critical years. There was testimony of angry and violent confrontations between them regarding this. It is also clear that the primary male influence on the Appellant was his older brother, Timothy Hamilton, who had adopted and the lead the Appellant into a life of drugs and crime.(R/H.VI.68-71) It is further clear that the Appellant's mother is still in denial of not only her own role in the Appellant's upbringing but even with respect to her own mental health condition.

During cross examination of her by the State, Ms. Neal (R/H . VI.103-115) stated that she and for the use of psychotropic medication but testified to at least five she was currently taking and numerous others that she had taken throughout the years which included her life with the Appellant. She also denied psychiatric hospitalizations but explained them as nervous illnesses which had required extended stays in mental health hospitals. Notwithstanding whatever good intentions and aspirations she may have had for the upbringing of Appellant, she was clearly both unable and ineffective herself at coping with this disturbed environment.

The presentation of Jewel Neal to the jury was a "can't lose" situation. Either she would have acknowledged her shortcomings as a parent as well as her husband's lack of support or she would have, much as she did at the evidentiary hearing, revealed these

same things with her attempts to explain her own condition and to minimize the contribution that familiar dysfunctionality he had on Appellant's life. This was never even discussed with Dr. Mhatre, much less prepared for presentation.

Accordingly, the Appellant not only had little opportunity to learn a healthy and productive lifestyle but also had some motivation to maintain resentment for his misfortune. Although all of these facts were readily available to the Appellant's trial defense attorney as well as to the consulting mental health professional, Dr. Mahtre, none of them were developed for presentation to the jury. The jury had no opportunity to understand what the Appellant's life had been like nor to have any empathy for his background.

At the evidentiary hearing the Appellant's trial defense attorney maintained that his fear that the diagnosis of antisocial personality disorder would have been of such devastation to the mitigation case that the jury would have been disposed to impose the death penalty. Appellant's trial defense attorney believed that the Appellant had been diagnosed as a "sociopath" rather than with antisocial personality disorder. (R/H 185) With all due respect to the Appellant's trial defense attorney's efforts on behalf of the Appellant at the penalty phase, this is an untenable position to take.

Had Appellant's trial defense counsel considered Dr. Mahtre's tru diagnosis of Appellant as suffering from "antisocial personality disorder" rather than calling him a

"sociopath", the decision would have been different. It has long been the law that the condition of "antisocial personality order" is, in and of itself a mitigating factor. (Please see Morton v. State, SC95171(Fla.06/28/2001), citing Eddings v. Oklahoma, 455 US 104,107,115 (1982).

It must be considered that by the time any mitigation is presented the Appellant had already been convicted of the crime of first-degree murder and the State of Florida had presented aggravating circumstance evidence on a variety of factors, including the escape from prison, the theory that the crime was committed to avoid the testimony of a witness, and the related crimes of sexual assault, armed robbery, and kidnaping. It is unreasonable to believe that a psychiatrist's opinion that the Appellant suffered from antisocial personality disorder would have been of any detriment to the Appellant's chances at all.

Conversely, it is even more unreasonable to believe that they would not have given serious attention and consideration to the non-statutory mitigation described above, all of which was made available to his trial defense attorneys, but withheld from both his consulting psychiatrist and the sentencing recommendation jury, as well as this Court upon its independent consideration of the jury's recommendation. How could this have possibly not benefitted the Appellant? Was there a concern that the jury would have further resented the Appellant because his eye injury had taken years of pain, suffering,

and medication to treat? Was there a concern that Appellant would have been blamed for the acts of his older brother? Was there a concern that Appellant would have been further prejudiced by testimony that his mother began her child-rearing in her early teens and fought with his father? Would Appellant have been blamed that his father took little role in his upbringing? There was no danger of these things and it is clear that the reasons for the antisocial personality disorder would have been extraordinarily helpful to the Appellant with his jury.

The preparation of the penalty phase of a death penalty trial is of equally significant importance as the guilt phase. Appellant's trial defense attorney could only offer that he did not believe that the testimony of Dr. Mahtre during the penalty phase would have benefitted the Appellant in light of the antisocial personality disorder diagnoses. This explanation, however, begs the question of whether an earlier exploration of these issues would have at least offered the jury a mitigating explanation for the Appellant's misconduct. It is clear that, having had the benefit of these portions of the Appellant's history, Dr. Mahtre was able to offer such an explanation. This explanation was neither presented to the Appellant's jury nor to this court prior to rendering sentence.

Appellant's trial defense attorney, in a noble gesture, assumed all responsibility for the preparation of the Appellant's trial. However, it is clear that the Appellant had

the benefit of a second chair defense attorney who could have at least been making exploration of these matters if the Appellant's primary trial defense attorney was without time to demote to this task. It is possible, if not likely, that the primary defense counsel had delegated preparation of the penalty phase to his new associate who had overlooked or inadequately accomplished this task.

The State offered evidence of seven statutory aggravating circumstances. (R/T .XVI.2109-2122) The Appellant offered only three witnesses. These were his uncle, Donnie Simmons (R/T.XVI.2070-2079), his brother, Timothy Hamilton (R/T.XVI.2081-2090), and a former acquaintance, Ann Baker (R/T.XVI.2095-2108). None of them provided more than a rudimentary depiction of the Appellant's home life. Timothy Hamilton did not then acknowledge his role in introducing the Appellant to drugs and criminal behavior while he was the Appellant's elder role model. There was no discussion of the degree of suffering and medication resulting from the eye injury. There was no development, even in lay terms, of the home life and the mother's extensive mental health problems nor were the Appellant's own mental health treatments or records mentioned, let alone any professional development of these issues. Essentially all they established was that the Appellant grew up in a rough neighborhood.

Furthermore, none of these matters would have, in the least, contradicted or undermined what defense counsel considered the primary mitigator, which was

cooperation with authorities. This itself is not a statutory mitigating factor. There is simply no rational basis for not offering and developing these issues in a thorough and professional manner. Given that the risk of presenting them was nonexistent and that a death sentence was in the balance, there was no reason not to pursue these other than a lack of preparation.

Appellant's trial defense counsel was generally aware of these matters from earlier interviews with the family members, but the failure to share them with Dr. Mhatre rendered the information useless to the defense. It was not reasonably possible for Dr. Mhatre to have done anything with the information because time for preparation was almost up when he was first contacted. In fact, it was less than 10 days before the trial was scheduled and was, technically, not allowed by the rules to add witnesses that late. In effect, trial defense counsel had foreclosed the possibility of any mental health mitigating evidence before it was even sought by this oversight.

Even without the presentation of this evidence two of Appellant's jurors recommended that the sentence not be death. It is not reasonable to believe that the outcome would not have been different with a proper presentation of these facts and circumstances.

In State v. Riechmann, 777 So.2d 342 (Fla. 2000) it was made clear that the failure to investigate and present this non-statutory mitigating evidence requires, at the

least, a new sentencing hearing. Pursuant to Strickland v. Washington, 466 U.S. 668 (1984) Appellant has shown that his trial defense counsel failed to satisfy a task clearly required for effective representation (to adequately investigate the family background) and that there is at least a reasonable possibility that such affected the outcome of his case. (Also please see Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986).)

In Mitchell v. State, 595 So. 2d 938, 942-43 (Fla. 1992) it was held that that penalty phase representation was ineffective where defense counsel failed to present evidence of mitigation and where evidence was presented at the evidentiary hearing that could have supported statutory and non-statutory evidence. In Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989) it was held that defense counsel's failure to investigate Appellant's background, failure to present this as mitigating evidence during the penalty phase, and failure such evidence to argue on a Appellant's behalf rendered defense counsel's conduct at the penalty phase ineffective). It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the Appellant in the penalty phase of a capital case.

In Gorby v. State, No. SC95153 (Fla. 04/11/2002) a Appellant was not entitled to relief when the factual assertions of failure to investigate and prepare were not true and when the forsaken testimony of the family members would have been merely cumulative with that of the mental health professional. In the present case the interviews

of family members which were conducted were not delivered or shared with the mental health professional at all. The mental health professional was not timely consulted and the interviews were meaningless. Appellant has shown how the oversight prejudiced his penalty phase.

Dr. Mhatre was never asked to look into the matter of statutory or non-statutory mitigation, but did consider the issue of statutory mitigation simply from experience in such cases. (R/H 139-141). This amounts to a non-investigation of these matters.

There is more than a reasonable likelihood that the Appellant's jury would have been affected by this evidence. Even without this evidence at least two of the Appellant's jurors voted in favor of sparing his life. With the presentation of a more professional and thorough exposure of these clearly mitigating factors it cannot be said by any legal standard that the recommendation of the jury and the ultimate decision of this court would have been different with respect to the imposition of the death penalty upon the Appellant.

These factors alone warrant setting aside the sentence of death on the Appellant and commuting it to life without parole. They at least require a new sentencing hearing at which time these matters may be presented to a jury for determination.

9. IT WAS ERROR FOR THE TRIAL COURT TO PROCEED TO A FINAL DECISION IN THIS MATTER WHEN SUCH DECISION WAS NOT RENDERED

UNTIL AFTER THE CASE OF RING V. ARIZONA WHEN THE PETITIONER HAD REQUESTED A CONTINUANCE PENDING THE OUTCOME OF SAID DECISION AND WHEN SAID DECISION WOULD HAVE RESULTED IN NEW CLAIMS AVAILABLE TO THE PETITIONER WITH RESPECT TO THE IMPOSITION OF THE DEATH PENALTY IN THE PETITIONER'S CASE.

Shortly before the Evidentiary Hearing the Appellant became aware of the *writ of certiorari* by the United States Supreme Court in the case of Bottoson v.Moore, 234 F.2d 526 (11th Cir.,2000). The granting of the *writ* was not clearly explained in the order granting the writ and the Appellant initially assumed that the *writ* was based upon matters which had previously been argued by Bottoson during his federal *habeas corpus* proceedings.

Prior to the hearing, however, the Appellant learned that the basis for the Bottoson *writ* was its factual similarity with the case of Ring v. Arizona. The Ring case was essentially a challenge to the death penalty based upon the case of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). The Arizona death penalty procedure called for the trial court, and not the jury, to make the determination of the existence of aggravating factors necessary to sustain the death penalty.

The Appellant moved to amend his original petition based upon the Bottoson decision to include this ground for relief. The Appellant sought to have this post-

conviction proceeding continued until the United States Supreme Court made a final decision in the Bottoson/Ring cases. The trial court denied both the leave to amend and the continuance. Accordingly, these issues were not heard by the trial court.

During the pendency of this appeal the United States Supreme Court has decided the case of Ring v. Arizona, 122 S.Ct. 2428. The United States Supreme Court applied the previously determined standards of the case of Apprendi v. New Jersey, 530 U.S. 466 (2000) to all death penalty cases. The Ring decision had initially resulted in a moratorium on the imposition of the death penalty and the stay of executions throughout those states which, like Florida, contained statutory and rule provisions which permitted the imposition of the death penalty without advance knowledge of the aggravating factors, without the requirement that at least one aggravating factor be proven to the jury by a beyond reasonable doubt, and in which the jury is informed that their decision is merely advisory and not binding upon the court. Since it is clear that the Florida death penalty laws and procedures were unconstitutional at the time of the present offense (and still are) and since the only possible cures require statutory amendments, the death penalty must be set aside in this case.

A. Analysis of Bottoson Opinion

Also, during the pendency of this case and, in fact, during the preparation of this brief, this Honorable Court has rendered its decisions in the cases of State v Bottoson,

SC02-1455, and State v King, SC 02-1457, both decisions dated October 24, 2002. Of most substance and of most significance to the present case is the Bottoson opinion. The Bottoson majority only agrees that United States Supreme Court did not grant relief to Bottoson. Based upon this, and with separate opinions from each of the justices of this Honorable Court, Bottoson is denied relief. Many issues are identified, however, which demonstrate why the present Appellant is entitled to relief.

Justice Wells appears the only Justice with clear confidence that the Florida death penalty provisions are sound and have met with the full approval of the United States Supreme Court. Justice Harding acknowledges that there is much still to be done, but it cannot be done until properly presented to the Court. The remaining justices, while ultimately concurring in the denial of relief to Bottoson, express serious concerns with the Florida death penalty process. Many of these concerns are applicable to the present case.

Justice Quince, based upon the case of Hildwin v Florida, 490 US 638 (1989), which was not expressly overruled by the United States Supreme Court in the Ring decision, is of the view that the Florida death penalty process is constitutional, although the Ring decision may require (or at least suggest) that new jury instructions are required.

Justice Quince notes that the Florida judicial override has previously been equated

by the United States Supreme Court to the functional equivalent of the Arizona judge alone determination in Walton v Arizona, 497 U.S. 639 at 648 (1990). He also recognizes that, under the same type analysis conducted by the United States Supreme Court, the Apprendi case would appear to apply to the Florida Death Penalty Proceedings since they concern fact finding (aggravating factors) which increase the penalty (to death) beyond the statutory maximum (life without parole).

Justice Anstead further notes the existence of five factors which leave doubt with respect to the Florida system. First, Florida requires a factual determination of an aggravating factor before the death penalty may be imposed. Second, a Florida judge may independently determine this fact from the jury and may consider evidence not presented to the jury.

Third, he notes that the jury is not asked to make a specific factual determination of an aggravating factor, only an ultimate recommendation. Fourth, the jury only makes a recommendation. Appellant additionally points out that the jury is specifically instructed that their recommendation is merely advisory and that the ultimate decision is up to the Court.

Finally, Justice Anstead notes that, unlike all other criminal jury determinations in Florida, the decision need not be unanimous. In fact, only a simple majority is required.

Justice Anstead then analyzes each of these factors and comes to the conclusion

that the Florida process is so nearly the same as the one formerly practiced in Arizona, that it likely violates the rule of Arizona v. Ring, supra. He further observes that the "safe harbor" seemingly created by pre-Ring approvals of the Florida Death Penalty Process may no longer be safe. He is correct.

Justice Shaw further notes that the Florida requirement of unanimity is one which cannot be disregarded in the light of Ring. He notes that jury unanimity for factual determinations has always been our rule in Florida as it was inherited from English common law. Accordingly, even if neither the Federal Sixth or Fourteenth Amendments require this, our own State Constitution does. Then, since Apprendi and Ring makes an aggravating factor the functional equivalent of an element of the offense, unanimity should be required. Justice Shaw also observes that, since the development of Ring meet the qualifying criteria of Witt v. State, 387 So. 2d 922 (Fla.,1980), it must be applied retroactively.

Justice Pariente sets forth that Ring applies Apprendi to the Florida Death Penalty Procedures. In particular, she believes that the aggravating factors are additional facts which permit punishment beyond the "statutory maximum". She concurs with the denial of relief to Bottoson, but only because one of the Bottoson aggravators was a prior violent felony. Pointing to the language in Apprendi which excepts "the fact of a prior conviction" from the requirement of jury findings, she finds Bottoson's sentence to be

sustainable. Justice Pariente like Justice Anstead, makes note of the admonitions in Apprendi that effect should prevail over firm. Appellant will point out below why the apparent Apprendi exception for the "mere fact" of a prior conviction is of no avail to the State in the matter of Florida penalty phase proceedings.

Justice Lewis reasons that, even though Apprendi may prevent completely judicial overrides of life recommendation, it does not require further change of the Florida Death Penalty Procedure. In so holding, he disagrees with the analysis that life without parole should be viewed as the statutory maximum penalty, preferring to be guided strictly by the statutory definitions.

b. Application to Present Case

Appellant submits that the proper analysis must be as follows. First, Appellant submits that the reasoning that life without parole is the statutory maximum is correct. This is because if a defendant is convicted of murder in the first degree with no aggravating factor, life without parole is, in fact, the maximum available punishment. Appellant urges that the Court consider the admonition of Apprendi that effect govern form and not the other way around. Accordingly, any aggravating facts must be found by a jury.

Appellant now prays the court recognize that, under Florida Law, a unanimous jury verdict is required for fact-finding in criminal cases. Finally, Appellant submits that

Apprendi and Ring should be applied retroactively.

If this analysis is adopted, the following is true. Prior to Apprendi and Ring, the law in Florida was such that a defendant could be sentenced to death if either: 1) A majority of the jury recommended to a judge that some unspecified aggravating fac tor (or factors) were found to exist and that such outweighed mitigating factors; or 2) a trial judge determines, with the advice of a jury, (and with the benefit of additional evidence not presented to the jury) that the death penalty is appropriate, or 3) a trial judge determines, contrary to the advice of the jury, by a "clear and convincing" standard, that "virtually no reasonable person could differ" from the imposition of the death penalty, again with the benefit of evidence not available to the jury.

Following Apprendi and Ring, it is clear that the death penalty requires a unanimous verdict that some specified aggravating factor exists as a threshold question, Appellant submits that no aggravating factor may be found otherwise.

Apprendi only excepts the "mere fact of a prior conviction" (emphasis mere). The Florida aggravating factor requires that this be found to be a violent felony and, in order to facilitate proof, the State may present a witness to the felony in order to verify that it is sufficiently violent. Accordingly, a Florida Death Penalty may not be supported on the mere fact of a prior conviction, but requires more.

This Court, in Bottoson, seemed confused and unconvinced of the required

changes. One reason was that the United States Supreme Court had not expressly overruled the Hildwin, decision in Ring. In Hildwin, it was held that (based upon Spazioni), the jury need not render a specific factual finding or a given aggravating factor.

Appellant asks this Court to consider that the point of Hildwin, to the extent it was not merely a restatement of Spaziano, was merely the form of the verdict, and not its substance. In particular, Hildwin was based upon the concept that the Sixth Amendment did not require jury consideration of the aggravating factors. We now know that it does. Hudson v. State, 708 So. 2d 256 (Fla.,1998), Rodriguez v. State, 753 So. 2d 29 (Fla.,2000), and Bowles v. State, 804 So. 2d 1173 (Fla.,2001) all stand for the preposition that extrinsic evidence of the details of a violent felony used to establish an aggravating factor is appropriate and, further, that a defendant may rebut such evidence. Accordingly, it cannot be said that Apprendi, which excepts from jury findings only the "mere" fact of a prior conviction, permits that this factor may be established by the judge alone. This is because they jury is presented with the factual circumstances of such felonies from which they may determine whether the felony is one which sufficiently aggravates the capital felony to one which warrants the imposition of the death penalty.

Accordingly, it is clear that Apprendi and Ring have substantively changes the

severity of murder necessary to sustain and support the imposition of the death penalty. It has been changed from one which permitted alternative paths, neither of which required a conclusive unanimous jury finding of a specific aggravating factor, to one which does. It has changed from one in which the State had two bites of the apple to one in which they do not. It has changed from one in which a trial court could consider matters not presented to the deciding jury to reach a different conclusion to one in which they cannot do so.

These are not trivial changes. Throughout all of these years of challenge to the jury override the legislature could have changed the law, but did not. Accordingly, it is clear that the legislature intended the law to permit a trial judge to have the opportunity to impose death when a jury would not do so. It is also clear that they have not determined the necessity of requiring unanimous agreement by a jury to a single aggravating factor before the imposition of the death penalty. They did not. Accordingly, they intended that jurors could base their recommendation of different combinations of one or more aggravating factors.

We now know that these things are required. We now know that the level of severity of a murder and criminal history of the defendant required for the imposition of the death penalty have been substantially elevated. We now have a materially different standard for decision.

Appellant, who was sentenced to death following a non-unanimous jury recommendation, respectfully submits that the Court consider that the Apprendi and Ring decisions apply to his case and do so retroactively and that his sentence to death ought to be set aside and discharged.

Appellant respectfully submits that the existing Florida death penalty laws and procedures are unconstitutional and are longer be permitted pursuant to the case of Ring v. Arizona, *supra*. Even if not completely struck down by the Florida Supreme Court the Appellant maintains that such practices are unconstitutional and violated his Sixth Amendment right to trial by jury in the present case. Additionally Appellant submits that he was denied due process in the imposition of the most severe penalty available under our laws.

Appellant further maintains that any change in the law following the commission of any offense by the Appellant would further violate the Florida and United States Constitution prohibitions against *ex post facto* laws. Accordingly, the constitutional defects regarding the death penalty sentence rendered him cannot be cured.

Accordingly, Appellant respectfully submits that he may not constitutionally nor lawfully be subject to the death penalty for the present advance and that such death penalty should be stricken as a potential remedy in this case and that this case must proceed to trial with a maximum possible penalty to be imposed against the Appellant

to be that of live without parole.

At the time of these offenses, the imposition of the death penalty was governed by F.S. §921.141, which provided as follows:

> 921.141. Sentence of death or life imprisonment for capital felonies: further proceedings to determine sentence
> (1) Separate proceedings on issue of penalty. - Upon consideration or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.
>
> (2) Advisory sentence by the jury. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as

enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

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

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of like imprisonment in accordance with §775.082.

It should be noted that the following conditions exist from or are specifically created by the statute:

1. There is no requirement of pleading or otherwise giving notice or "alleging aggravating factors".

2. Hearsay evidence, or other evidence of less reliability then that imposed by the Rule of Evidence may be considered by the jury:

3. They are to find whether "sufficient" aggravating circumstances exist, but not

to identify any given aggravating factor; and

4. The jury determination is merely advisory. The trial court may either impose death over a life recommendation or vice versa.

Moreover, prior to the penalty phase, the jury was instructed substantially as follows:

> If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel it should receive.]
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> The sentence that your recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations. In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of the jury determine that (defendant) should be sentenced to death, your advisory sentence will be:
>
> A majority of the jury, by a vote of ____advise and recommend to the

> court that it impose the death penalty upon (defendant).
> On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) with possibility of parole.

It should be noted that they were clearly told that the effect of what they are doing is "advisory" rather than conclusive. They are further told to render and communicate only a single decision, namely the ultimate recommendation, and not any specific findings as relate to aggravating factors. Finally, they are told that a simple majority is adequate to render their advisory verdict.

From these provisions, the following can be said conclusively about the jury's verdict in the penalty phase under the existing law:

1. It does not need to be unanimous.

2. The jury renders their verdict in the belief that it is only advisory and will reviewed by a judge.

Additionally, the following conditions likely exist with respect to the jury's understanding of their penalty phase verdict (or recommendation).

1. They may be of the belief that they do not have to agree that the same aggravating factor has been proven beyond reasonable doubt, but only that a majority believes that some aggravating factor (or combination) has been proven and that such outweigh the mitigators.

2. They must revisit the guilt phase evidence, having first heard it without attention drawn to the sentencing factors.

These conditions are each specifically addressed and forbidden by the Ring decision. Whereas previous case law went no further than questioning them, they are now each conclusively forbidden. Accordingly, the law with respect to the imposition of the death penalty at the time of this offense was and is, without question, unconstitutional.

Other questions and potential improprieties from the existing framework include each of the following:

1.The jury might have been of the belief that they should not take their decision as seriously because it is only advisory.

2. The jury might be of the belief, because of the instruction relating to mitigating factors, that the burden of proof has shifted to the Appellant to prove his worthiness to live.

3. Since the jury is not instructed of the required aggravating factors before trial, they may not be aware of the importance of such evidence while it is being presented.

In the present case, the Appellant was faced with a variety of aggravating factors, at least two of which could not be considered together. Without a fact verdict

rendered by the jury, there is no way to know or to be sure that the jury did not engage in double counting of these factors.

Having established that the law applicable to the case is unconstitutional, the question becomes whether or not there is any cure other than amendment of the statutes and rules. Appellant respectfully maintains that there is not. Accordingly, this case must proceed to retrial with a maximum punishment of life without parole.

Even if it may be said that the rules applicable to the death penalty proceedings are "merely procedural", the substantive provisions which gave rise to such rules are not. Both the Florida and United States Constitutions forbids the enactment of *ex post facto* laws.

The only way that the present Constitutional infirmities can be corrected is with the enactment of a new statute and the promulgation of new rules. Such rules would necessarily change the law at east enough to only allow the imposition of the death penalty when a jury had found, unanimously and beyond reasonable doubt, that at least one aggravating circumstance was present. They also would likely result in notice or allegation of any aggravating factors and apply the rules of evidence to penalty phase proceedings.

If these changes are implemented either by judicial activism or the legislature, they would amount to substantive material changes to the law. Alternatively, and

additionally, these changes would amount to an increased penalty for the same offense. This is because prior to the changes, there was no constitutional death penalty and after the changes there might be a death penalty law and procedure which passes Constitutional muster. In either (or both) situations, the new provisions would be *ex post facto* with respect to the present offense.

Having shown both the constitutional defects in the Florida Death Penalty Provisions together with the lack of cure, Appellant respectfully requests a ruling that the case may proceed to trial with the maximum penalty of life without parole and with no possibility of the imposition of the death penalty.

In addition to the emerging and substantial case law which has recently come into existence, the recent Florida election resulted in a second attempt at the amendment of Article I, section 17 of the Florida Constitution relating to cruel or unusual punishments. While Appellant would take the position that the amendment is first of all unconstitutional and second of all not applicable to his case, the Appellant would also set forth that the language of the amendment serves to resolve and negate the position taken by the State of Florida with respect to the unlawful retroactive application of the change in the manner of execution.

The reason that the amendment is unconstitutional is that it purports to deprive the citizens of Florida access to courts and to deprive the courts of Florida, in

particular this Honorable Court, of its duty and responsibility to interpret the constitutionality of the laws of Florida. Indeed, if this amendment is given effect there would really be no point to the Constitution of Florida containing Article V, relating to the appellate jurisdiction of this Honorable Court. It would simply be wholly subsumed by the Eighth amendment of the United States Constitution and the decisions of the United States Supreme Court or, as may become applicable through have bailed corpus, the various United States District Courts of the state of Florida or the 11th federal Circuit Court of Appeals. The interpretation of the laws of the Legislature is not a right of this court, it is a duty of this court owed to the citizens of this state.

Our Constitution additionally provides for a prohibition against *ex post facto* laws. The purported constitutional amendment violates this prohibition by purporting to be entitled to retroactive effect. Appellant would respectfully set forth that such retroactivity when used to enhance or materially change the punishment of criminal behavior or the standards or procedures for such would be forbidden by both the state and federal constitutions.

The reason that the amendment does not apply to the present Appellant is because the amendment does not state a separate the effective date. In the absence of such a separate lease dated effective date the amendment would not be effective

until the time defined by Article XI, section 5 (c), or January 7, 2003. By this time the parties should have substantially completed all briefing of this case and the appellant's case will have been through direct appeal to the United States Supreme Court on one occasion, will have been through an initial postconviction proceeding, and will be before this Honorable Court both on appeal from such postconviction proceeding as well as on appellant contemporaneously filed a petition for a writ of have bailed corpus. To say that a new constitutional amendment could be retroactively applied would effectively negate all of this activity and would change the law of this case in midstream. This is precisely the reason that both federal and state constitutions forbid Expos facto loss.

What is worth noting about this constitutional amendment is this. The state of Florida has consistently taken the position that our Legislature intended the change in the manner of execution to be given retroactive effect and that the Legislature further had considered retroactivity when changing the manner of the death penalty executions. This constitutional amendment, originally proposed by the Legislature for the 1998 general election, proves that the Legislature, in fact, neither intended that such provisions begin in retroactive effect nor considered that they constitutional he could be given retroactive effect. This is because the Legislature, who drafted both the 1998 and the identical 2002 amendment found that appropriate and necessary to specify that

the provisions be given retroactive effect. Accordingly, it is clear that provisions which are not so designated to be retroactively applied cannot be considered as legislatively appropriate for retroactive application. It must be remembered that this was a constitutional amendment drafted by our Legislature and passed by it onto separate occasions. It must be considered and accepted that each and every provision of the amendment is a carefully considered product of legislative intent and will.

It further must be considered that the legislature has determined that the previous changes in the manner of carrying out the death penalty were not previously intended to be retroactively applied since it found it necessary and proper to make such provision prospectively, either to change its prior will regarding retroactivity or to cure a previous defect which precludced retroactive application of such changes..

VII. CONCLUSION

Appellant seeks appellate relief based upon errors and omissions of his trial defense counsel. In order to be accorded such relief, it was necessary for Appellant to show first, that his trial defense counsel made errors, which fell below the standard of reasonable representation, and second that there is a reasonable likelihood that the outcome of the trial would have been different if the errors and omissions had not been made.

The trial court either failed to apply the proper standard, overlooked the relevant

evidence, or failed to permit Appellant an opportunity to present his case in denying relief.

Appellant maintains that the failure to consult a mental health professional until March 15, 1995, with trial scheduled for March 29, 1995, can not be viewed as anything other then grossly deficient. The only reason the trial did not commence on March 29, 1995 was because a jury could not be selected. This deficiency was multiplied by the failure to provide the mental health expert with the Appellant's dysfunctional family history and extensive mental and medical treatment history, which included long term childhood treatment with painkilling medication. All of these matters, including his diagnosis of antisocial personality disorder were valid non-statutory mitigating factors.

The prejudice of this is remarkably clear. Appellant's jury included two members who, despite not having the benefit of most of Appellant's available mitigation, voted to spare his life.

Appellant's trial counsel exposed Appellant's jury to unnecessary testimony during the guilt phase of the trial which was so prejudicial that both his co-defendant's trial counsel and counsel for the State warned him before it was presented. Since the only justification for this offered by the Appellant's trial defense counsel was a reason which was wholly irrelevant to the guilt phase and of virtually no value to the penalty

phase, this was also clearly ineffective assistance of counsel.

Again, it is clear that the integrity of the verdict is undermined when the jury is unnecessarily presented with the Appellant's acknowledgments not only of guilt, but also of suitability for the electric chair.

Appellant's jury was known to have both been exposed to improper testimony and to have engaged in premature deliberation. In neither case did his trial defense counsel either seek inquiry of the extent of the damage to his client or to have curative instructions given. The trial court accepted the invitation of the State to simply presume that the wealth of legal experience in the room somehow prevented the Appellant from being prejudiced by the jury overhearing improper and prejudicial testimony and engaging in improper deliberation. The reality is that such has again undermined the integrity of the verdict.

Appellant's trial counsel could have had, for the asking, a defense instruction which could have allowed his jury to understand how Appellant could have been guilty of some, but not all of the crimes of the indictment and, more importantly, how he could have been disassociated from his co-defendant with respect to the capital felony. The failure to seek and agree to proper instruction of the jury is both ineffective assistance of counsel and fundamental error.

The most devastating evidence against Appellant were his pretrial statements.

Having moved to suppress them, Appellant's trial counsel allowed the matter to be based upon the testimony of senior law enforcement officers that Appellant had knowingly waived counsel against the bare denial of Appellant that he had orally sought counsel. Appellant had refused to sign the written rights waiver. His trial counsel could have, but did not, corroborate Appellant's testimony with that of his family members, who were aware of the inducements made to obtain the statements. Such error again undermines confidence in the result.

During the pendency of the evidentiary hearing it became clear that the United States Supreme Court, in the case of Arizona v. Ring, was about to make a substantial decision in a death penalty case which would have some impact in Florida. This was telegraphed by the Court's action in granting *certiorari* in the Bottoson case. Appellant sought to continue the progress of his case pending these decisions, but the trial court denied this.

During the pendency of this appeal, both the United States Supreme Court and this Court have rendered decisions which concern the procedures used in this case. In particular, Appellant now would be able to point out constitutional infirmities in his jury instructions which could have, and should have been litigated in the proceeding pursuant to Fla. R. Crim. P. §3.850 proceeding. Accordingly, his case should be remanded.

WHEREFOR, Appellant prays this Honorable Court set aside his conviction and sentence or, alternatively, set aside the death sentence or, alternatively remand his case to the trial court for a new trial, or, alternatively, remand this matter to the trial court for a new postconviction evidentiary hearing.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and accurate copy of the foregoing was served upon:

Carolyn M. Snurkowski
Deputy Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

by ( ) regular United States mail ( ) by hand delivery and/or by ( )_____ _____.

this ____day of _____200__.

_____
Charles E. Lykes, Jr., Esquire
FBN: 291341

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this AMENDED BRIEF OF APPELLANT brief is printed in 14 point proportional (New Times Roman) type.

_____

Charles E. Lykes, Jr., Esquire
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