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.
_____/

REPLY BRIEF OF APPELLANT

Submitted by.

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III. CORRECTION OF MISSTATED FACTS

The Appellee State provided a statement of facts which included virtually all of the facts from the original trial. Appellant does not necessarily disagree with many of these facts but would take the position that this proceeding is concerned with the facts relevant to a collateral attack upon the earlier proceedings and that, as such, are not and should not be the focus of this appeal. Accordingly, Appellant will not seek to correct all of the various factual representations made by the Appellee State even though many are clearly wrong or are arguably wrong. It is respectfully requested that this Honorable Court consider that the Appellant has not stipulated to any factual

representation not specifically addressed herein.

For whatever significance it may have, Jimmy Hunt is no longer a judge. Mr. Hunt was opposed and defeated by Thomas Coleman, who had previously been with the local state attorney's office. The Appellee State was likely unaware of this fact and Appellant will refer to him as Mr. Hunt in this reply.

The Appellee State's contention that Appellant's 3.850 complaint concerning the failure to present family members as witnesses during the suppression hearing was limited to the time of the refiling of this motion during the trial is wrong. In fact, it clearly included that the family members should have been called at the first instance of this hearing before trial. This is clear from the fact that Appellant noted that his

suppression hearing amounted to a series of law enforcement officers opposed factually only by the bare testimony of the Appellant.

Dr. Mhatre never referred to the Appellant as either a sociopath or as remorseless. It is important to set that the record straight about the testimony of Dr. Mhatre. This is not only to correct this serious misrepresentation of his testimony by the Appellee State in its brief but also to show how Appellant's trial counsel made a critical mistake in effectively delegating legal decisions to a psychiatrist and taking it upon himself to make mental health evaluations. Dr. Mhatre did diagnose the Appellant with antisocial personality disorder and would have, at trial, offered the

opinion that such was a permanent condition and that the Appellant could not be rehabilitated from that diagnosis.

On cross-examination the Appellee State, taking the language of Mr. Hunt, used Mr. Hunt's term sociopath and elicited that a lack of remorse might be an attribute in some sociopaths, but Dr. Mhatre never attributed either the term "sociopath" or the characteristic of remorselessness to the Appellant. Dr. Mhatre did state that he could have offered an explanation for the Appellant's antisocial personality disorder based upon the dysfunctionality of his childhood and the steady dose of aberrant behavior to which he was exposed throughout his childhood and adolescent life.

The Appellee State represented that there was no evidence that the jury

overheard the courtroom proceedings when they were meant to be sequestered. During the evidentiary hearing the Appellant called both of the bailiffs who had served during his trial. Both of them testified that they had no present recollection concerning this matter. They did each recall that this was the first time they had served as bailiff. Neither of them denied having made the statement which appeared in the record of trial concerning the fact that the jury could hear the courtroom proceedings in the deliberation room when the microphones were turned on. The record also makes it clear that, from that point forward, counsel and the court were careful to ensure that the microphones were turned off during sessions when the jury was not intended to

hear or be present. Accordingly, Appellant would respectfully submit that the only reasonable inference to draw from this is that it was true that the jury did hear the proceedings prior to this time when they were meant to be sequestered.

Appellee State makes reference to the purported murder in the Daytona Beach area that Appellant had mentioned when talking to law enforcement. The record conclusively demonstrates that no such murder had occurred and that such had been fictionalized by Appellant to try and get a better deal. While fictionalizing a criminal offense is not good behavior, Appellant respectfully submits that such is not relevant to this case and specifically asks this Honorable Court to disregard the Appellee State's attempt to falsely depict Appellant as a serial killer.

IV. SUMMARY OF THE REPLY

The Appellee State, in seeking to sustain the decision of the lower court, has engaged in the process of seeking to define the issues on appeal in ways contrary to those expressed by Appellant. In so doing they have incorrectly restated the Appellant's claims. They have also misunderstood or misrepresented the facts.

The Appellant complained that his family members were not called for the original hearing on the motion to suppress. The Appellee seeks to state that the Appellant was only concerned that the family members were not called when the

motion was effectively re-raised during the trial. This is not the case at all. It is clear not only from the Appellant's argument but from the record itself that the critical time at which the family members' presence was required was when the motion to suppress was heard before trial. By the time that the Appellee trial counsel ever got around to presenting even the deposition testimony the trial court had already made a ruling that the statements were to be admitted and all parties and counsel had prepared for trial accordingly. It is not reasonable to assume that a trial court would not be predisposed to rule in the same manner when a motion is effectively re-filed in the middle of a trial based upon evidence that was available before trial and when it should have properly been presented.

The same sort of reasoning applies to the Appellant's argument with respect to the venue issue. Appellant has clearly set forth in his petition, which was sworn and which is now uncontroverted since no contrary evidence has been presented, that he was never informed that the wording of the indictment unconditionally ensured him the right to elect venue with respect to each of the four counts. This would have ensured his ability to sever the counts into at least two separate venues. While it may be true that the Appellant's trial counsel moved for a change of venue and appeared to have accepted the venue of Clay County, Florida, it is also clear from the record that no effort was ever made to seat a jury in Columbia County, Florida, and that the Appellant

had previously sought to sever his trial from that of his co-defendant. Appellant should not be found to have waived a right when he had no way of knowing the right ever existed. It is a fundamental right of our State Constitution, but one which would normally be known to counsel and not a citizen.

Appellant will demonstrate that the arguments and authorities presented by the Appellee State with respect to the remaining issues fail to answer the Appellant's complaints.

V. ARGUMENT

A. Introduction

Appellant agrees that Strickland v. Washington, 466 U.S. 668 (1984) is the principal case regarding ineffective assistance of counsel claims. Appellant also agrees with the principles embodied in the authorities cited by the Appellee State, but it will be seen that when analyzed with their facts they support the Appellant and not the Appellee in this case.

The Appellee has cited the case of Lopez v. Singletary, 634 So. 2d 1954 (Fla., 1993) for the proposition that post-conviction proceedings are not to be used as a second appeal. The Appellant would have no quarrel with this proposition but strongly maintains that nothing of the sort is being attempted here. Each and every one

of the Appellant's claims are based upon an error or omission of his trial counsel which prevented the Appellant from receiving the benefit of the effective assistance of counsel and one or more other constitutional rights. Furthermore, the present complaints coul

d not be the subject of a direct appeal because such errors or omissions of trial counsel prevented an appropriate appellate record from being made.

One important holding of the Lopez case, however, is that when a post-conviction motion is denied without an evidentiary hearing it is necessary that the motion and the record must show conclusively that no relief is warranted. Accordingly, since all of the Appellant's post-conviction claims were made with an adequate recitation of the relevant facts and under oath, then it is clear that the case must be returned to the trial court for an evidentiary hearing on those claims which find legal validity.

B. Background of the Representation of Appellant.

In order to place this matter in its proper perspective some background discussion is appropriate. In particular, Strickland v. Washington, 466 U.S. 668 (1984) indicates that the appropriate test for the evaluation of an ineffective assistance of counsel claim should be applied by considering the status of the case, to include the knowledge of counsel at the time of the alleged error or omission.

Appellant's trial defense counsel was about to face the task of representing Appellant through trial for a variety of serious felonies, including murder in the first-degree. Appellant was also facing a potential sentence of death. Accordingly, it is appropriate to consider what facts were known to the Appellant's counsel and to consider what strategies and theories were reasonable under the circumstances. Finally, we may determine whether or not the actions of Appellant's counsel furthered any reasonable strategy, how they affected the case, and whether they may be the basis for relief herein.

Mr. Hunt knew that Appellant's family life was dysfunctional. His father was rarely in the home. His mother struggled to cope and was consistently under treatment for a variety of mental problems, several times requiring institutionalization. There was violence in his home, often directed at him and even by his own mother. His older brother (Appellant's male role model in the absence of a functional father) engaged in drug activity and juvenile level crime and introduced the Appellant to such.

Appellant also had required at least two mental-health confinements. Appellant also suffered the loss of an eye in an accident with a BB gun. Because of the manner of treatment selected by his physician for this accident, Appellant was introduced to painkilling medication on a regular basis in his early adolescent years before the eye was finally removed.

Appellant demonstrated the capacity to engage in both successful employment and in meaningful relationships with other persons but ultimately regressed to criminal activity, usually associated with drug use, from his late teens throughout his early adult life. Immediately prior to the crimes for which he stood trial in this case Appellant had been incarcerated in a North Carolina prison and had escaped together with his co-defendant, Anthony Wainwright.

The events charged in the indictment all occurred within the several days following this escape of Appellant and his co-defendant. Such facts have been repeatedly referenced throughout both the Appellant's statement of facts and the Appellee's statement of facts. No one could take issue with the fact that such facts are horrible and tragic. While such facts are horrible and tragic, Appellant respectfully submits and prays that this Honorable Court will not find that the Appellant is any more or less entitled to the protections of the United States Constitution and the Constitution

of the Appellee State because of the condition of such facts. Indeed, such should demand that even more care be taken to ensure that the proceedings have been conducted with the requisite integrity.

He was arrested following a shootout and automobile crash in which he sustained multiple injuries in the State of Mississippi. Before questioning by the

police, he was under treatment with a variety of painkilling medications. His family members drove down from North Carolina to be with him. A variety of Florida law enforcement officials also traveled to Mississippi because the vehicle in which Appellant was driving at the time of the arrest was a stolen vehicle associated with the missing victim.

Appellant's family members were aware of the Appellant's belief and of representations of law enforcement officers that things would go easier on him, likely sparing his life, if he were to be cooperative with law enforcement officers with respect to this offense. To that end he had discussions with the Mississippi Sheriff Lynn Boyte and Sheriff's Investigator Russell Johnson from Hamilton County, Florida. Appellant began to make incriminating statements and was transported to Florida for the purpose of assisting in the recovery of the body and throughout this trip made additional incriminating statements.

Appellant was appointed representation of the public defender shortly after his initial arrival in Florida. The public defender who was assigned to his case was Jimmy Hunt, who later became a county judge in Columbia County, Florida, but is no longer sitting as a judge as a result of defeat in the 2002 judicial election. Mr. Hunt, in the latter part of 1994 and early 1995, conducted a series of interviews with family members of the Appellant in which the dysfunctional nature of the family was clear and

in which the Appellant's found mental-health history was made known to him. He also was made aware of their trip to Mississippi at the time of the arrest.

Appellant's case was first set for trial on March 25, 1995, or within one year of the alleged crimes. His case was set for trial jointly with his co-defendant and such trial was to be conducted in Hamilton County, Florida, in the city of Jasper, Florida. All four counts for both defendants would to be tried together.

On or about March 15, 1995, Mr. Hunt requested and obtained for the first time a mental-health evaluation of the Appellant. Pursuant to specific instructions from Mr. Hunt, the examining psychiatrist, Dr. Umesh Mahtre considered whether the Appellant was capable of participating in trial, whether it is possible that any mental health defense existed, and whether or not Dr. Mhatre could support the existence of any statutory mitigating factor. Dr. Mhatre could not support any mental responsibility defense nor could he support the existence of any statutory mitigating factor. Dr. Mhatre was not asked nor did he expressed any opinion with respect to the existence of any non-statutory mitigating factor. Dr. Mhatre was not presented with the record of the interviews with the Appellant's family nor did he have any interviews nor discussions with the Appellant's family.

With this knowledge and preparation, trial actually commenced on May 15, 1995, in Clay County, Florida. A hearing on the Appellant's motion to suppress his

pretrial statements and to sever his trial from his co-defendant had been denied.

C. Theory of the Defense.

The Appellant's counsel adopted as a primary goal the task of presenting to the jury that the co-defendant acted alone in the murder and that the Appellant had cooperated with law enforcement and should, therefore, be spared from a recommendation for the death penalty. In so doing, it is clear to see that the defense virtually conceded the matter of the guilt of the Appellant to every offense other than as principal to the murder. This is obvious from the fact that to prepare such a mitigation defense it necessarily follows that the Defendant's pretrial inculpatory statements would be eventually presented to the jury and that any fact, including a fact of innocence, which would undermine the "cooperation with law enforcement" theory would not be stressed other than those indicating that co-defendant Wainwright acted alone in the murder. When considering whether or not certain actions of the Appellant's trial defense counsel were reasonable and satisfied standards of minimum effectiveness, it is important to consider this fact.

It is also important to consider that the Appellant did not choose to enter a plea of guilty but rather chose to contest the charges against him at trial. Accordingly, it is clear from the outset that there was a likely conflict between the Appellant's own theory of defense and that of his trial defense counsel. Appellant desired to contest

the validity of the pretrial statement, but his trial counsel did not make a significant effort of this.

Also consider the matter of Trooper Leggett. If the objective of the defense were to try and support the theories of the Appellant's innocence, then it is clear that there could be no rational basis for permitting his testimony concerning the Appellant's statement of being ready to meet his maker. That is why the counsel for the co-defendant and even counsel for the Appellee State warned Appellant's trial counsel against allowing his jury to hear this testimony. Because counsel for the Appellant was not primarily concerned with getting the Appellant a reasonable chance at a not guilty verdict, however, he disregarded these warnings and allowed the Appellant's jury to hear this testimony. At the evidentiary hearing Appellant's trial counsel stated that his reason for permitting Appellant's jury to hear this testimony was that it supported the mitigating factor of cooperation with law enforcement.

D. The Nature of Genuine Strategic Decisions.

Much of the response of the Appellee State sets forth that the matters complained of by Appellant were valid strategic and tactical decisions of his counsel and that they should not be subjected to our hindsight and second guessing. Appellant will show that these complained of actions do not fall within that zone.

In Stewart v. State, 801 So. 2d 59 (Fla. 2001) the Appellee State claims

support in this case from the proposition that the strategic decision in Stewart to forgo a voluntary intoxication defense was not ineffective assistance of counsel. Of course, there was no potential voluntary intoxication defense here. The case does make the point that all of the defenses of strategic reasonableness to post-conviction claims are fact dependent. Accordingly, while the general principle of Stewart is true this principle must be applied in a case-by-case basis when the Appellee asserts that a strategic decision was reasonable.

What is important about Stewart is that Stewart gives us some guidance as to how counsel may fulfill what is defined as a "strict duty" to investigate a defendant's background for possible mitigation. In Stewart the investigation was reasonable because the Defendant had received either three or four psychiatric visits. Additionally, numerous medical records and documents were available to the psychiatrist and psychiatric and neurological testing was done. That is quite dissimilar from this case, wherein family records were never shared with the psychiatrist, no psychiatric or neurological testing was done, and only one visit was made by a mental-health

professional, and that was not until within two weeks of the originally scheduled trial date. Accordingly, Appellant agrees with both the general principle of Stewart as well as the specific guidance it provides to us.

In Asay v. State, 769 So. 2d 974 (Fla., 2000), also cited by Appellee State, a different aspect of a proper mental-health investigation is at issue. In this case the mental-health investigation was reasonable under similar circumstances except that it is clear that in Asay the background investigation of the family was shared with the mental-health professional. It is uncontroverted in this case that it was not. We know this from the doctor's testimony, from the trial defense counsel testimony, and from the fact that the examination by the mental-health professional was so late as to be an afterthought.

The Appellee also cites the case of Sweet v. State, 810 So. 2d 854 (Fla. 2002) as an example of a reasonable strategic choice resulting in a finding of no ineffective assistance of counsel. In the Sweet case the challenged act of the defendant's trial counsel was the failure to call a witness who had, at one time, provided a description of the defendant which was slightly different than that given by the victim. However, the defendant's trial defense counsel was aware of the fact that the uncalled witness also later made a clear identification of the defendant based upon pictures seen on a television report and was aware that this witness would have ultimately resulted in

corroboration of the State's eye-witness identification.

The failure of the Appellant's trial counsel to ever present, either at the pretrial hearing or when he re-raised the issue during trial, the Appellant's family members on

the issue of the suppression of the Appellant's pretrial statements also demonstrates the lack of concern with the guilt phase. Because the Appellant's trial counsel was concerned with proving the issue of "cooperating with law enforcement" even during the guilt phase of the trial, the suppression of this statement was, wrongfully, not a matter of significant concern to Appellant's counsel. The proper choice would have been to first make an all out effort for suppression, pretrial, in order to significantly lessen the need for a penalty phase. That the Appellant's trial counsel belatedly offered the family testimony during trial to renew the suppression request demonstrates that the evidence had at least enough reliability and relevance to offer it to the Court and that the withholding of this evidence at the proper time was woeful ineffectiveness.

E. The Errors and Omissions Complained of Cannot Be Explained Away as Strategic Decisions.

In order to ascertain whether or not the matters complained of can be explained or excused as valid strategic decisions it is first helpful to determine what, if any, strategies had been adopted for the defense of the case. In Appellant's case there were two distinct phases. In a first phase it was determined whether or not the defendant

was guilty of the crime as charged, any lesser included offense, or not guilty. Following the determination of guilt to murder in the first-degree a second phase was

held in order to determine whether the death penalty is appropriate. While it is true that considerations of the second phase had to be considered throughout the proceedings, it is also true that the objectives and considerations of each phase were different and required different strategies. The minimal standards of competence in a death penalty case must be such as to require counsel to be familiar with and balance effectively these considerations.

The defense in the first phase seemed to be that the Appellant was not the person who killed the victim nor did he ever design to bring her death about. This could be supported by circumstantial evidence and by statements of inmates to whom co-defendant Wainwright had made remarks to the extent that the Appellant had not had the guts to engage in the murder. Beyond that it appears that the defense had little purpose other than to hope to find a weakness in the Appellee State's case.

With respect to the second phase it would appear that one of the principal strategies adopted by the defense was to be able to argue that the Appellant had cooperated with law enforcement by assisting to find the victim's body.

With these things in mind analysis of the described actions and decisions of the Appellant's trial defense counsel are seen to be both ineffective and to have

undermined the integrity of the trial to a sufficient degree that it may be said that there is at least a reasonable likelihood of a different result if these matters had been handled

effectively. They are also seen to be lacking in any valid strategic basis.

Dr. Mhatre is clearly a most capable and credible psychiatrist. His analysis and diagnoses are not only well reasoned and thorough, but his manner of testimony was very convincing and would have ben effective with a jury. What Dr. Mhatre is not and should not be required to be, however, is a lawyer with a lawyer's knowledge of statutory and non-statutory mitigating factors. Additionally, Dr. Mhatre, as well as any professional being called upon to render a significant opinion in a consultation of dire consequences, should be presented with all of the information available and should be afforded a sufficient amount of time to develop, radio, and analyze the data. This was not done in this case.

Dr. Mhatre was called into the Appellant's case less than two weeks before the case was originally scheduled to commence trial. That was much too late. On March 25, 1995, an effort was made to empanel a jury and begin the trial. Only the inability to pick a jury from Jasper, Florida, prevented this from occurring. The trial did not begin until 6 weeks later, but no further mental health inquiry was made.

The delegation of legal decisions to a psychiatrist was evident from the way Appellant's trial counsel and Dr. Mhatre interrelated in this case. Appellant's trial

counsel seemed to think it was satisfactory to simply send Dr. Mhatre over to see his client ten days before trial without guidance or even with the family and client history

abd background uncovered by investigation and the state attorney seemed to indicate that Dr. Mhatre should note, on his own, that there was such a thing as non-statutory mitigating factors, what they were, and whether or not he could support any of them.

In this one session with the Appellant conducted ten days before the beginning of trial and from time apparently expected Dr. Mhatre to be able to competently consider the potential of any insanity or mental responsibility defense as well as factors in mitigation. Appellant respectfully submits that this practice is ineffective on its face and prays that this Honorable Court make a strong statement to that effect in its opinion, however it may ultimately decide this case.

In the case of Gorby v. State, 819 So. 2d 664 (Fla., 2002) cited at page 82 of the Appellee's brief, Appellee seeks to support the proposition that Appellant's trial counsel was not ineffective in failing to call members of the Appellant's immediate family for the purpose of mitigation. In the Gorby case the facts are quite different from the present case. The potential witness and family member in question was the Appellant's father. Appellant's trial counsel had come to the conclusion that the father was not particularly interested in the case and could not offer anything other than cumulative testimony to that of the other immediate family members. In Gorby the

defendant's trial counsel had also presented a mental-health professional.

Unlike Gorby, in the present case the only immediate family member of

Appellant's it was called was the Appellant's brother, Timothy Hamilton, who was himself an adolescent during his acquaintance with Appellant and the family background. He lacked either the observation or understanding to describe how the dysfunctional family would have impacted on Appellant. The Appellant's mother, father, and sister, each of whom were more close and understanding of his family background, were not called even though their testimony would have been substantially helpful.

In Van Poyck v. State, 694 So. 2d 686 (Fla., 1997), it was not ineffective that the defendant's trial counsel did not present mental health mitigation. What differentiates Van Poyck from this case is that Van Poyck had told his counsel that he had faked mental illness. That certainly made mental health mitigation untenable. No such circumstance was present in this case.

Also, before trial, Appellant's motion to suppress his pretrial statements was called up for hearing, Appellant would again point out that the Appellee State has misrepresented the crux of this argument. The Appellee State takes the position that Appellant complaints only that this family members were not called when the motion to suppress his pretrial statements was renewed on the third or fourth day of his trial.

Such is not the case. Appellant has claimed throughout this proceeding that his family members should have been brought to testify at the pretrial hearing. Rather then have

the Appellant's bare testimony be in competition with an entire cast of law enforcement officials from two counties in two states, it was ineffective with no inexcusable merit to not have had these family members present for this hearing, or to have at least had some means of them presenting their full testimony.

The Appellee State is also off the mark when they represent and ask this Honorable Court to take the position that any complaint about the suppression of the statement is procedurally barred. The Appellant would expressly agree that, given the state of the record and presented with the testimony available at the original suppression hearing and the lack of any evidence to refute it, the trial court had no realistic choice but to deny the motion to suppress the Appellant's statement. No one can seriously doubt this. What the Appellant had said in his post-conviction proceeding and what is now repeated is that Appellant was denied his Sixth Amendment right to the effective assistance of counsel when his trial defense attorney did not bother to present at least 80% of the evidence available to support an argument and theory under which the Appellant's pretrial statement should be suppressed. This is particularly true when said evidence would come from third parties who had firsthand knowledge of the events and occurrences at the time these events and occurrences were taking place.

The Appellee State indicates that it was sufficient for the Appellant's trial defense counsel to wait until the third or fourth day of trial and then offer sheets of

paper upon which the depositions of these witnesses being questioned by the Appellee State and not by the Appellant's own trial defense counsel had been published. This tactic was procedurally late was strategically late, and was technically without merit.

The tactical reason for permitting the jury to hear the statement of Trooper Leggett that the Appellant was ready to meet his maker does not pass even a nominal test of validity. Appellant's trial counsel's position seems to be that it benefit Appellant for the jury to hear that the Appellant had offered the self-serving explanation to Trooper Leggett that he was firing a shotgun at Trooper Leggett in order to save Trooper Leggett life. This is an absurd proposition under any analysis. Accordingly, in order to place before the jury an absurd proposition the Appellant's trial counsel permitted the Appellant's jury to hear what amounted to not only an admission to the crime but an admission to the appropriateness of the death penalty to him. Appellant's trial counsel was even warned about the fact that the cross-examination of Trooper Leggett would be prejudicial.

A valid strategic or tactical decision to allow harm must require some realistic or at least potential benefit. In order to find any such potential benefit the Appellee State asks us to believe that it was reasonable to try and convince Appellant's jury that Appellant repeatedly fired shotgun blasts at Trooper Leggett's automobile, placing bullet holes in the windshield and in the body of the patrol car, in an attempt to save

Trooper Leggett's life. If that is the best argument available to the Appellee State and to Appellant's trial counsel then such decision is clearly tactically invalid. The ineffectiveness of such decision is obvious from its face an the prejudicial nature of the statement is clear from the fact that even the State Attorney warned the Appellant's trial counsel against permitting the jury to hear this testimony.

In an effort to show that the Appellant's trial defense counsel was not ineffective in the penalty phase the Appellee State has embellished upon the testimony of Dr. Mhatre. Dr. Mhatre never described the Appellant as either a sociopath or as without remorse. In fact, just as in the cases cited by the Appellee State, Dr. Mhatre referred to the Appellant's condition as "antisocial personality disorder" which is a recognized mitigating factor, Dr. Mhatre also could have offered an explanation of factors beyond the control of the Appellant leading up to this diagnosis. The fact that such diagnosis may be a lifelong condition is no more reason for execution than it is for life without parole.

The Appellee State additionally offers the purported reluctance of the Appellant's family members to participate in his trial as reasons for not calling them to testify in mitigation. It is, of course, not unusual for persons to be nervous and anxious about testimony. It is not only a frightening ordeal for some but there are worries of being confused during cross-examination and doing more harm than good. There also may have been a certain amount of sorrow and perhaps even shame when

a member of their immediate family had been convicted of the most serious crime in state jurisprudence. It is enough to dispense with this argument to know that each of these family members appeared in the post-conviction evidentiary hearing and testified that they were willing and available to testify at the original trial, even though not always delighted at the prospect. If not, Appellant's trial counsel should have sought a delay to accommodate them.

When determining whether a decision to forgo such evidence is genuinely strategic or whether it is simply an ineffective error or omission it is appropriate to consider what is lost by not presenting the evidence versus what harms may have been avoided by not presenting the evidence. Appellant respectfully submits that none of the testimony offered in the evidentiary hearing was harmful to the Appellant. Even those unpleasant experiences and the descriptions of his early misconduct had been explained by his troubled upbringing, the misfortune of the loss of his eye, his early exposure to drugs, the absence of a male role model with any responsibility, and at least two adolescent mental health institutionalization. These events amount to overwhelming evidence of non-statutory mitigation.

What was avoided in the way of potential harm to the case? Appellant respectfully submits that there was absolutely no downside to this evidence. Even the proper diagnosis of antisocial personality disorder, which was mis-characterized by the

Appellant trial defense counsel as that of being a "sociopaths" was a recognized mitigating factor. To the extent that any of these factors were raised in his penalty phase, they were ineffectively raised before the jury. The fact that the trial court may have mentioned some of this does not explain how the jury considered these matters. In the worst case, if it turned out that Appellant's immediate family members were not supportive of Appellant, would that not also have helped show the jury how disadvantaged Appellant had been? Dr. Mahtre's testimony would have resolved that dilemma.

Finally, we consider the failure to seek any inquiry or cure of the situations when the jury was exposed to improper testimony and engaged in premature deliberation type discussions of the evidence. Where was there any downside to seeking individual voir dire and a curative instruction or a mistrial? There was none. To ignore these events without at least developing the record was a woeful inadequacy.

F. The errors and omissions were clearly prejudicial and, at the least, there is a reasonable likelihood of a different result if these errors and omissions were eliminated.

Hopefully it goes without serious contradiction that the valuation of the nature and demeanor of witnesses is among the most critical factors available to a fact finder in determining which of two versions of an event to believe. One need look no further than the concept of due process and confrontation to understand the importance of this.

That is why our law expresses serious concern with regard to the aspect of due process called "confrontation" in the presentation of testimony. That is why we require evidence to be subject to cross-examination as among the more important of all legal rights. Appellant was denied that with respect to the matter of the suppression of his retrial statement. The Appellant's trial defense counsel made what can best be described as an ineffective and less than halfhearted effort to present the suppression case when it should have been presented and tried to make up for this by handing the Honorable Trial Court depositions of the questioning of these witnesses by his adversary. Imagine the position of the trial court after all such pretrial matters were to have been accomplished faced with statements which would have been inadmissible before the jury and would have even been inadmissible over any objection on the Appellee State after all counsel had prepared for trial based upon his earlier ruling. The Honorable Trial Court had little reason to do anything other than what he did.

Furthermore, the action of the trial defense counsel in having withheld this evidence during the first proceeding effectively prejudiced his client by effectively changing the standard of proof for obtaining the requested relief from the proper standard of proof to that applicable to the review of a prior decision.. The Appellant's trial counsel must have believed the withheld testimony to have some measure of credibility and relevance or he would have never presented and argued it.

Appellant again submits to this Honorable Court that it is appropriate to give serious concern to whether this Honorable Court desires such practice to become an acceptable standard of performance. Appellant respectfully prays this Honorable Court not take that step and make a clear statement that if a motion is worthy of filing, then it is worthy of a proper factual presentation.

Determining whether or not the mitigation phase errors or omissions had a reasonable likelihood of producing a different result, Appellant respectfully submits that this Honorable Court consider the fact that even with the meager mitigation case presented, two of Appellant's jurors voted to spare his life. Appellant further respectfully submits that there is at least a reasonable likelihood that four other jurors may have been convinced to recommend the sparing of the Appellant's life if they had heard in detail how Appellant was raised, how he was introduced to prescription painkillers and an early age because of a medical condition and not because of any misconduct, that he had no role model other than his older brother who led him to crime at his own parents pulled a gun on him, and a competent psychiatric explanation of how this may have impacted his life.

Appellant respectfully submits that there is no way a responsible for nominally competent presentation of Appellant's family members coupled with Dr. Mahtre's testimony could have done anything but help his mitigation case and that there is more

than a reasonable likelihood of a different outcome had such been accomplished.

Appellant was on trial for his very life. His life was dependent upon a legal proceeding in which the consultation, analysis, and potential presentation of mental health factors upon the Appellant could have and should have been a determining factor. The Appellant was deprived of the benefit of a dispassionate and objective discussion from a knowledgeable professional about who Appellant was from the standpoint of his mental well-being and how he came to be that way.

The Appellee State seeks to excuse the lateness of the consultation with Dr. Mhatre on the familiarity between Dr. Mhatre and Appellant's trial defense counsel, Jimmy Hunt. Familiarity between Dr. Mahtre and Jimmy Hunt did not allow Dr, Mahtre to become any more informed about the Appellant's case or the potential for mental health issues. It was incumbent upon Jimmy Hunt to make sure that Dr. Mhatre was aware of all available data and that he was guided through the non-statutory mitigation factors for the purpose of determining whether the dictate the Appellant's mental health stands with support any of them.

Put another way, one can examine the action of Appellant's trial defense counsel from a standard of reasonableness. Mr. Hunt was not a psychiatrist and Dr. Mhatre was not an attorney. Dr. Mhatre was serving as a consultant for Mr. Hunt with respect to mental-health factors. Furthermore, Dr. Mhatre was a confidential consultant with

complete privilege which attached until and unless Dr. Mhatre was listed as a witness in the case. These are conditions which ought to be known to any attorney, much less one with the responsibility for defending capital cases. Accordingly, by failing to provide Dr. Mhatre with the information about the Appellant's family background and medical and mental health history, Mr. Hunt assumed the responsibility of the psychiatrist with respect to this portion of the investigation and took the matter out of Dr. Mahtre's province. Conversely, by asking Dr. Mhatre to consider only statutory mitigating factors prevented the Appellant from having the opportunity to support non-statutory mitigating factors with professional testimony.

Appellant is not aware of any case in which it was found to be proper and effective to wait until less than two weeks before scheduled trial to first consult a mental-health professional and then denied the mental-health professional knowledge of an access to critical information, records, and data directly bearing upon the clients mental health. The cases of which the Appellant is aware, including those cited by the Appellee State, in which it was determined a defendant was effectively represented, included item multiple visits by a single psychiatrist or consultation with several different mental-health professionals. Additionally, the mental-health professionals were told of the family history and other significant mental-health events, documents, and records.

Appellant also respectfully prays that this Honorable Court not allow this to become accepted as a reasonable standard of performance by trial defense counsel. If this Honorable Court rules that calling a psychiatrist to evaluate a defendant in a death penalty case two weeks before trial and then withholding from the mental health professional volumes of evidence concerning the Appellant's family history and prior mental health and medical problems, it is clear that many defendants may be condemned to death when the existence of substantial and important non-statutory mitigation was available.

There was no excuse and no reasonable basis for failing to present this evidence. If the Appellant's trial defense counsel, who had at least gotten a good start on investigating the family background, followed through in a timely manner by securing the appointment of a psychiatrist to spend the necessary time evaluating the Appellant's personality and family history together with his own individual medical and mental health history, Appellant's trial defense counsel would have known to present this evidence and would have been prepared to argue the effect of it. That he failed to do so was grossly ineffective and it cannot be said that such did not reasonably effect the outcome of the sentencing phase.

G. The Issues of Venue and the Independent Acts Instruction Are Entitled to a Hearing and the Jury Impropriety Claims Are Entitled to Complete Factual Development.

Appellant respectfully submits that the Appellee has completely misunderstood

the Appellant's complaint with respect to the issue of opinion. Appellant also respectfully submits that the Appellee has demonstrated a misunderstanding of the law. The point of Leon v. State, 695 So. 2d 1265 (4th DCA, 1997) was that the use of the alternative conjunctive "and/or" results in giving the Defendant the option set forth in F.S. §910.03. It may be that the Appellee State could have, by exclusively using the conjunctive "and" by itself, prevented the Appellant from having this option but the fact is that they did not. Leon states that Appellant should have had the option.

Given that the Appellant should have had the option it is unreasonable to assume that such option would not have, more likely than not, resulted in a severance of not only the counts from each other but the severance of one defendant from the other defendant. Since both defendants were charged with the same "and/or" language it is clear that they could have (although may not necessarily have) obtained separate trials by making different venue elections. It may well be that the Appellee State could have amended to deprive of this choice but that is purely speculative, as set forth above in the Stewart case, since no evidentiary hearing was granted on this issue, the facts set forth in the motion in the record must conclusively shown that no relief is warranted before the claim can be denied.

Appellee State seeks to characterize this as a novel issue. Appellant respectfully submits that there is nothing novel above Article I, §16 of the Florida Constitution. There is also nothing novel about F. S. §§910.03, 910.05. Leon was decided more

than five years ago and quoted on relevant language from an early 20th century case. If there is any novelty it comes simply from the fact that no one ever failed to take advantage of a venue allegation to sever before. That is not a reason to excuse failing to advise Appellant or to deny him a fundamental constitutional right to accomplish a matter of critical importance to his trial.

The Stewart case makes it clear that, in the absence of an evidentiary hearing, this Honorable Court must examine the motion and the record and be able to come to the conclusion that the inappropriateness of relief is clear from the record. Such is not the case here with respect to either the venue issue or the independent acts instruction issue.

In the absence of an evidentiary hearing on the matter of the independent acts instruction, it would be wrong for this Honorable Court to accept the invitation of the Appellee State to assume that the Appellant's trial defense counsel was fabricating when he represented to the trial court, in the presence of the State Attorney and uncorrected by the State Attorney, that the State Attorney had indicated that the independent acts instruction would have been acceptable. The Appellee State now takes the position that the trial court would not have permitted this instruction and that the record does not demonstrate that the Appellee State did, in fact, agree to this instruction.

The only way this position can be accepted is to deny the only reasonable

inference from the record in its present state. This is that the Appellee State did, indeed, indicate that it would accept the independent acts instruction. By remaining silent in the face of this representation by the trial defense attorney, who indicated that it was his own decision not to seek the independent acts instruction even though acceptable to the Appellee State, was the reason this instruction was not given the Appellee State has allowed this to be the record on this part. It is mere conjecture and contrary to the only reasonable inference available from this record to assume either that the Appellee State or the trial court would have objected to this instructions.

Had the Honorable Trial Court permitted an evidentiary hearing on this issue then the State Attorney that had taken such a position and could have made whatever argument was available to oppose the independent acts instruction. In the absence of the evidentiary hearing and in the face of Appellant's well described and well claimed request for relief on this point, Appellant respectfully submits that this Honorable Court should either remand this case for a new trial or should at least remand the post-conviction proceedings to the Honorable Trial Court for the purpose of developing the evidence relevant to this claim for relief.

H. This Case Concerns Numerous Issues Unresolved From the Ring, Bottoson, and King Cases.

Without repeating each of the matters previously raised by the intitial brief,

Appellant herein submits that the matters raised in the case of Ring v. Arizona, 122 S. Ct. 2428 which were of sufficient concern to be addressed by the majority of justices of this Honorable Court exist herein. They concern the fundamental meaning of due process and the right to a jury trial in this State. Appellant reiterates his earlier arguments on these issues, but specifically points out that even the aggravating factor of a prior felony does not escape the Apprendi v. New Jersey, 120 S. Ct. 2348 analysis in Florida since the penalty phase allows presentation of something more than the "mere fact" of the prior conviction.

Accordingly, Appellant would submit that any sentence to death which did not require that each aggravating factor be found, by a jury, to exist beyond reasonable doubt would lack Constitutional validity. That would include the present one.

VI. CONCLUSION

Appellant has shown that a variety of errors were made in the preparation and presentation of his case. Appellant has further shown, particularly under the facts and circumstances of this case, that these errors were below any acceptable standard of representation.

Finally, Appellant has shown the prejudice to his case. The magnitude of the errors was substantial. They went to the more critical parts of his trial.

Appellant respectfully submits that before this Honorable Court permits his conviction, much less execution, to thee offenses, that he be afforded a trial in which:

A. His motion to suppress his pretrial hearing is given a proper hearing and receives due consideration;

B. All mental health factors are developed before critical strategic decisions regarding both guilt and penalty phases and all mental health considerations are presented.

C. Appellant is made ware of his Constitution and statutory venue options and makes a reasonable election;

D. Unnecessary concessions of guilt and punishment are not made for trivial gain;

E. His jury is not exposed to improper, prejudicial evidence, particularly when even the presentation undermines his mitigation interest;

F. He is accorded a meaningful mitigation case; and

G. This Honorable Court has fully considered and applied the cumulative impact of the Ring and the Bottoson v. State, SC 02-1455 (Fla. 10/24/2002) and the King v. State, SC 02-1457 (Fla. 10/24/2002) cases of the facts of this case.

Respectfully submitted.

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_____

Florida Bar No. 291341

VII. CERTIFICATE OF COMPLIANCE

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

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

VIII. CERTIFICATE OF SERVICE

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

Charles J. Crist, Jr.
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