IN THE SUPREME COURT OF THE STATE OF FLORIDA

GEORGE W. BROWN,

Appellant,

CASE NO. 02-1787

v.

STATE OF FLORIDA,

Appellee.
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APPELLANT GEORGE W. BROWN'S AMENDED INITIAL BRIEF

Lower Tribunal: The Circuit Court of the Tenth
Judicial Circuit, In and For Polk County, Florida

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STATEMENT OF THE CASE AND THE FACTS

A. NATURE OF THE CASE

The instant presentation is George W. Brown's direct appeal from the denial of his Amended Motion to Vacate Judgments of Conviction and Sentence of death, R. III, 505-592 [1] filed on his behalf on December 3, 1999 by his then-counsel, Capital Collateral Relief. An evidentiary hearing was held on October 19 and 20, 2000, and

[1] The originally prepared Record will be referenced by "R." followed by the appropriate volume number and page number. The Supplemental Record will be referenced as 1st Supp. And 2nd Supp. followed by the volume and page numbers.

on December 15, 2000. R. IV. 607 *et seq.* Mr. Brown filed requests in May and later in October, 2001, directed to the lower court asking it to hold its ruling on vacation in abeyance, 1st Supp. Vol VI, 934, to accept supplemental written argument, and to permit supplemental oral argument in support of the vacation request. 1st Supp. Vol.VI, 93 The State responded. 1st Supp. Vol. 937. In its Order of March 26, 2002, the court denied all three requests. Mr. Brown appeals therefrom. 1st Supp. Vol II, 185.

This Court has jurisdiction over this appeal by virtue of Art. V.§ 3(b)(1), (9) *Fla. Const*.

COURSE OF PROCEEDINGS[2]

Mr. Brown filed his Amended Motion to Vacate Judgments of Conviction and Sentence

December 3, 1999.[3] R.505-592 The trial court entered its Amended Order Setting Briefing scheduling as well as setting a *Huff* [4] hearing. R.593. The State

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[2] This cause was assigned to the current court due to disqualification of the judges of the Tenth Judicial Circuit by virtue of the ascension to the Bench in that Circuit of Mr. Brown's trial counsel Robert Doyel. R. III, 445-461.

[3] The initial Motion to Vacate Judgment of Conviction and Sentence included a request for leave to amend and was filed March 18, 1997. R. I, 130-166.

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

responded to the Motion to Vacate on January 28, 2000. R595-598. The State conceded hearing on Issues I through V. 1st Supp.Vol. I., 2 & 6. The *Huff* hearing was held May 25, 2000. 1st Supp.Vol. I, 1-16.

Mr. Brown raised twenty-one issues in his pleadings. The state's position is contained in its Response. R. III, 595-598. The court's rulings are contained in its Order. R. VI, 999-1000.

> Claim I Mr. Brown's capital conviction and sentence are constitutionally unreliable in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution: conflicts of interest and improper delegation of responsibility.
>
> A. Conflict of interest: Counsel's improper interest in the outcome of trial.
>
> B. Conflict of Interest: Assistant's improper relationship with lead detective.
>
> C. Ineffective assistance of Counsel: Improper delegation

The State conceded the necessity for a hearing on this issue prior to the *Huff* hearing and a hearing was granted.

> Claim II The state violated the Constitutional requirements of *Brady V. Maryland* and its progeny, thus denying Mr. Brown his right to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under the corresponding provisions of the Florida Constitution. The State's actions and omissions rendered defense counsel's representation ineffective and prevented a full adversarial testing of the evidence.

The State conceded the necessity for a hearing on this issue prior to the *Huff* hearing and a hearing was granted.

> Claim III Mr. Brown was denied effective assistance of counsel and an adversarial testing at the guilt phase of his trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, and as a result, his death sentence is unreliable.
>
> A. The *Strickland* Standard
>
> B. Failure to present voluntary intoxication defense
>
> C. Counsel was prejudicially ineffective for failing to challenge the State's case by presenting available witnesses to counter crucial testimony regarding the alleged manner in which the crime occurred
>
> i. Failure to challenge the Medical Examiner's testimony.
>
> ii. Failure to challenge crime scene evidence.
>
> iii. Failure to investigate lay witness and the victim or present available witnesses
>
> D. Failure to adequately argue suppression of statements.
>
> E. Failure to object to prosecutorial misconduct
>
> F. Failure to communicate or adequately explain plea offer
>
> G. Failure to effectively cross-examine Detective Ore
>
> H. The cumulative effect of trial counsel's deficient performance
>
> I. Failure to pursue phone records.

The State conceded the necessity for a hearing on this issue and a hearing was granted.

Claim IV Mr. Brown received prejudicially ineffective assistance of counsel and was denied adversarial testing at the penalty phase of his trial in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida

Constitution.

A. The *Strickland* Standard
B. Failure to present mitigating evidence
C. Failure to present expert testimony
    i. Medical expert in epilepsy
    ii. Positron emission tomography scan
    iii. Expert in schizophrenia

The State conceded the necessity for a hearing on this issue and a hearing was granted.

> Claim V Due to the inadequate time, documentation, and preparation, the mental health expert who evaluated Mr. Brown did not render adequate mental health assistance required by *Ake v. Oklahoma*[5], in violation of Mr. Brown's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The State conceded the necessity for a hearing on this issue with the caveat that it believed that the claim was one of ineffective assistance rather than access to expert witnesses. A hearing was granted.

Claim VI Mr. Brown was denied his fundamental right to a fair trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, due to prosecutorial misconduct, which rendered the outcome of his trial unreliable. The State encouraged and presented misleading evidence and improper argument to the jury.

A. Introduction
B. Lead detective's relationship with defense legal assistant
C. Improper argument
    i. Improper instruction and conditioning of the jury
    ii. Improper introduction of evidence
    iii. Improper elicitation of emotional response

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[5] 470 U.S. 68 (1985).

iv. Improper comment
v. Improper non-statutory aggravators
vi. Improper instruction to the jury
D. Prejudicial Photographs not admitted into evidence, were reviewed by the jury.

The State argued that claims of prosecutorial misconduct contained in claims six and nine should be summarily denied; that these claims must be raised on direct appeal with citation to *House v. State,* 199 So2d. 134 *(*1st DCA 1967.) in support of this assertion. Claims six and nine were found by the court to be procedurally barred because they should have been raised on direct appeal. The Order did not speak to the State's position that prosecutorial misconduct claims were not cognizable. R. VI, 999.

Claim VII Mr. Brown's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution were violated during voir dire due to counsel's deficiencies or being rendered ineffective by State action.

A. Intentional exclusion of black jurors without race-neutral reason
B. The jury was not impartial
C. Prosecution's improper hypothetical questions tainted the jury

The state argued that the court in *House* had determined that the matter of exclusion of African Americans from a jury panel cannot be raised for the first time in collateral proceedings.

Claim seven was found to be procedurally barred because it should have

been raised on direct appeal

Claim VIII Mr. Brown was denied his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, when the court found one of the aggravating factors in support of a death sentence to be that the murder occurred during the commission of a felony because that finding was duplicative of the basis for the death penalty; i.e., felony-murder.

A. Automatic Aggravator: Felony Murder
B. The jury considered two other improper aggravators.
C. Conclusion

The state argued that the argument in claim eight was legally incorrect as well as that it should have been raised on direct appeal.

Claim eight was found to be procedurally barred solely because it should have been raised on direct appeal.

> Claim IX Mr. Brown's sentencing jury was misled by comments, questions, and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The state position and the ruling on claims six and nine are identical.

> Claim X Use of an invalid prior conviction in the sentencing calculus violated Mr. Brown's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. To the extent trial and appellate counsel failed to properly litigate this issue, Mr. Brown received ineffective assistance of counsel.

The State argued that the claim was moot because it was not ripe; the court ruled that it failed to state a claim on which relief may be granted.

> Claim XI Mr. Brown's sentence of death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the penalty phase jury received information which was incorrect under Florida Law and shifted the burden to Mr. Brown to prove that death was inappropriate and because the trial court employed a presumption of death [sic] sentencing Mr. Brown.

The State argued that this issue attacked a statute and therefore should have been addressed on direct appeal. The court agreed, finding that it should have been raised on direct appeal.

> Claim XII Mr. Brown did not make a knowing and intelligent waiver of any rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights were violated when his purported statements were improperly admitted into evidence. Trial counsel rendered prejudicially ineffective assistance by failing to investigate and adequately litigate this issue.
>
> A. Mr. Brown's statements were obtained illegally.

The state argued that both claim twelve and claim thirteen were raised on appeal. The court agreed.

> Claim XIII Mr. Brown was denied his right to a speedy trial in violation of the United States Constitution and the corresponding provisions of the Florida Statutes and the Florida Constitution.

This claim and claim twelve were dealt with identically.

> Claim XIV The introduction of nonstatutory aggravating factors and the State's argument upon nonstatutory aggravating factors rendered Mr. Brown's death sentence fundamentally unfair and unreliable, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Defense Counsel's failure to argue effectively constituted deficient

performance.

The State argued that this claim should have been addressed on direct appeal and the court agreed.

> Claim XV Mr. Brown is denied his rights under the Eighth and Fourteenth Amendments of the United States Constitution and under the corresponding provisions of the Florida Constitution because execution by electrocution is cruel and/or unusual punishment.

The state's position was that this claim was moot. The court agreed.

> Claim XVI The rules prohibiting Mr. Brown's lawyers from interviewing jurors to determine if Constitutional error was present violates equal protection principles, the First, Sixth, Eighth, and Fourteenth Amendments to the Constitution and the corresponding provisions of the Florida Constitution and denies Mr. Brown adequate assistance of counsel in pursuing his post-conviction remedies.

The State argued that this claim did not state a claim upon which relief could be granted and the court agreed.

> Claim XVII Prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy and sympathy, thereby depriving Mr. Brown of a reliable and individualized capital sentencing determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution. To the extent counsel failed to request that the jury be instructed that mercy and sympathy are proper considerations in the penalty phase of a capital murder trial, Mr. Brown received prejudicially ineffective assistance of counsel.

The state argued that claim seventeen encompassed prosecutorial

misconduct and should be denied. The court found that this was an issue which should have been raised on appeal.

> Claim XVIII The finding of the aggravating factor of heinous, atrocious, or cruel violated the Eight Amendment, *Jackson v. Virginia,* 443 U.S. 307 (1979), and *Lewis v. Jeffers*, 110 S.Ct. 3092 (1990), because this aggravator was not proven beyond a reasonable doubt. Mr. Brown in entitled to a new sentencing proceeding.

The state argued that this claim was moot. The court found that the claim was raised and that Mr. Brown prevailed on this issue on appeal.

> Claim XIX The trial court failed to find mitigating circumstances appearing in the record in violation of Mr. Brown's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The failure to properly litigate this issue at the trial or on direct appeal denied Mr. Brown the effective assistance of counsel.

The state argued that this was raised on direct appeal and the court agreed.

> Claim XX Mr. Brown's jury returned a general verdict of guilty which must be set aside pursuant to *Mills v. Maryland*[6] and *Stromberg v. California,*[7] because the jury was instructed it could rely on two independent grounds to support the verdict, i.e. premeditated or felony murder, and the ground of premeditated murder was improper. Mr. Brown was denied his right, under the Sixth Amendment, Eighth Amendment, and Due Process clause of the Fourteenth Amendment to the United States Constitution, to a unanimous jury verdict.

The state argued that claim twenty misstated the law. The court held that this

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[6] 486 U.S. 367 (1988).

[7] 283 U.S. 359 (1931).

issue should have been raised on appeal.

> Claim XXI Mr. Brown's trial court proceedings were fraught with procedural and substantive errors which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

The state argued that this claim was insufficient on its face. *The court never ruled on this issue.*

In sum, a hearing was granted on the issue of conflict of interest between Mr. Brown and his counsel; between Mr. Brown and the employee of trial counsel; and on the issue of improper delegation of responsibilities to this employee. Mr. Brown was allowed hearing on a *Brady* claim; on the claim that his conviction and death sentence went untested due to ineffective assistance of trial counsel; and that, due to factors beyond his control, including ineffective assistance of counsel, Brown did not receive the mental health assistance required by *Ake v. Oklahoma, supra.*

October 19 and 20, 2000, a hearing was conducted on Mr. Brown's Amended Motion before the Honorable J. Rogers Padgett. R. IV, 607 through R. VI, 965. Mr. Brown was at that time represented by CCR Middle. Mr. Brown's counsel introduced both testimonial and documentary evidence. Testimony was elicited from former trial counsel–now judge–Robert Doyel R. IV, 612-666, 687-765, 774- R. V,

842; from Drs. Leroy Riddick, M.D. R. IV, 765-774, and Alberto Piniero, M.D., R. IV, 666-687, as well as from Linda Goodwin R. V, 846-930, Carmen K. Jones R. V, 931-938, Betty Hill Highlander R. V, 938-942, Carol Smith R. V, 942-945, and Detective Robert Ore R. V, 945-955.

The hearing was recessed in order that the defense could produce its two medical expert witnesses. R. VI, 964.

The hearing was continued on December 15, 2000, without the presence of Mr. Brown. R. VI, 966. A written waiver had been filed with the Court on November 20, 2000, and was presented to the Court at the December 15, 2000, hearing. 1st Supp. Vol. I, 99. At that time, three depositions previously taken, all surrounding the veracity and trait of mendacity of legal assistant Linda Goodwin were introduced as substantive evidence. R. I, 32, 51, 76 and 2nd Supp. Vol . VII, 1009 *et seq*. No medical testimony was introduced nor was there explanation requested nor given for its absence. The State had no evidence. No closing argument was requested nor given.

Subsequent to that time, due to administrative difficulties at Capital Collateral Relief, new counsel was assigned to represent Mr. Brown. That counsel asked the court to hold its ruling in abeyance and for leave to supplement argument on the issue of handwriting exemplars and other exemplar evidence. R. I, 184.

On October 11, 2001, a period when the trial court had had the evidentiary submissions under advisement for nearly one year, CCR, through new counsel Mark S. Gruber, filed a Motion to Accept Supplemental Argument and Permit Supplemental Oral Argument. R. 1001. Mr. Gruber had reviewed the evidentiary hearing transcript and examined the documentary evidence introduced there. Mr. Gruber addressed the issue of the origin of certain handwriting[8].

C. STATEMENT OF FACTS

1. Facts surrounding Mr. Brown's absence at the December 15, 2000, evidentiary hearing.

When, on October 20, 2000, counsel and the court were discussing a third day of hearings, Mr. Brown addressed the court directly. R. V, 957. He informed the court that he wished to waive his presence because he expected to testify that day and he had been told that his lawyers wanted him to wait until the concluding day. His reason was for "medical reasons and stuff." R. V, 957. The court spoke in general terms with Mr Brown. No specific waiver inquiry was had. R. III, 351-358 The hearing concluded with the Defendant asking to "put this [the request to waive

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[8] In a single Order entered the 26th day of March, 2002, Judge Padgett denied the Motion to Vacate; the request to hold his ruling in abeyance; and to accept supplemental argument. R. I, 185.

his presence and the opportunity to present this testimony] in abeyance," and asking for time to discuss the other witnesses who would R. V, 963.

When the "hearing" was recommenced on December 15, 2000, Mr. Brown was not present. His counsel, Collateral Relief (Middle) Counsel had filed a written waiver with the Clerk on November 20, 2000, one month before the hearing. The court had not entered a writ to take Mr. Brown to court.

Defense counsel presented a copy of the typewritten waiver of appearance at evidentiary hearing, R. VI, 967, executed one month previously on November 16, 2000, which in its entirety states:

> I, **GEORGE WALLACE BROWN,** having been fully advised of my right to appear at and testify in my evidentiary hearing, hereby waive appearance at the December 15, 2000 hearing. I understand that by not appearing and providing testimony, I may fail to present evidence on claims for which I have been granted a hearing buy knowingly waive appearance and the possible presentation of my own testimony.

2nd Supp., VOL I, .99.

Counsel defined his conversation with Mr. Brown: "We advised him of the ups and downs and pros and cons of that, and he did not want to come." R. VI, 967. At that point, the defense submitted "these depositions and reports" R. VI, 967 and immediately rested. The defendant's case went unrebutted. R. VI, 967.

WITNESSES DURING THE TESTIMONIAL PHASE

Mr. Brown first called as a witness now-Judge, former trial counsel, Robert Doyel. R.IV,612[9] Mr. Doyel had been appointed to represent Mr. Brown after withdrawal of the Office of the Public Defender. He had a law degree, a masters in law, and had served as a professor. R. IV, 613. He had never tried a capital case to a penalty phase. R. IV, 613. This presentation will attempt to relate testimony relevant to the distinct factual area of the representation of Mr. Brown in separate sections.

DEFENSE LEGAL ASSISTANT LINDA GOODWIN AND HER AFFAIR WITH THE LEAD DETECTIVE

Linda Goodwin began working for Doyel "perhaps" one year before the instant case as a secretary. R. IV, 624. He mentored this young woman and she traveled under the title of legal assistant . R. IV, 624. Mr. Doyel understood that Mr. Brown had become, although not "dependent," on Linda Goodwin, "close friends," at least in Mr. Brown's estimation. R. IV, 627.

Because the local courts did not appoint second chair or penalty phase counsel to assist lead counsel in death penalty matters, before trial Mr. Doyel asked

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[9] After Mr. Doyel's ascension to the Bench, the matter was transferred upon motion of Mr. Brown to Judge Padgett who was specially appointed a Judge of the Tenth Judicial Circuit for this purpose.

that the court appoint Ms. Goodwin to assist him at the court's expense. R. IV, 630. She was appointed and his office was reimbursed for her time. R. IV, 631. She actually sat through the trial at counsel table. R. IV, 631.

Mr. Doyel did not recall whether Ms. Goodwin attended depositions including that of Lead Homicide Detective Robert Ore in December of 1990, but deferred to that fact as established by the transcript. R. IV, 748-49.

Goodwin recollected that she spoke with Ore for the first time when the Brown jury was out, R. V, 908, they became friends after the trial, R. V, 910, but she could not give a specific date. Ore used to call her at home, R. V, 911, and on at least one occasion met her at Doyel's office.

Mr. Doyel did not recollect when but knew that it was not very long after the trial–within the week or two or three weeks–when he became aware that the affair began between Ore and Goodwin. R. IV, 737. Mr. Doyel learned of it when the detective came to his office to take Goodwin to lunch. Ore stated that he met her during the trial and three weeks or so after they had lunch. R. V, 941, 957. Ore was at Doyel's office when Goodwin called Doyel about a note on her windshield which had alarmed her. R. V, 955.

Goodwin stated that Ore took her to lunch once or twice but didn't come into Doyel's office. R.V. 891 This was, according to Goodwin, a sexual relationship.

R. IV, 738. The physical aspect of the affair began close to the end of the trial, perhaps one month. R. V, 953.

At some unknown date, Mr. Doyel fired Ms. Goodwin because she would not terminate her relationship with Detective Ore–he knew that it was a conflict of interest which he would have to disclose to all clients and potential clients. R. IV, 737. Ms. Goodwin stated, on the other hand, that she was fired because of her friendship with a secretary at the State Attorney's Office, R. V, 903, and that that was what he would have to disclose to his clients. R. V, 903.

There were several related Goodwin incidents. Ms. Goodwin told Mr. Doyel that a note stating "George knows" was put on her windshield. R. V, 955. Goodwin stated that this occurred right after she left Doyel's employ, Doyel said it was one to three weeks after trial, R. V, 890, and Ore stated that he was in Doyel's office when this incident was conveyed to Doyel. Although Mr. Doyel does not know when this occurred, he states that it was after the trial**.** R. IV, 737. Goodwin stated that it was possible that she said that the victim's son Wayne had placed the note because he had called her home. R. V, 925. He had called her while she worked for Doyel. Goodwin believed that the note was a message to her and the lead detective, Ore, about their relationship. R. IV, 737. In another incident, Goodwin reported that she was sexually "attacked." She immediately called Ore. R. IV, 741, 317.

Goodwin reported the attack. R.V. 912. She told the investigating officers, according to him, that she worked for Bob Doyel on some murder trials "And during that trial she had been involved with...Detective Bob Ore" R. VII 1020. She denied telling the investigating officer that she began an intimate relationship with Ore during a murder trial; R.V. 914, that she had been going out with Ore for six weeks. She did remember Ore bringing his wife to Goodwin's mother's house and telling the two women to "figure it out." R.V. 922.

She remembered showing her injuries to State Attorney Investigator Tom Spate and Ore testified that he had seen them too. R.V. 921 Her friendship with Spate was the same time as that with Ore. R.V. 921. Goodwin suggested that her attackers were Private Investigators Fred Reynolds and Al Smith, R.V. 915. Smith was a friend of Mr. And Mrs. Ore. R.V. 915. Their depositions were introduced into evidence.

Ore met her during the trial and three weeks or so after they had lunch. R.V. 954. Reynolds had seen Ore's car parked in Doyle's parking lot numerous times and saw Ore and Goodwin in the car during lunch. R. I, 59 He had seen Ore and Goodwin together after the alleged attack. After he and Smith learned that she was trying to "destroy them" they paid attention and saw that Ore was spending a lot of time with her. R. I, 61,66. Reynolds even saw Goodwin and Spate at a restaurant

and Spate spoke to him urging that he "hadn't seen anything." R. I, 63.

Al Smith said that Goodwin implied to him that she had been involved with Ore romantically for weeks or months before the alleged sexual attack. R. Vol. I, 82.

Dave Anderson, the investigating police officer on the sexual assault concluded that Goodwin wanted attention but the investigating officers concluded that the event did not take place. Ultimately when the officer contacted her she did not wish to pursue the case. 2nd Supp. VII, 1034.

THE TAKING OF HANDWRITING EXEMPLARS

Mr. Doyel conceded that his billing records reflected an office conference regarding exemplars and blood tests with Goodwin, he had no recollection other than that the state was seeking handwriting exemplars. R. IV, 634,635. Mr. Doyel was sure that he was not trying to obtain exemplars. R. IV, 635. He believed that the exemplars revolved around a note and credit cards. R. IV, 636.

On November 7, 1990, Mr. Doyel met with State Attorney employee Spate to obtain exemplars. R. IV, 639. Mr. Doyel was not sure whether Ms. Goodwin was present, R. IV, 657, but he doubts that she was there because there "would have been no reason for her to be there." R. IV, 640. Mr. Doyel could not imagine Linda Goodwin obtaining handwriting exemplars: "I don't think that I would put myself or

somebody in my office [sic] of putting them in a position of having to testify about how these were collected....I can't imagine that we would participate in that." R. IV, 658. However, he remembered having previously seen a cover affidavit executed by Goodwin which transmitted exemplars, and when confronted by his statement to the trial court that Ore was not present, R. IV, 657, he agreed that "the odds [were] that it was Spate not Ore. R. IV, 657. He testified that since he said that it was Spate at the hearing, he would "take that to the bank because" he would not have "represented that to the judge if it weren't true. R. IV, 660. He believed that the problem which caused them to return to court was that Mr. Brown had written the note out some number of times which Mr. Doyel believed sufficient. R. IV, 659. Mr. Doyel identified the handwriting sample page R. IV, 659. It was summed up as the state having had three of the Arab notes and the ABCD, R.V. 813, exemplar page, and being permitted by the court to take seven more. R.V. 813.

Mr. Doyel sat with Mr. Brown R. IV, 639. Ore took additional exemplars on January 24. R.V. 822. Ore said that that Doyel was with him for both handwriting sessions but doesn't recall whether Spate was there. R.V. 950. His report stated that it was Spate who took the note exemplars.

Doyel "must have" assumed that it was his job to get the exemplars. R.V. 803. Ore states that he did not ask Goodwin to get the exemplars. R.V. 949. He had

no idea about the affidavit and did not use those exemplars. R.V. 949.

Goodwin drafted many of the pleadings for review by Doyel. R.V. 880. She agreed that she probably prepared the affidavit and signed it. R.V. 881. It was notarized by Mr. Doyle's receptionist. R.V. 882. She remembered that Mr. Doyel told her to get the handwriting samples, R.V. 883, and she was pretty sure that they were for the state. R.V. 883.

At the evidentiary hearing, the handwriting report of FDLE Agent Outland was introduced into evidence. R. V, 791. As well a copy of a certain check was introduced as exhibit 13 and the note as exhibit 14. R. V, 791-792. Outland testified that Brown "probably executed" some credit card signatures R. IV, 700; with regard to a certain check Mr. Brown "very probably" executed the endorsement R. IV, 702, and executed the handwriting which appeared on the note R. IV, 699. Mr. Doyel testified that Mr. Brown told him that he had taken the credit cards, checkbook and wallet as well as the car, R. V, 826, therefore he did not raise objection to the exemplars. R. V, 826.

PREPARATION FOR TRIAL AND FOR THE PENALTY PHASE

Mr. Doyel was sure that if George Wallace Brown was convicted at the guilt phase of the trial, Doyel could put on sufficient mitigation so that it was very possible that there would not be a death recommendation. R. IV 734. Despite this

belief, he concentrated almost exclusively on the guilt phase, not doing any meaningful mitigation, and not beginning on the penalty phase until the first day of trial. R. IV 649.

Doyel admitted that he did not do any investigation of non-family mitigation except mental health issues, R. I, 707, and virtually no investigation of family mitigation. Mitigation was just not a priority. R. IV, 649.

He did not recall speaking with any family witnesses other than the ex wife and Mr. Brown's mother. The mother was not contacted until the first day of the guilt phase. R. IV, 735. Mr. Brown's mother was not present when the trial began. R. IV, 726.

Trial counsel did not recall a rift in Mr. Brown's family and the trauma that that caused Mr. Brown. R. IV, 774. He never spoke with Mr. Brown's stepmother who raised him nor to his stepsister Carmen Kay. R. IV, 775.

Doyel stated that he did virtually no investigation because "it was Mr. Brown's position that he didn't want me to involve his family'[10] and, essentially I was restricted until the time of trial in considering who to put on was to put on Dr. Dee." R. IV, 734 Doyel admitted that he failed to investigate mitigation because he felt that "the defendant was the captain of the ship on some things...." R. IV, 783, 775.

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[10] Doyel did not specifically explain the statutory mitigators to Mr. Brown. R. IV 736.

Mr. Doyel recollected that either he or the public defender had obtained records from Montana. R.IV 646. He recollected no more about the records than that they recorded that Mr. Brown had a propensity for violence and was epileptic. R. IV, 646. He did confer with Dr. Dee, a psychologist who had previously been retained by the Public Defender. R. IV, 647.

Mr. Doyel had a conference with Dr. Garcia, R. IV, 66, Brown's treating physician, after Brown suffered from epileptic seizures while at the Polk County Jail. R. IV, 661. Mr. Doyel didn't recollect anything about the meeting, R. IV, 662, didn't recollect whether the consultation was for competency–did Mr. Brown have the ability to aid and assist counsel and to sit through a trial, nor whether he intended to use Dr. Garcia's testimony in the penalty phase. R. IV 663.

It was not until the time of the guilt phase that Doyle got permission to introduce Dr. Dee's testimony. R. IV, 734. Although Mr. Doyel placed Dr. Dee on the stand he didn't recall whether Dr. Dee found the statutory mental health mitigators. R. IV 782 Even though Dr. Dee was to testify, Doyle did not recollect advising him of such things as Brown's voluntary psychiatric admissions, the existence of epilepsy, or the injury suffered by Mr. Brown when his own father intentionally shot him in the head. R. IV 757.

Doyel's investigator performed no more mitigation investigation than was

present on the bill before the court. R. IV 709. Investigator Taylor never traveled to interview the Brown family in Alabama or in Mississippi. R. IV 736.

Doyel admitted that he sought out only guilt phase witnesses R. IV 707, and, although he thought that Mr. Brown's wife might have served both guilt and penalty phase purposes, she was not called. R. IV, 707.

Doyel cannot remember speaking with any other potential mitigation witnesses. R. IV, 735. Although the medical records from Warm Springs Hospital indicated schizophrenia, Mr. Doyel never spoke with a psychiatrist on this matter. R. IV 779 Mr. Doyel remembered no information gathered on the voluntary intoxication defense. R. IV 713.

Doyel discussed the opinion of Dr. Wiley that this may have been a sex crime with Mr. Brown and Brown did not want this area pursued, R. V 825, because it would subject the victim's wife to pain and might reflect on his sexuality. R. V 826. Doyel did nothing more.

At the evidentiary hearing Carmen Jones, Mr. Brown's sister, testified. R. V, 934. She remembered that Mr. Brown was the "bodyguard" of the smaller children. Their father beat them. R. V, 933. She stated that their father "was the devil's right hand," and that he "sexually, physically, mentally abused" the girls in the family and probably the boys. R. V, 934. She related specific incidents from her

childhood, one where her father threatened to blow her brains out if she didn't tell him where their sister was hospitalized. She told of her father almost knifing her stepfather to death. R. V 935. Her father pretended to have seizures and came into her bedroom and did terrible things to her. R. V, 936.

She remembered that her brother George was shot by their father. R. V, 937. She testified that he was a good person, a defender of the family, and she had never seen him drink. R. V, 937.

Potential mitigation witness Betty Hill Highlander testified that she knew Mr. Brown under his stage name Carl Kent and she performed the marriage between Mr. Brown and his wife Wanda. R. V, 939. He was a good stepfather. R. V, 940. She was never contacted to be a witness.

Potential mitigation witness Carol Smith testified that she also knew Mr. Brown by Carl Kent. She also knew Wanda. R. V, 942. She saw Mr. Brown interact with his stepchildren and this interaction was so kind that she thought that he was their natural father. R. V, 943. She contacted Ore when the arrest of Brown took place and identified him as Carl Kent. R. V, 944. No one contacted her to testify.

Doyel also may have spoken with two medical experts other than Brown's treating physician, R. IV, 648, because he wanted "help with the autopsy." R. IV, 648. Mr. Doyel recollected that the body was badly decomposed and that the

hyoid bone was not in the right place. R. IV, 650.

EXPERTS AT THE HEARING

Dr. Leroy Riddick, a forensic pathologist testified. R. IV, 666. He was unable to determine time of death with reasonable medical certainty but the state pathologist was "in the ballpark." R. IV, 669. He was unable to establish that the three stab wounds were the cause of death, R. IV, 670, conceded that the victim could have bled to death, R IV 680, but probably there was another cause. R IV 670 The hyoid bone, the brain, the tongue and upper esophagus were missing and no expert returned to the scene to search. R. IV, 672, 681. Although the position of the body was very important for a forensic pathologist to ascertain, because position may determine the cause of death, no determination was made. R. IV, 674. This was particularly important because the stab wounds were on the front of the body and the body was found lying face down. R. IV, 675. No one photographed the body from all positions. R. IV, 765.

Dr. Albert Piniero, a neurologist, testified. R. IV, 765. He had reviewed medical psychological and neuropsychological records, R. IV, 766, as well as the trial testimony of Dr. Dee. R. IV, 677. He testified that Mr. Brown had a history of and currently suffered from the most severe type of epilepsy. R IV, 766, 767. He agreed that Mr. Brown suffered from organic brain syndrome from which the epilepsy flowed.

R. IV, 768. He testified that the several episodes of head trauma–car accidents and the gunshot wound to the head–affected Mr. Brown's executive functions such as judgment, initiative, decision-making, social interaction. R. IV, 769-770 Mr. Brown lacks inhibition, R. IV, 770, and impulse control. R. IV 771. Mr. Brown has above normal intelligence but his judgment and behavior are inconsistent with his intelligence because of the frontal lobe damage existent. R. IV, 771.

PLACING THE PUBLICITY VALUE ABOVE MR. BROWN'S INTERESTS

Mr. Doyel attempted to tie the instant case to the murders committed by Danny Rolling, a very high publicity prosecution. R. IV, 699, 701. Ms. Goodwin stated that Mr. Doyel was pretty happy with the newspaper coverage received. R. V, 869. Mr. Doyel filed motions rather than asking permission of Rolling's attorneys to speak with him. R. IV, 703. His intervention in the Rolling matter "triggered a lot of press interest." R. IV, 700. Although he learned at some point from a reporter that Rolling was not in Florida when the instant death occurred, R. IV, 700, he pursued the matter until precluded by an Order prohibiting him from arguing anything about the Gainesville murders. R. IV, 719. He never spoke with Rolling and "laughed" at the deposition testimony of Linda Goodwin that she saw Rolling, R. IV, 825, and the statement that Goodwin said that she drove to the jail in Ocala to see Rolling, sent by Doyel. R. V, 876. Goodwin stated that she was sent by Doyel because she met the

physical descriptions of the Rolling victims, R. V, 877, but admitted that she "misstated" when she said that she actually interviewed Rolling. R. V, 884,885.

Certain letters and representation contracts between Mr. Doyel and Mr. Brown were identified for the record. R. IV, 760. In open Court Mr. Brown stated that the privilege with regard to the contract was waived but not the outline for a book. R. IV, 781.

Mr. Doyel testified that on the morning of sentencing Mr. Brown gave him some poems which were intended to be lyrics of songs. R. IV, 763. Doyel agreed that he had seen a few poems before. Goodwin stated that Doyel "always wanted the poems that George wrote because he wanted to have his wife turn them into songs." R. V, 895,896. Goodwin said that Doyel thought that Brown was very talented but she felt that he was unethical because he manipulated Mr. Brown. R. V, 897.

Mr. Doyel agreed to set the poems to music, with the music being more appealing because Mr. Brown was on death row but had such a creative personality and characteristics. Being on Death Row would have made the book more interesting. R. I, 157. Mr. Doyel stated that there was no discussion of contracts before sentencing.

D. DISPOSITION IN THE LOWER TRIBUNAL

On March 26, 2002, the lower court entered its Order Denying the

Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence, Motion to Hold Ruling in Abeyance, and Motion to Accept Supplemental Argument and Permit Supplemental Oral Argument. 1st Supp. Vol.II, 185.

The Motion to Vacate Judgments of Conviction and Sentence was denied and a timely Notice of Appeal was filed. This appeal follows.

E. SUMMARY OF ARGUMENT

George Wallace Brown is a man who is to be executed, a rare sentence for a person whose crime did not warrant the statutory aggravators of Cold Calculated and Premeditated or Heinous, Atrocious, and Cruel.

His representation at trial was cruelly deficient and this was only compounded by the errors committed by the post-conviction trial court.

The issues raised in his Motion to Vacate–except for the ones with which the state agreed–were summarily denied without benefit of meaningful review. Although now codified by Rule, the weight of this Court's prior decisions, particularly in death cases, was that an evidentiary hearing was required if there were factual issues in dispute for which evidence existed for presentation. Here factual allegations were made and no hearing was granted.

At the evidentiary hearing on five of his twenty-one issues, Mr. Brown was scheduled to testify and bring forth evidence to which he alone could testify. Mr.

Brown suffers from a multitude of physical and resultant mental problems including epilepsy and a prior history of stroke and its attendant resulting illnesses. He must take prescribed medications or he cannot adequately function and he might die. Because the local jail and the hearing court chose to ignore the fact that Mr. Brown was without his medications, he was in terrible health at the hearing. And when it was continued for an undetermined date, he firstly asked to waive his appearance and later asked for time to decide. A purported waiver was obtained one month after the initial hearing and discussed at the third day of hearing one month after the waiver, by his CCR counsel addressing his absence.

No waiver colloquy was engaged in by the hearing court; no recitation by the court–whose duty it is to elicit knowing, voluntary and intelligent waivers *on the record*–defining the nature of the things waived nor their consequences was held. Although presence and waiver of the right to testify are cornerstones of our jurisprudence, they were ignored. Although this Court has not defined the specific factual elements of waivers in all cases, there is no question that the colloquy with the court must establish that the defendant is competent to enter into a waiver, that he wishes to waive, that he knows what he is doing and wants to do it, and that he knows the consequences of his acts. Due to denial of medication, Mr. Brown may not have been competent and he decided that rather then waiver he would wait.

Here the consequences were never defined but are grave indeed: the facts which only Mr. Brown could present were not heard and the Order denying relief was based in great part on this "absence" of evidence from Mr. Brown on the various points. Particularly in an attorney client claim, the only two people who can present facts are the attorney and the client. Mr. Brown should have been made aware that if he didn't present his evidence to the trial court, the trial court's factual determinations would be given great deference before this Court and would be virtually unassailable should Mr. Brown proceed to federal court. This was not an insignificant matter yet it was dealt with as if it were.

Trial counsel failed to prepare a mitigation case–purportedly because his client didn't want him to. Trial counsel had doubt as to the ability of the client to aid and assist him and to sit through the trial, hence his deference to the ever-changing client preferences on investigation and mitigation was factually and legally unreasonable. Trial counsel abandoned all of his responsibilities to the penalty phase of the defense. He or his staff spent bare minutes speaking to the wife and mother of Mr. Brown during trial preparation. The wife was never a witness. Counsel spent, conservatively, no more than 7.5 hours of mitigation preparation and this was done during the guilt phase trial. No investigation was done–the jury was given two hastily prepared mitigation witnesses with no corroboration. The mitigation representation

was a total failure.

The recent United States Supreme Court of *Wiggins v. Smith*, *supra* is dispositive of the claim that paltry investigation for mitigation, no matter the excuse or alleged tactic, cannot be effective assistance of counsel.

This is a case where direct evidence that Mr. Brown was the assailant is non-existent. There was evidence submitted from which the State hoped that inferences would be drawn as to that fact. Important in that chain of purported evidence was the handwriting exemplars. There exist questions regarding handwriting exemplars–their origin and their quantity substantiate enough to themselves require rehearsal. The State's own papers clearly show that there are more exemplars in play than were legitimately taken by law enforcement. That is coupled with the fact that the legal assistant to trial counsel–who was paid by the court to assist in trial and who told at least one person that she had been involved with the lead detective in this case during the trial–*she garnered and filed* exemplars. Her boss said that he would not have done that. She would only have done it to please. She was an invader in the defense camp.

Confusion ruled in the handling of this exemplar evidence. It was established by documents produced at the evidentiary hearing that Lead Detective Ore's written report regarding his activities did not agree with his testimony and that

a note of no established origin and with no evidentiary basis was admitted at trial and consistently referred to as having been written by George Brown. It is clear from the record that Brown's post-conviction counsel were challenging the taking of the handwriting with a particular emphasis on who was present. Mr. Brown's testimony would be logically relevant from the emphasis which they placed on this area. It can be presumed that he intended to testify about these points. As well, only he and Doyel could testify about their interactions. Mr. Brown's words were never heard.

Add to this mix the fact that the trial court ignored the legal concept that the cumulation of errors can justify relief even when issues standing alone do not. The outcome below speaks loudly for relief. This is a case which required evaluation of all evidence singly and in conjunction with other evidence adduced.

The legal error was compounded by the fact that there was no legal or factual argument invited or entertained at the conclusion of the hearing which would have served the purpose of clearly laying out the interaction of each individual piece of evidence.

F. ARGUMENT

I. Summary denial in the Court below, without evidentiary hearing or legal argument, of issues six through twenty-one violates the instructions of *Huff V. State* which were made explicit by subsequent Amendment to Rule 3.850.

On March 25, 2000, the court below held a hearing in accordance with *Huff v. State*, 622 So.2d 982 (Fla.1993),[11] to determine Defendant George Wallace Brown's entitlement to an evidentiary hearing on the issues raised in his 3.850 motion and to entertain or set legal argument on purely legal issues. The State had conceded such entitlement on issues one through five, but contested a hearing on the remaining

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[11] The instant order was entered before the effective date of the new rule. The standards of review, as reaffirmed recently by this Court in *McLin v. State*, 827 So. 2d 948 (2002), include the recognition that Rule 3.851 now governs post conviction motions in death sentences and "mandates an evidentiary hearing 'on claims listed by the defendant as requiring a factual determination.'" *Id.*, at n.3. The standard applied in *McLin* was enunciated thusly:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent that they are not refuted by the record.

Id., at 954.

The standard or review after an evidentiary hearing is one of deference to the trial court–"as long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Id*. Citing to *Blanco v. State*, 702 So.2d 1250,1252, (Fla. 1997) and *Stephens v. State*, 748 So. 2d. 1028,1033-34 (Fla. 2000). Although deference is given to the factual findings, review of the court's ultimate conclusions on the deficiency and prejudice prongs are considered *de novo*. *Lewis v. State*, 838 So.2d 1102,1112, (Fla. 2002) citing to *Bruno v. State*, 807 So. 2d 55, 62, (Fla. 2001).

stipulated issues on various grounds, principally contending that they were procedurally barred as either having been raised on direct appeal or as issues that should have been raised on direct appeal. R. V, 595-598. Following the *Huff* hearing, the court below granted Mr. Brown a hearing on issues one through five and denied a hearing on the remaining issues. R. VI, 999-1000. The court's order substantially tracked the state's position, summarily denying, without hearing or argument, issues 12, 13, 18, and 19 as having been raised on direct appeal, and issues 6, 7, 8, 9, 11, 14, 17 and 20 as alleging issues that should have been raised on direct appeal. Issues 10 and 15 were summarily denied for other reasons and are not raised in this appeal. Issue 21–which spoke to the cumulative effect of the various prejudicial determinations made–was not addressed by the court below at all.

George Wallace Brown seeks review of the decision by the court below to summarily dispose, without evidentiary hearing or legal, of issues six through twenty of his initial petition. These issues, and their subparts, are summarized in the statement of facts above. Brown contends that the trial court held a hearing which honored *Huff v. State* in name only. The substance to be accomplished by such a hearing was missing in the court below; the state's claims of procedural bar were permitted to obscure the need for evidentiary hearing or legal argument to develop the merits of Mr. Brown's claims.

This Court has recently repeated its well-established standard of review applied to summary denial of claims in a 3.850 motion: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *State v. Coney*, 848 So.2d 120, 135 (Fla. 2003). The action of the court below cannot withstand such review.

A. Clarification by Rule change of the role of the *Huff* hearing:

The summary disposition by the court below of Mr. Brown's claims was made prior to the July 12, 2001, corrected opinion in *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993 and Florida Rule of Judicial Administration 2.050*, 828 So.2d 999 (Fla.2001). In pertinent part, the Supreme Court addressed the unwarranted delay in collateral review of death penalty cases occasioned by the large number of cases in which that court was required to reverse summary denials of initial postconviction motions. While those amendments apply to postconviction motions filed on or after October 1, 2001, and Mr. Brown's motion is governed by the version of the rules in effect prior to that date, the rule change was an attempt to guide the trial courts down a path that would avoid precisely the error committed by the court below in this case.

The October 1, 2001 amendment added Rule 3.850(f)(5)(A)(i) which requires a prompt case management conference on initial postconviction motions at

which "the trial court **shall** ... schedule an evidentiary hearing ... on claims listed by the defendant as requiring a factual determination...." (Emphasis supplied). The Court Commentary says of this new subdivision (f): "Most significantly, that subdivision requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most case, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay."

The Supreme Court's corrected opinion of July 12, 2001, stated:

> Amended Rule 3.851, as did our proposals, requires that an evidentiary hearing be held on claims identified in an initial motion as requiring a factual determination. We have considered the comments in opposition to this requirement but continue to believe that "[i]n light of the large number of summary denials of initial motions which the Court has been compelled to reverse under the current rules ... this change will reduce unwarranted delay in many cases."

772 So.2d at 489.

The second function of the case management conference mandates that the trial court shall "hear argument on any purely legal claims not based on disputed facts." Rule 3.850(f)(5)(A)(ii).

B. The court below failed to look beyond the labels attached by the State to Mr. Brown's issues:

The record suggests that the trial judge was aware of the central role played by an evidentiary hearing in the prompt but fair evaluation of collateral attack to a death case. At the *Huff* hearing on May 25, 2000, counsel for Mr. Brown expressed his understanding of when a hearing is required: "/T/he way I look at these is that an evidentiary hearing is required if we have outside witnesses that we can bring in." The court agreed: "Okay. I'll buy that." 1st Supp. Vol. I, 2. Indeed, the court below elected to hold an evidentiary hearing on one issue, stating: "Better safe than sorry." *Id*., at p. 4. However, the court below succumbed to the magical incantations of "raised on appeal" and "should have been raised on appeal"raised by the state, and summarily denied many of Brown's issues as procedurally barred. The trial judge may have "bought" defense counsel's view of when an evidentiary hearing was required, but he did not apply what he bought. He summarily denied the balance of Mr. Brown's claims as an undifferentiated mass, giving them no more individualized attention than calling them "the other 16." *Id.*, at p. 8.

1. Issues 12, 13, 18 and 19 were summarily denied on procedural bar grounds because the court below accepted the State's claim they had been raised on direct appeal.

Mr. Brown's Issue 12 was grounded on questions surrounding suppression of his statements to law enforcement officers. The state correctly claimed that suppression had been "raised below" and "raised on appeal," but these

incantations do not dispose of nor bar the issue raised in Mr. Brown's 3.850 motion. The issue raised on collateral attack shares subject matter with the issue raised on direct appeal, but is both fundamentally different and inherently appropriate for resolution on collateral attack.

The issue raised in the court below is one of effective representation of counsel, specifically the failure of trial counsel to investigate issues of Mr. Brown's mental condition and the status of his medication at the time he allegedly gave up his right to avoid incriminating himself. The United States Supreme Court has recently underlined the obligation of counsel to make inquiry into his client's "background and present mitigating evidence of his unfortunate life history at his capital sentencing proceeding." *Wiggins v. Smith*, *supra*. This obligation is no less compelling when inquiry into the client's background would reveal information about the client's psychiatric and medical condition that would be pertinent to the question of his knowing and voluntary waiver of his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution .

Mr. Brown presented in support of Issue 12 unambiguous factual allegations that require an evidentiary hearing: "Mr. Brown was incapable of making a knowing and intelligent waiver of any of his rights due to his mental condition;" "In Polk County, as in Colorado, he was not provided proper medication and was at the

mercy of his mental illness;" "Trial counsel was ineffective in failing to present, at the suppression hearing, evidence of Mr. Brown's inability to understand or voluntary waive his rights;" Mr. Brown's mental illness was never properly investigated by trial counsel;" "Had defense counsel presented evidence of Mr. Brown's mental condition to the trial court, Mr. Brown's statements would have been suppressed." R. V, 563. On the other hand, the issue that trial counsel litigated and that appellate counsel pursued on direct appeal challenged the failure of law enforcement officers to advise Mr. Brown of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), before engaging in custodial interrogation.

To conclude, as the court below did, that the fact that trial counsel litigated a motion to suppress based on failure to give *Miranda* warnings procedurally bars a post-conviction challenge to the adequacy of counsel's inquiry into his client's mental and medical condition, is precisely the muddled treatment of post-conviction claims that demands remand.[12]

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[12] Doyel testified as to his fine-tuned expertise on the *Miranda*–he wrote his dissertation on "the *Miranda*-type issue" and therefore he was "thoroughly familiar with *Miranda* law and had there been an issue that came to my attention, and issue spotting is one thing law professors are all about, I would have raised it had I known there was an issue there." 2nd Supp. Vol I, 106.

In spite of these statements, at the hearing Doyel testified that his argument was based on the conduct of the police and whether *Miranda* warnings had been given.

Mr. Brown's Issue 13 was summarily denied in what was substantially a repeat of the error found in Issue 12. The broad issue was one of speedy trial, which Mr. Brown had litigated below and raised on direct appeal.[13] Issue 13, however, raises a different issue than the speedy trial issue previously litigated. The State opposed, successfully, Mr. Brown's appeal of the denial of his motion for discharge on speedy trial grounds. In the State's brief filed in this Court on June 21, 1993, the State argued that Mr. Brown was not entitled to discharge because two delays were attributable to Mr. Brown, "first when Assistant Public Defender Norgard requested a continuance

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He did not recall whether he made the argument that the state of mind of the defendant is a relevant inquiry when considering whether the warnings are adequately given. 2nd Supp. Vol I, 106. It must be noted that Mr. Doyel stated that at the inception of his representation of Mr. Brown may have consulted Mr. Brown's treating physician Garcia because he was unsure whether Mr. Brown could assist him in the defense of this matter. This is evidence which "slipped in" on a precluded issue. One can only imagine what could have been developed had this issue been included on those on which testimony was relevant.

[13] Ultimately at the hearing, testimony was elicited from Doyel–over objection of the State, 2nd Supp. Vol I, 86–106, on the speedy trial issue but of course it was not before the court.

Doyel said that there was a viable speedy trial issue which was based on the fact that Mr. Brown was not aware that "speedy trial had been waived by a continuance...." 2nd Supp. Vol I, 83. 106. He took a writ of prohibition on the issue which was denied. 2nd Supp. Vol I, 84.106. Doyel testified that Brown didn't "have a clue" about the *consequences* of the request for continuance, 2nd Supp. Vol I, 85,106, and was unaware of the legal impact of a motion. 2nd Supp. Vol I, 86.

in September of 1990, and second when newly-appointed trial counsel Mr. Doyel sought and received a continuance in November of 1990." Brief of the Appellee, Case No. 78,007, p.52.

Mr. Brown's Issue 13, while sharing the heading of a speedy trial claim, differs from the issue previously raised. Issue 13 is based on the assertion that "To the extent, Mr. Brown's attorney sought or acquiesced to any continuance or waived any speed trial protection or provision, he did so without Mr. Brown's permission, knowledge, or consent, and such unauthorized surrender of Mr. Brown's substantive rights constitutes ineffective assistance of counsel." R. V, 565.

Mr. Brown's Issue 18 was grounded on his contention that the aggravating factor of heinous, atrocious, or cruel was not proven at trial. On direct appeal, this Court agreed. The HAC aggravator was reversed. *State v. Brown*, 644 So.2d 52, 54 (1994). Consequently, the State urged procedural bar on the court below.

Mr. Brown's issue for collateral attack differs from the issue he successfully raised on direct appeal. Mr. Brown seeks collateral review of the impact of the HAC reversal on the constitutionality of his sentencing proceeding. He contends that he was prejudiced because "in weighing states... the consideration of an invalid aggravating sentencing factor is fatal to the reliability of the sentence." "Use

of one invalid aggravating factor is fatal to a death sentence in a 'weighing' state, even where the jury has found other valid aggravating circumstances, because the invalid factor operates as an impermissible 'thumb' on death's scale." *Stringer v. Black*, 503 U.S. 222 (1992). R. V, 580. Mr. Brown further alleged that to the extent his lawyer failed to preserve this error, he rendered prejudicially deficient assistance.

This court recently considered a similar argument in *Wright v. Crosby*, Case No. SC00-1389, 2003 FLA. LEXIS 1144 (July 3, 2002). There the defendant argued that this Court failed to reweigh the remaining aggravating and mitigation circumstances, with citation to *Sochor v. Florida*, 504 U.S. 527 (1992). This court held that since that defendant had not raised his claim in a motion for rehearing after the initial opinion, the matter was abandoned, citing to *Lightbourne v. State*, 841 So.2d 431,442 (Fla. 2003).

Apprendi v. New Jersey, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), both decided subsequent to Mr. Brown's filing of his 3.850 motion, show that what had previously been viewed as procedural issues in the sentencing phase of death cases are now being viewed as substantive, and significant, rights. The court below summarily denied this issue on grounds of procedural bar. This action could only have been taken after only cursory attention to the posture of this case and the state of the law. Summary denial was error.

Mr. Brown's Issue 19 was summarily denied by the court below on grounds of procedural bar. Also because it had been raised on direct appeal. In this issue, Mr. Brown challenged the failure of the sentencing judge to specifically address nonstatutory mitigation presented by the defense. Summary denial of this issue also was error because these allegations of violation of the Florida scheme for sentencing in death cases, coupled with the failures raised in issue 18, raise substantial questions under *Apprendi* and *Ring* that were not ripe until this Court had agreed with Mr. Brown that the HAC aggravator was improper.

2. Issues 6, 7, 8, 9, 11, 14, 17 and 20 were summarily denied on procedural bar grounds because the court below accepted the State's claim they should have been raised on direct appeal.

Mr. Brown's Issue 6 was summarily denied because the court below accepted the State's contention that the issue should have been raised on direct appeal. The State does not explain how Mr. Brown could have raised this issue on direct appeal since the record clearly established that even at the time of the *Huff* hearing, his collateral counsel were still engaged in deposing the witnesses necessary to establish the factual basis for this issue. The court below does not explain how Mr. Brown could have raised this issue on direct appeal; to the contrary, the court below was engaged with counsel in a discussion as to whom collateral counsel could depose to establish factual aspects of this issue.

This issue actually was discussed during the *Huff* hearing, so there is a record which can permit review. It appears from the record that the State's contention was that since this issue was in essence a claim of prosecutorial misconduct, it perforce had to be raised on direct appeal. Counsel for Mr. Brown disagreed, citing the court below to *Garcia v. State*, 622 So.2d 1325 (Fla.1993). SR. I, 3. The specific allegations of Issue 6 show that Mr. Brown could not have raised this issue on direct appeal. Subpart D of this issue alleges that "/p/hotographs which were not admitted into evidence are located in the box of evidence given to the jury during deliberations." R. V, 545. At the *Huff* hearing, collateral counsel told the court: "There is a question about the photographs that are in evidence. We would be able to present a witness, I believe from the clerk's office, that will show that a number of photographs that were not introduced into evidence are actually in with the other evidence and that should support or partially support our claim that the jurors were exposed to evidence that was not admitted."

Subpart B of Issue 6 particularly demonstrates the failure of the *Huff* hearing to accomplish what such a hearing is intended to accomplish, and what subsequent rule change mandates the hearing must accomplish. Subpart B addressed the romantic relationship that developed between lead detective Robert Ore and trial counsel's legal assistant. Mr. Brown alleged: "The State is responsible for the acts of

the lead detective in improperly entering into a relationship with trial counsel's assistant. This conduct presented a clear conflict of interest and was obviously improper. The State improperly obtained information from trial counsel through this relationship. This action prejudiced Mr. Brown and denied him the fundamental right to a fair trial." R. V, 536. Considerable discussion was had regarding the progress of discovery on this subpart. The record shows that depositions had been taken of Detective Bob Ore and of Linda Goodwin. 1st Supp. Vol. I, 9. Collateral counsel asked the court below for "a general order allowing us to take depositions," based on the need to depose the wife of the lead detective and the wife of the trial attorney, as well as "some detectives" who refused to talk unless they were deposed. *Id.*. The State objected to the deposition of Beth Ore, the wife of the lead detective, due to concern about harm to the marriage that would flow from inquiry into this extramarital relationship. *Id*., at 10. Collateral counsel responded with information leading to a belief that Beth Ore was responsible for an attack on her husband's girlfriend. *Id.*, at 11. At this point, the judge interjected his belief that "there's also going to have to be some showing that Mr. Doyel either knew about it or should have known about it, and I'm assuming at this point he's denying those things." *Id*., at 13. Later, the judge returned to the state of Mr. Doyel's memory, this time unequivocally: "he's going to say that he didn't know." *Id.*, at 14.

Why the judge should assume that Mr. Doyel was denying knowledge is unclear on the record. The court's belief that Mr. Doyel would either not know of the affair between his legal assistant and the lead detective, or that he should not have know, simply has no place in Mr. Brown's issue. However, what is most significant is that the judge was deeply involved in the issues raised by collateral counsel's ongoing efforts to discover the evidence pertinent to the question of the affair between the detective and the legal assistant and then he summarily denied the claim on the ground that it should have been raised on direct appeal. How that conclusion could have been reached on this record is unexplained.

Mr. Brown's Issue 7 raises a jury selection issue under *Batson v. Kentucky*, 476 U.S. 79 (1986). Again, collateral counsel advised the court of the status of discovery on this issue: "In claim 7, there is an IAC element as well to the claim, and certainly Mr. Doyel's testimony on that would be relevant as to why certain questions were asked or why jurors were seated and whether there – whether there was any evidence from Mr. Doyel that a race – non race neutral reason was used for the selection of the jury." 1st Supp. Vol. I, 5.

Mr. Brown's Issue 8 challenges the felony murder aggravator. R. V, 553. Mr. Brown's Issue 9 asserts that the jury's sense of responsibility in the sentencing phase was improperly diluted. R. V, 557. Mr. Brown's Issue 11 contends that the

burden of proving that death was not the appropriate penalty was improperly placed on the defendant. R. V, 559. Mr. Brown's Issue 14 asserts that non-statutory aggravators were erroneously considered. R. V, 565. Mr. Brown's Issue 17 claimed that "the jury was left to believe that Florida law precluded considerations of sympathy and mercy." R. V, 578.

The court below summarily denied each of these issues on the ground that they should have been raised on direct appeal. Unfortunately, the court below never addressed, either at the *Huff* hearing or in his subsequent written Order, Mr. Brown's Issue 21, which asserted cumulative error: "The flaws in the system which sentenced Mr. Brown to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Brown's direct appeal. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence. These errors cannot be harmless." R. V, 588-589.

Each of the flaws in the sentencing process raised in issues 8, 9, 11, 14 and 17, which were not raised on direct appeal, as well as the flaws raised in issues 18 and 19, aspects of which were raised on direct appeal, go to the integrity of the sentencing procedure in this case. Given the reversal of the HAC aggravator on direct appeal in *Brown v. State*, 644 So.2d 52 (Fla.1994), the first, and only, opportunity Mr.

Brown has for comprehensive reevaluation of the integrity of the process that led to his sentence of death is this collateral attack. By raising these issues individually, and by collecting the issues that relate to the sentencing process in Issue 21, Mr. Brown seeks a reweighing of the factors that lead to his sentence of death.

The summary denial of these claims by the court below cannot survive the standard of review applied to summary denial of claims in a 3.850 motion, stated at the beginning of this section of the brief: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *State v. Coney*, 848 So.2d 120, 135 (Fla.2003). Mr. Brown's challenge to the integrity of his death sentence is neither facially invalid nor conclusively refuted by the record.

Wherefore, Mr. Brown asks that this court reverse the decision of the trial court and permit him an evidentiary hearing on all issues raised, or, in the lesser alternative, a hearing on issues six through twenty.

II. The United States Supreme Court made clear mere days ago what this Court has taught for years–an attorney cannot ignore his responsibility to gather and evaluate mitigation evidence in a death case. This Court has gone farther: if a lawyer fails to investigate he cannot effectively advise the client on the impact of the mitigation, hence cannot assist in the decision to waive mitigation. Here, counsel knew of the severe physical and mental problems of his client, questioned the client's very competence to assist counsel at trial and attend court proceedings, yet failed to investigate for

either the guilt or penalty phases because he believed that the defendant was the "captain of the ship." This representation defines ineffectiveness.

Counsel Robert Doyel was an experienced lawyer but had never represented anyone in a death penalty phase trial. He conceded that he concentrated only on the guilt phase of Mr. Brown's representation. On the other hand, he clearly believed that if Mr. Brown were convicted it was very possible that there would not be a death recommendation." R. IV,734 Knowing that mitigation evidence might be the difference between life and death, he spent a maximum of 7.5 hours preparing for the penalty phase and only presented two witnesses: Mr. Brown's mother and his medical consultant Dr. Dee. R. VI, 1306-1355.

Doyel's own records show that he spent 11.5 hours on the first day of trial representation and mitigation investigation; 13 hours for the second day of trial and penalty phase work, and 13 hours for the day of the penalty phase. If he spent eight hours in trial or sentencing each day, one hour driving to and from the courthouse, one hour conducting legal research, reviewing the previous testimony of state witnesses, and assembling his notes and files on the table, he would have spent ten hours out of the 11.5 or 13 billed hours. That means that 1.5 hours were available for mitigation on the first day of trial; three hours on the second day of trial; and three hours on the day of sentencing itself. Doyel's lack of preparation could not be cured

during a delay between trial and sentence phases. The trial took place April 29-30, 1991; the penalty phase took place May 1, 1991, and the sentencing before the court on May 1, 1991. (See Defense Hearing Exhibit 1, p. 10 of attached billing of Mr. Doyel). This is woefully deficient preparation and is ineffective assistance of counsel.

These facts are similar to the facts confronted in *Lewis v. State,* 838 So2d 1102 (Fla. 2002). That defense counsel did not have sufficient time to prepare, hence he was unable to advise the client as to the potential mitigation to which the witnesses and records could speak. *Id*., at 1113-14. Here, Doyel spent less time than Lewis' counsel in preparation. He never spoke with potential mitigation witnesses except for the psychologist, Dr. Dee, R. IV, 735, and presumably Brown's mother. Doyle or the public defender gathered some records for the penalty phase which themselves indicated the severe nature of the Mr. Brown's physical and mental illnesses which should have given an attendant attorney dozens of investigative leads.[14] Counsel recollected that some of the records spoke to propensity for violence and others reflected epilepsy. R. IV, 646. He was aware that Mr. Brown had been hospitalized while in the county jail on this charge for seizures due to epilepsy but did

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[14] An investigator was appointed by the court. Mr. Doyel testified that the investigator completed no mitigation task-presumably because none w as assigned-other than the few months on the investigator's billing submitted to the court and introduced at the evidentiary hearing as Defense Exhibit 3.

not recollect whether he intended to use the treating physician as a witness. R. IV, 661-2. In fact he did not use this or any other physician.

Here defense counsel had available substantial information, expert opinion, and documents from which a duty clearly arose to actually interview witnesses and conduct other investigation into the background of the defendant. This is only magnified when defense counsel admits that he was perhaps seeking an opinion on whether the defendant was competent to assist him in trial. In the recent US Supreme Court opinion in *Wiggins, supra*, the defense was relying on a Presentence Report as well as a Social Services report, both of which contained background information on Wiggins. The Supreme Court noted that because counsel were aware of some aspects of the defendant's background, that knowledge did not excuse them from further investigation but *rather triggered* an obligation to look further.

As *Wiggins*, coupled with the jurisprudence of this Court, teach, finding out "some" does not absolve counsel's obligation, it increases it.

In *Lewis v. State*, supra, that trial counsel spent fewer than *eighteen* hours in penalty phase preparation–more than twice as much as Doyel and that preparation time was over a thirty rather than three day period,[15] yet Lewis counsel was found to

[15] This Court noted that in *Rose v. State*, 675 So.2d 567,592 (Fla. 1996) trial counsel had seventy-nine days to prepare which was insufficient because that counsel,

have rendered ineffective assistance at the penalty phase. On the day of sentencing Lewis' counsel had merely one doctor ready to testify. Doyel had available only the consulting psychologist and Brown's mother–neither of whom could have been studiously prepared to testify in 7.5 hours' time. In *Lewis*, trial counsel testified, just as did Doyel, that the defendant did not want to place alcoholism evidence into the record at the trial because the defendant asserted innocence and he did not "want any family members to testify or any other form of mitigation presented." *Id.*, at 1110; 1114

This was tantamount to an attempted waiver of the penalty phase. Waiver of a penalty phase is not a matter to be taken lightly. *Lewis, supra*, also speaks to the waiver of mitigation or investigation by a defendant:

> Equally clear is the fact that a defendant cannot knowingly, intelligently, and voluntarily waive his or her right to present mitigating evidence during the penalty phase when his or her defense counsel does not have adequate time to investigate all mitigating circumstances or witnesses.
>
> *Lewis, supra,* at 1112.

It is respectfully submitted that Mr. Doyle did not and that a person cannot waive meaningful mitigation until his lawyer tells him what the investigation has uncovered and what the lawyer believes will be the impact of this evidence on the jury;

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just as Mr. Doyel, had never previously prepare a penalty phase.

and then he yet must knowingly, intelligently and willfully, fully understanding the consequences thereof, enter into a waiver. It is further submitted that this waiver should be the subject of clear and unequivocal discussion between the defendant and the only neutral observer in the courtroom–the judge.

This concept was brought home less than two weeks ago when this Court decided *Thibault v. State*, ___ So.2d___, 2003 LEXIS 1072 (June 26, 2003). There, unlike here, a discussion ensued before the Court with the defendant present. At that hearing the prosecutor noted his understanding that after the plea the parties and the defendant would return for allocution and a jury. The trial court recognized its responsibilities and asked if that decision had been discussed with the client and whether it was his decision. Defense counsel for the guilt phase stated that there were quite a few discussions held and that once penalty phase counsel could become familiar with the case, the defendant and his two counsel would decide. Thibault returned to court six times for status inquiries between the August, 2000 plea and the May 30, 2001 sentencing without the waiver of jury being discussed. Finally the defendant was sentenced to death by the court without benefit of jury recommendation. This Court cited to *Boykin v. Alabama*, 395 U.S. 238 (1969); *Carnley v. Cochran*, 369 U.S.506 (1962) and *Lamadline v. State*, 303 So.2d 17 (Fla. 1974) for the proposition that a waiver cannot be presumed and the failure to object

or to request a jury sentencing procedure guaranteed by statute cannot be presumed to constitute an effective waiver. § 921.14 Fla. Stat.

At the *Lewis* post conviction evidentiary hearing as here it was demonstrated that substantial mitigation evidence existed which was never uncovered: the defendant's mother was an alcoholic and promiscuous; he was exposed to extreme neglect and violence; he suffered a skull fracture at the age of two or three which required hospitalization but his mother refused to take him to the hospital, waiting for the father to return; he observed domestic abuse daily; the parents separated and tried to kidnap the children from each other; he was placed in foster care but his prior history of neglect and abuse prevented his success in foster care and he was shuttled from one foster care situation to another to an uncle's home, back home, and to his father; he had diminished mental capacity; brain damage, history of serious alcohol and drug abuse; had consumed a great deal of alcohol on the day of the incident. Testing showed that he had temper outbursts followed by occasional amnesia and behavior problems which could have resulted from skull fracture–in other words a behavioral lack of control. Brown's background was virtually identical but this information was not meaningfully and unimpeachably presented to the jury hearing testimony from Dr. Piniero. These facts included that Mr. Brown suffered from tonicoclonic epilepsy–the most severe form of epilepsy, the most severe form of epilepsy; post traumatic

seizures; epilepsy; brain damage; judgment lower than would be consistent with Mr. Brown's intelligence. R.IV,768-773.

Even earlier, this Court's jurisprudence supported the proposition that if substantial mitigating evidence existed and was not presented to the sentencing jury, through error of trial counsel, a new penalty phase sentencing was mandated.

In *State v. Lara*, 581 So.2d 1288 (Fla.1991), that trial counsel, in his first penalty phase trial, did not investigate any detail of the defendant's background which paralleled the circumstances under which Mr. Brown was reared. At the evidentiary hearing, counsel placed the aunt of Lara on the stand. She spoke to the beatings of Lara by his father, beatings so severe that he had to be hospitalized. Other witnesses painted a bleak picture. Lara's father would not feed the family and they had to eat dirt. Lara was severely punished by his father by being hang upside down over a well and left in sugar cane fields alone for days. He began drinking at the age of 8 or 9 years and regularly heard the voice of the devil. *Id*., at 1289.

When it became apparent to counsel that he was being confronted with the reality of his first penalty phase trial, he convinced Mr. Brown to take what little was available. According to Mr. Doyle, in spite of the fact that Mr. Brown did not initially want any penalty phase witnesses he agreed to this presentation. R. IV, 832-833.

It is clear that Doyel had woefully insufficient time to prepare. Citing to *Deaton v. Dugger*, 635 So.2d 4 (Fla. 1993), this Court held in *Lewis, supra,* that the penalty phase attorney must have adequate time to prepare in order to protect the defendant's Constitutional rights. Here, Mr. Doyel had only the hours from the close of court until the next day to prepare his mitigation case. Insufficient time and insufficient work equaled a disastrous and unwarranted result.

Although some testimony on the background of Mr. Brown did come in at the hastily prepared penalty phase, the information from Dr. Dee was impeached because his conclusions were drawn from "self reported" information and the testimony from Mr. Brown's oft-absent mother was virtually all double or triple hearsay. She was not a part of her son's life during some of the most abusive and deadly periods of his upbringing so could not meaningfully testify as to these troubled times in Mr. Brown's life. Mr. Brown did not testify.

At the evidentiary hearing, Mr. Brown's sister, Carmen Jones, gave the Court a window into a childhood which, if investigated, would certainly have yielded significant evidence of import to the sentencing jury. Ms. Jones is twelve years younger than her brother. He was her "bodyguard" while she was young and took beatings to protect her. R. V, 933. She remembers him as coming to town, placing her on his lap and singing to her. She was reared by their sister Anita. R. V, 933. She

testified that their father sexually abused the girls and probably the boys. R. V, 934. He beat their mother and George had to fight him off to protect the family. R. V, 934. The father, now deceased, pulled a knife in one instance when George was defending their mother.

The father held Ms. Jones when she was a child at gunpoint threatening to blow her brains out. R. V, 935. He sexually abused and did horrible things to her. R. V, 936. The father also pulled a knife on her stepfather while the father had his new girlfriend hold Ms. Jones' mother and some of the smaller children at gunpoint. Brown Senior almost killed the children's stepfather. R. V, 936.

In another instance, George protected their sister Ina when the father tried to kill her because she had accidentally turned on the electricity where he was working. She believes that that was the time when George was shot in the back of the head, intentionally, by the father. R. V, 937.

Witnesses Highlander and Smith presented evidence of a side of George never seen by the sentencing jury–loving husband and caring step-father as well as talented musician and performer. R. V, 938-945.

At sentencing, Mr. Brown's mother, Ms. Lamey, spoke to the horrible family situation; the division of the family; the multiple families of which George became a part, and the hardships which they all endured at the hands of Brown Senior.

It is clear that had she been interviewed in trial preparation, the leads which she would have given to the defense would have yielded multiple favorable witnesses who could have placed into context the horrific background of Mr. Brown. Had Dr. Dee or a psychiatrist or a forensic social worker been consulted and been presented with this information which was not "self-reported," he or she could have persuasively convinced the jury that mitigation was called for. Mr. Brown was prejudiced by the absence of investigation and preparation.

Counsel presented only two mitigation witnesses: Dr. Henry L. Dee and Mr. Brown's mother, Juanita Lamey. Trial Record at pp. 1306 through 1355.

The ostensible reason for lack of mitigation was that " my client made me do it," or, alternatively, "the defendant is the captain of the ship." R. IV, 783. This was in spite of the observation of trial counsel that he himself had questions as to whether Mr. Brown was even able to sit at trial and aid in his defense. R. IV, 663. The evidence is clear that Doyel did not recognize nor appreciate the fact that if he followed his client's instructions, this was effectively a waiver of the client's rights. There was absolutely no evidence that there was an informed waiver and the testimony spoke only in conclusory terms.

Doyle conceded that Brown was cooperating with him in providing him with mitigation evidence, including filling out an extensive form which counsel had

copied from a seminar. R. V, 839-840.

Even if counsel actually believed that he could not investigate unless he had permission, the above were clear signals that the client would participate in mitigation. Unfortunately, the information taken from Mr. Brown which might have led to relevant, persuasive evidence was ignored and when it became necessary, it was too late. His client made him do it cannot justify dereliction of duty to a client.

Purportedly because Brown wanted the "focus" on the innocence phase, that is what Doyel did. R.IV, 649 and the few pre trial moments of penalty phase preparation contacts which his office made were primarily through Ms. Goodwin to Mr. Brown's mother and through the investigator to Mr. Brown's wife who was not introduced as a witness although she had relevant evidence as to the guilt and the penalty phases. RIV703-7

Trial counsel repeatedly pointed out his theory: if his client didn't grant "permission" he would not do it. See, for instance: Mr. Brown "didn't want us to involve his family;" "we didn't have his permission to use his family for those purposes;" " he didn't want me to go into those things with his family;" " essentially I was restricted until the time of trial in considering who to put on." RIV 704-707, 734 This was abandonment of the duties of defense counsel, not deference to a client's wishes. This abandonment tainted the substantive trial as well as the sentencing

proceedings. For instance, Mr. Doyel would–in great part--not utilize an intoxication defense nor would he present the opinion of Dr. Wiley that this might have been a sex offense, because Mr. Brown was the captain of the ship, and like on a ship the captain's word is law. R. V 824-825. Here representation was thrown overboard when this counsel relied on the ever-changing comments of a man whose very competence he himself questioned.

This case is startlingly reflective of *Wiggins, supra*. Though procedurally dissimilar, the Constitutional principles are identical.

The issue decided by *Wiggins* is not whether a mitigation case should have been put on but, "[R]ather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself unreasonable. Wiggins,* at Slip Opinion Page 10.

Although substantial evidence existed which spoke to the penalty phase of his death case, Wiggins' counsel failed to engage an available forensic social worker to prepare a social history because counsel had decided to conduct the penalty phase by focusing their efforts on retrying the factual case. The United States District Court which ruled on the Motion to Vacate under Title 28 USC § 2254 soundly rejected the State's argument that "retrying the case" was a valid strategy. To be a valid strategy, it must be reasonable and based on information gathered after conducting a reasonable

investigation. *Wiggins* made clear that the principles of *Strickland* are viable: if a strategic decision is made after thorough investigation, it is to be given deference; if the decision is made on less than complete investigation, it must be reasonable. Here, the decision not to prepare a mitigation case was made absent investigation and certainly was not reasonable–just as it was unreasonable in *Wiggins.*

The *Wiggins'* Court cited to *Williams v. Taylor*, 529 U.S. 362 (2000) as illustrative. There, also, that "counsel's failure to present voluminous mitigating evidence at sentencing could not be justified as the tactical decision to focus on Williams' voluntary confession, because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'" *Id.*, at 413.

Likewise, here the failure to investigate the case–guilt and penalty–was not a strategy, rather simple ineffectiveness of counsel.

It cannot be that counsel was unaware of his duties. He virtually qualified himself as an expert witness in criminal law because of his education and experience background. He should have been aware of a then-recent treatment facts virtually identical to those in Mr. Brown's case which caused an issuance of the writ by the Eleventh Circuit in *Harris v. State*, 874 F.2d 756 (11th Cir. 1989). Harris' trial lawyers did exactly what was done by Doyel–virtually nothing, but put on no evidence in mitigation. There they had the excuse, at least, that each of the two believed that the

other one was doing the mitigation phase.

> Both lawyers stated that neither one of them properly investigated Harris' school or military records. Neither one had traveled to Jacksonville, Florida, Harris' hometown, to meet the appellant's parents, sister, brother-in-law, niece, friends, employers and neighbors to learn whether they could offer beneficial mitigation evidence. In fact, the lawyers' testimony demonstrated that, prior to the day of sentencing, neither had performed any investigation in advance for the penalty hearing.

Id., at 759.

Doyel admitted similar failings.

It is equally clear that the deference to the defendant's wishes, which reached the level of abdication of duty, clearly infected the entire investigative strategy for the trial and the sentencing phase.

In an analogous situation, this Court noted in *Griffin v. State*, 820 So. 2d 906 (Fla. 2002), that a similar rule to Florida Rule of Criminal Procedure 3.172(c), where a checklist is provided to the trial court of factors which must be covered in a colloquy to ensure the voluntariness of a plea, should also be enacted delineating the various rights of a capital defendant in a capital phase which would ensure that a trial court also conduct a colloquy which apprises the defendant of all rights relinquished through a waiver. *Id*. at 913, n.9. It is respectfully submitted that the instant situation in which a defendant has a last chance opportunity is equally as important as the

capital phase and thus, a detailed colloquy which apprises the defendant of what rights he or she is waiving should also be conducted.

Therefore, for this is reason alone, the judgment of the postconviction court should be reversed, the writ should be granted, and a new trial granted. In the lesser alternative, the judgment of the postconviction court should be reversed and a new hearing ordered; and, in the still lesser alternative, the judgment of the postconviction court should be reversed and a new sentencing ordered. If this Court does not find that the argument in the above issue, taken alone, supports the requested remedies, it is the request of Mr. Brown that an evaluation of the cumulative prejudice from the multiple errors of the trial court be undertaken followed by the appropriate remedy.

III. Death is different. The law is clear: Before the right to be present and to testify on one's own behalf–guaranteed by the Florida and United States Constitutions–can be knowingly, intelligently, and voluntarily waived, it is necessary for a citizen to understand the exact nature of what is being waived and the waiver's potential consequences. It is the duty of the court to assure itself, before accepting any waiver, that the defendant (1) is capable of and actually comprehends what is being waived; (2) knows the consequences of the waiver; and (3) being accurately advised of the nature and consequences of the waiver. It is only a clear, voluntary, knowing, and intelligent abandonment of the right which can pass Constitutional muster. The evidence here fails to establish a waiver.

Although Mr. Brown hereinafter raises issues of errors in the evidentiary

hearing and its resultant Order, he submits this Court need go no further: his absence and the consequent opportunity to testify at his evidentiary hearing requires reversal.

At the end of day two of the evidentiary hearing on Mr. Brown's motion to vacate, being held in Tampa, it was announced that the continuation of the hearing would take place at a date to be selected.

Mr. Brown, who suffers from substantial health problems such that medication is not a luxury but a life preserving necessity, addressed the difficulties of his incarceration in the local jail and the failure of that institution to administer his required medication. Because of these threatening health problems, he spoke of his desire to "waive" his appearance. It is clear that the word "waiver" was being used in a conclusory way. The trial court made no attempt to inform Mr. Brown of the meaning of waiver nor the virtually conclusive consequences of waiving his presence and particularly his testimony, the deference with which the facts which were presented before the trial court would be ultimately treated by this Court and subsequent federal courts. Defense counsel informed the court that there were facts to which only Mr. Brown could testify. After a discussion with the court, Mr. Brown *withdrew* his request to waive his presence and asked to permit him to hold his decision on the matter in abeyance. Yet on December 15, 2000, a purported waiver of presence and of testimony was accepted by the court without any inquiry and

without Mr. Brown being present.

It is important to review in detail what transpired.

At the conclusion of evidence on October, 20, 2000, defense counsel announced that he had two medical witnesses who were unavailable and sought rescheduling for a later date. The court was favorable to such rescheduling. During these discussions, Mr. Brown himself raised his health issues and their interaction with his presence at the hearing and in his presentation of his own direct testimony.

> THE DEFENDANT: Your Honor, may I just for a second, they're talking about another hearing. I would formally like to waive my presence at the next hearing. *I expected to testify today, but they said, no*, they're going to wait for the next hearing, and *I don't want to come back for the next hearing for medical reasons and stuff*. So they can handle it.

R. V, 957. (Emphasis supplied)

The court did not address the underlying reasons for Mr. Brown's reluctance to remain in Tampa. Though the court knew from the hearing testimony of the health problems of Mr. Brown, including his hospitalization at least once while incarcerated and his need for extensive medications. It never appeared to consider if Mr. Brown's statements to the court were affected by his lack of medications. In other words, it entered into these discussions with total disregard of the mental and physical state of Brown.

Mr. Brown's words speak to his frustration:

> Well, let me–see, I was under the impression I come down here to testify. Now they said they want to wait until the next hearing to put me on and I don't want to come back for another hearing, and so I'm just going to decline to testify period, Okay?

R. V, 958.

Defense counsel indicated that decision-making had always been an evolving process and stressed the importance of Mr. Brown being able to testify: "these decisions are made and unmade," and "*there are certain things that only Mr. Brown can testify to....*" R. V, 958. Defense counsel stated that he wanted Mr. Brown to testify last in order: "But it's my counsel to him that he go last to avoid having to come down and testify twice." R. V, 959. The Court replied that Mr. Brown would not have to come if he did not want to. R. V, 959. It did not, however, enter into any discussion with Mr. Brown about his state of mind, his knowledge of what he was waiving or his ultimate intentions.

After defense counsel informed the court that "these decisions are made and unmade," Mr. Brown himself, demonstrating his frustration with the process, said, "I just want to go back to the prison where I got a nice–and leave me alone." R. V, 959. These comments elicited no waiver discussion from the court. The court, apparently having reached a decision that the words spoken thus far were sufficient to

establish a waiver, concluded that if anything were to change, the decision could be changed. Before the end of the hearing, something changed.

The Court, again with no reference to the health of Mr. Brown at the moment, attempted to "confirm" that Mr. Brown did not want to appear "for whatever reason, reasons of convenience or comfort or whatever..." R. V, 960. Rather than answer in the affirmative, *Mr. Brown made clear his position*: "my reasons are I came down here to testify....." R. V, 960.

Perhaps in frustration itself, the Court stated:

> Let me tell you something. The reason you're here this time is because you have to be, okay? The law says you have to be, and if you're not here, it can only be if you make a waiver in front of a judge. So you had to come here to talk to me, if nothing else, or yesterday, you had to be here to talk to me about not being here, okay? You had to be here to tell me you didn't want to be here. So that's why you're here. They may have planned to put you on and maybe have changed their mind about it, but you're here yesterday and today because the law requires that you be here...Now you can talk to me. Now you can waive an appearance, okay, and that's fine, too, if you're telling me you don't want to be here at some subsequent hearing, we'll let that be on the record right now and if you don't come at the next hearing, I and the Supreme Court will both understand why you didn't, okay?
>
> R. V, 961.

Once again in spite of the requirements of law as stated, the trial court did not enter into any discussion about the elements of a waiver of appearance and of testimony, it did not advise Mr. Brown of the consequences of a waiver, nor did it

elicit a formal waiver, rather it spoke in conclusory terms about the defendant "waiving." It is respectfully submitted that "waiver" is a term of art and its particular significance in the Constitutional context cannot be presumed.

In fact, the trial Court's summary of the manner in which waivers worked procedurally itself was not honored. At the end of this hearing, Mr. Brown asked to hold the issue in abeyance, hence there was no in-Court waiver.

At the continuance of the hearing two months later the court accepted a one month old written waiver without inquiry and without the presence of Mr. Brown.[16]

Then Mr. Brown attempted to explain to the Court his thought processes:

> *....and my medical conditions, it's like I didn't even get my medication yesterday morning or this morning. I need–I have to have my medication. I'm only getting half of what I'm supposed to get to start with, and I'm not going to put myself in this thing so I'll get all messed up again and again and again, okay?* So if they want me to testify, I would say they better get me up there today because if they don't, I'm leaving.

R. V, 961-962

Rather than attempt to rectify the problem being caused by the jailers'

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[16] The waiver was filed one month before the hearing and apparently there was a tentative indication of its validity by someone as Mr. Brown was not "writted" to Court.

failure to administer prescribed medications, the Court proceeded as if it had no control over the conditions of imprisonment of its defendants.

It was at this point that the *State, recognizing the problem, offered to return in the afternoon* for Mr. Brown's testimony.

> Mr. Brown is saying, it sounds to me like he wants to testify, and he wants to today, and I'm concerned that if the Supreme Court gets this and he's said on the record I want to testify today, and he doesn't that the State is going to be in trouble, and we're going to have to do this hearing again. If he's not going to waive his right to testify, let's come back at 1:15 or start right now and get on the witness stand and say something.

R. V, 962.

Mr. Brown then addressed the prosecutor stating his position was that he did not want to come back and his lawyers had told him that they wanted to put other witnesses on the stand before him. R. V, 963. The Court did nothing after this comment.

It was at this point that the Court's comments become somewhat confusing. The Court replied to the state that Mr. Brown did not:

> say anything about not coming back this afternoon. All he's saying is he has, since he arrived here in Tampa, changed his mind about testifying for a couple of reasons, okay? He's entitled to change his mind if he wants to.
>
> R. V, 963.

The court still did not reflect on Mr. Brown's physical or mental state caused by the lack of medication.

This was not a hale and hearty 25 year old who could be perceived to be manipulative or malingering. Mr. Brown is a middle aged man who has suffered extensively from substantial physical illnesses which were only compounded by the trauma which he had suffered in an automobile accident, multiple incidents, and when he was shot in the head by his father. He required medications which he was not receiving.

The court invited comment from defense counsel who added that Mr. Brown had been upset because the jail did not have his medicines right. The court still did not pause to consider the effects or to inquire about the effects of lack of medicine on Mr. Brown. Rather, it acknowledged that it hears that complaint "all the time." R. V, 963. It made no inquiry into why the medical treatment of Mr. Brown was not being addressed nor how the court could intervene.

Ultimately, after this truncated and deficient waiver conversation with the court, Mr. Brown receded from his prior position and asked for the matter *to be placed in abeyance*. R. V, 963. He left the courtroom with the judge's words ringing in his ears: you have to be here to waive. He hadn't waived. He could only have believed that he would have to be brought to the court *if* he ultimately decided to

waive.

It is difficult to understand how in something as compelling as a hearing addressing Constitutional infirmities in the prosecution process that the Court would not be directed to or would not *sua sponte* address the *real* and compelling reason why Mr. Brown was anxious: he was ill and was not receiving his medications This trial court error was only compounded when, after it had time to reflect, the trial court would not require Mr. Brown's presence on December 20th and would not accept, without question, the purported waiver.

Looming large in the court's mind should have been the fact that Mr. Brown had never testified but, had evinced a clear intent to testify at this time. The court was completely cognizant of the ramifications of any waiver to be present or to present testimony: that very judge would make factual determinations without benefit of desired input from the defendant. Those factual determinations were worthy of great deference from this Court. As well, under the AntiTerrorism and Effective Death Penalty Act, those factual findings would be virtually dispositive. Unfortunately, although the trial court knew, it did not communicate these or any other consequences to Mr. Brown.

It is clear that the trial court knew that its factual findings would be of virtually conclusive weight in all further proceedings In its Order denying relief, 1st

Supp. Vol. 1, p.108 the court cited to *Porter v. State*, 788 So.2d 917,923 (Fla. 2000), and to *Stephens v. State*, 748 So.2d 1028,1034 (Fla. 1999), signifying its recognition that the factual findings which it would make would, at a minimum, be given deferential consideration when this Court reviewed the matter. It is these precepts of Florida law when coupled with the clear knowledge of the weight to be given to factual determinations in any federal proceedings,[17] the court should not have treated the document purporting to be a waiver lightly. At a minimum, the court should have ascertained Mr. Brown's mental and physical health on the day that the waiver was executed, then should have ascertained whether the medications which he may have

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[17] Should Mr. Brown be unsuccessful in this Court, the federal courts would also be deferential to the legal findings of Florida Court. See, for instance, the recent United States Supreme Court, *Price v. Vincent*, 123 S.Ct. 1848 (2003).

Federal habeas corpus is governed by statute which in itself provides for substantial factual and legal deference.

When a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, *28 U.S.C. § 2254*(d) forecloses relief unless the state court's adjudication of the claim:

"'(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"

been taking that day impacted on his decision. Lastly, it should have determined what he wanted to do on December 20th. The court should have communicated to the defendant sufficient information and elicited from the defendant sufficient information acknowledging that the defendant understood, in order that the court could find that he made a knowing, intelligent and voluntary waiver. The situation today is thus: Mr. Brown is potentially to be forever silenced. A colloquy was not engaged in. Proper information was not imparted. Consequences were not discussed. Everyone in the courtroom spoke in the conclusory term of "waiver." Unfortunately, only Mr. Brown was the layman and only Mr. Brown suffered.

The lower court herein failed in its duty to ascertain whether this particular defendant understood the consequences of the waiver.[18]

This was in spite of the medical necessity enunciated by Mr. Brown. This was in spite of the fact that the court was advised by counsel that the defendant changed his mind about matters frequently, and the fact that the court was aware that it could not accept a waiver of the defendant's presence at the evidentiary hearing

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[18] For an adequate procedure, see, for instance, *Henry v. State*, 613 So.2d 429 (Fla. 1992) where, before the court with Henry present, a formal sworn waiver to present evidence at mitigation was entered into. Henry testified that he had told his counsel that he did not want family members subpoenaed and did not want them to testify even if brought to court; did not want the psychiatrist to testify–all against the advice of counsel. *Id.* at 434.

unless the defendant in person waived that presence. The in-court discussion fails. The written document fails. There is absolutely no evidence that Mr. Brown knew what he was waiving.

The entirety of the waiver states:

> I, **GEORGE WALLACE BROWN,** having been fully advised of my right to appear at and testify in my evidentiary hearing, hereby waive appearance at the December 15, 2000 hearing. I understand that by not appearing and providing testimony, I may fail to present evidence on claims for which I have been granted a hearing buy knowingly waive appearance and the possible presentation of my own testimony.

2nd Supp., VOL I, .99

When this document was presented to the court, along with the announcement that three depositions were being introduced as substantive evidence–and with no mention of the health experts for which a continuance was granted–the court not only did not address Mr. Brown. He was not present.

The court's Order denying the motion did not speak to Mr. Brown's absence, his illness, the stated necessity for his testimony, nor the lack of that testimony and in fact of his presence. 1st Supp. Vol. II, 166-345. The waiver was given no consideration even when the court made factual and credibility determinations on issues on which only Doyel and Brown could meaningfully testify. The silence of Brown was a non-issue.

Mr. Brown's waiver was a nullity. It was taken out of the presence of the court in violation of rule; there was no disclosure to Mr. Brown about the actual and perhaps fatal consequences of his failure to present evidence through his own testimony. There was no determination that the waiver was knowing, intelligent or voluntary and the facts extant militate toward the conclusion that it was unknowing and uninformed and coerced by the overwhelming health considerations of Mr. Brown and perhaps impacted by his medical status.

But the Florida and United States Constitutions require that a defendant must be present at all "critical stages" of a trial and of other dispositive evidentiary proceedings against him. Rule 3.850 of the Florida Rules of Criminal Procedure required Mr. Brown's presence. As well, Florida Rule of Criminal Procedure 3.851(3) provides, in pertinent part, that the defendant's presence is mandated "at the evidentiary hearing on the merits of any claim...." This is consistent with the discussion between the court and Mr. Brown.

Since it is clear under the law that Mr. Brown's presence was required, this court must next turn to the question of whether the defendant's presence can be waived and if so, through what mechanism and with what factual and legal safeguards.

The cornerstone of our analysis is the seminal case of *Johnson v.*

Zerbst, 304 U.S .458 (1938), which held that the issue of whether the defendant has made a Constitutionally valid "intelligent waiver" of his Constitutional rights is determined by the individual facts of each case, but the court must take into account "the background, experience and conduct of the accused." *Id*. at 464. Here, Mr. Brown's overwhelming health considerations had to be first addressed by the court before it could move to any other consideration. The health issues were ignored.

Since no Florida Statute or Rule provides specifically the elements of a valid waiver, we must look to analogous situations and what the Supreme Court of the United States and this Court have taught.

In federal law the two most frequently litigated areas of waiver law encompass waivers of conflict of interest between clients and their counsel; and whether a plea was knowingly entered. In both of these areas, carefully delineated questioning is Constitutionally required. The purpose of such questioning is to advise the defendant of the parameters of his waiver and its possible impact. His decision is seen as "unknowing" if, for instance, he "enters" a plea of guilty without first being advised that by entering that waiver he has waived, inter alia, the right to a jury trial, the right to cross examine witnesses, the right to counsel, the right to confront his accusers, and a unanimous verdict from twelve independent jurors.

When those courts consider waiver of a potential conflict of interest, the

court must follow the procedures set out in cases such as *United States v. Garcia*, 517 F.2d 272 (5th Cir. l975), which requires a colloquy with the court wherein the court informs the defendant of the potential pitfalls of conflicted representation and provides him with an opportunity to consult with independent, unconflicted counsel before he makes his decision.

Although no case from this Court can be cited under Rule 3.851 concerning the waiver of the presence and the testimony of a defendant, analogous situations speak to the necessity for a defendant to be informed of the potential results of a waiver before a meaningful, knowing, intelligent, voluntary waiver can be of effect. The most recent among these is *Thibault*, *supra*. In *Thibault*, No colloquy was entered into between the trial court and the defense, hence, even though the defense did not object to the penalty trial before solely the court, there existed no evidence of a waiver of a penalty phase, hence the was vacated.

Of course, Florida Rule of Criminal Procedure 3.172 provides the safeguards which must be undertaken when a court accepts a guilty plea—a waiver of trial and of guilt.

When dealing with the requirement for a voluntary waiver of spousal privilege, the same trial judge who conducted Mr. Brown's evidentiary case, in a matter decided after Mr. Brown's hearing, found an implied waiver of spousal

privilege. This court disagreed. *Bolin v. State*, 793 So.2d 894 (Fla. 2001). In a direct appeal in which the issue of whether a certain letter written by the defendant on the eve of a suicide attempt, which was unclear on its face, "waived" the spousal privilege which had been asserted unyieldingly during the pendency of the litigation.

This Court formulated the issue thusly:

> Therefore, the question which has to be answered is whether under the totality of the circumstances Bolin voluntarily consented to Coby's disclosure of Bolin's statements to her regarding involvement in these criminal activities. [footnote omitted] We recognize that this is an issue of fact, but on the record here, we do not find there to be competent, substantial evidence to support the trial court's decision that Bolin made a voluntary waiver through the letter.

Id. at 895. (Emphasis supplied).

In a waiver of counsel case, this Court found the following steps to advise a defendant of the ramifications of his decision sufficient: it conducted an "exhaustive inquiry, including informing the defendant that the State was seeking the death penalty, that the defendant would be incarcerated during the trial preparation and may be unable to prepare as well as counsel could on his behalf, that the legal system had terms of art and procedure which would be unfamiliar to a layperson, and that the defendant would receive no extra help because of his pro se status. Also, inquiry was made into the defendant's age, education and experience, and physical and mental condition. *Hill v. State*, 688 So. 2d 901 (Fla. 1996).

Here, the only discussions with the Court were had in the conclusory term—"waiver." No evidence was adduced on whether the defendant knew what he was waiving and how that "waiver" would impact on his motion to vacate in this death case. No inquiry was had as to the health, education, knowledge or experience of the defendant—in other words no inquiry into the context of the waiver.

No litigation has been located where a defendant's waiver of appearance at a post conviction hearing arose. Presumably, this is because, particularly death row and to some extent all inmates, wish to have this hearing of last resort accomplished promptly and completely with their input being heard. Of course there has been much litigation concerning the absence of either the defendant or the trial judge during proceedings. See, for instance *Peede v. State*, 474 So.2d 808 (Fla. 1985) where a defendant's request to absent himself from trial was addressed properly by the trial court, which, along with counsel and a court reporter, traveled to the jail to engage in colloquy with the defendant. The waiver was sufficient because the defendant was "extensively questioned.. .as to whether he was knowingly and voluntarily waiving his presence at trial." *Id*.

After completion of the colloquy, the *Peede* trial court found that the decision was made by the defendant "after weighing the consequences; it's a free and voluntary decision on his part, and it's not prompted by any illness that he may have

or any outside factors being exerted upon him. The defendant was further advised that trial would proceed with his attorneys even in his absence.

Therefore, for this reason alone, the judgment of the postconviction court should be reversed, the writ should be granted, and a new trial granted. In the lesser alternative, the judgment of the postconviction court should be reversed and a new hearing ordered; and, in the still lesser alternative, the judgment of the postconviction court should be reversed and a new sentencing ordered. If this Court does not find that the argument in the above issue, taken alone, supports the requested remedies, it is the request of Mr. Brown that an evaluation of the cumulative prejudice from the multiple errors of the trial court be undertaken with the appropriate remedy.

IV. The trial court denied due process to Mr. Brown under both the Constitutions of Florida and the United States and abused its discretion when it failed to permit a request for argument submitted by Mr. Brown's counsel.

As noted above, the evidentiary hearing was held on two separate days, October 19 and 20, 2000. R. IV, 607-965. A third appearance took place on December 15, 2000. R. IV, 966-998. The court neither entertained nor ordered written or oral final argument to sum up the evidence presented at the hearing and to argue logical inferences therefrom. The court took the case under submission.

Mr. Brown filed requests in May and later in October, 2001, directed to the

lower court asking it to hold its ruling on vacation in abeyance, 1st Supp. Vol VI, 934, to accept supplemental written argument, and to permit supplemental oral argument in support of the vacation request. 1st Supp. Vol.VI, 934. The State responded. 1st Supp. Vol. 937. In its Order of March 26, 2002, the court denied all three requests. Mr. Brown appeals therefrom. 1st Supp. Vol II,

In its motion new CCR counsel, Mr. Gruber, notified the court that there had been administrative changes at CCR which necessitated a change of counsel. CCR requested time in which to read and analyze the transcripts of the hearing, presumably in order to prepare a written submission urging the granting of the motion as litigated.

The state replied, essentially saying that the matter was final and should not be reopened. However, new counsel for Mr. Brown at CCRM, Mr. Gruber, prepared and filed a substantial pleading which pointed out evidentiary problems and challenges to the validity of the evidence before the court, a document which easily fits the description of a partial closing argument. That pleading sought relief by permitting supplemental argument, both oral and written. This request was filed one year after the evidentiary hearing. R.Vol. IV, 939 *et seq*.

The court did not enter a specific order addressing these issues. Rather, it appended the denial of Mr. Brown's requests to the general Order denying relief.

It is respectfully submitted that the evidentiary issues which Mr. Gruber asked the court to entertain are of such importance that the denial of this request is an abuse of discretion, and requires that the matter be returned to the trial court.

No case can be located where a litigant was denied the right to frame his issues and argue the evidence so that the court can be informed of how the issues are dispositive in light of the evidence presented. Here, rather than permit this argument, the court denied total relief shortly after the filing of this motion without having previously ruled on the motion. This prejudiced Mr. Brown in his attempt to marshal the evidence and convince the court that such irregularities existed in the evidence that it should be discarded. (See discussion *infra*).

Wherefore, the summary denial of the right of a defendant to argue the merits of the evidentiary hearing testimony and submissions was an abuse of discretion and requires vacation remand.

V. It is undisputed that the conviction of Mr. Brown rested on no eye-witness nor forensic evidence, but solely on circumstantial evidence, to wit, Mr. Brown's connections with certain belongings of the victim, equally consistent with those items being a gift or taken. Where the evidence is purely circumstantial, any "tangible" evidence which can be touched and felt by the jury assumes disproportionate importance. Here, the gaps in the case were filled with the unauthenticated note, checks and handwriting expert testimony. The "tangible" evidence in this case was unreliable because of lack of evidentiary foundation, the mishandling of the exemplars, the tentativeness of the expert opinion, and an invader in the defense camp.

There are myriad reasons why the handling of the tangible evidence in this case is of dubious value. Taken singly or together, they cast such doubt on the trial process–either because of misconduct by the prosecution team or through ineffectiveness of trial counsel–that the writ should issue. Here, there were other looming issues which raised questions about the representation and the prosecution team. Citizens can correctly question the validity of a first degree murder prosecution which raises issues of an admitted affair between counsel's assistant and the lead detective, the extraordinary taking of Court ordered state requested handwriting exemplars by a defense team member; the evidence of a business deal between counsel and the client, and where there was total lack of authentication of the documentary evidence. As was discussed hereinabove, these substantial questions were highlighted in a request for argument which was wrongfully denied. They were not addressed by the trial court.

In this request for oral argument, then-counsel, Mr. Gruber, offered that one handwriting exemplar form and three copies of a note which began with the word "Bobby" were the total product of the November 7, 2000, handwriting session. R. 1002. The evidence supports this argument. Mr. Gruber argued and the state's exhibits themselves established that the processes of transporting Mr. Brown from jail to a hospital; the drawing of blood at that hospital, the return to PCSO and the taking

of the above-referenced handwriting specimens occurred in less than one and one-half hours' time–a period consistent with the four pages of exemplars described above. R. VI, 1003. He noted that the supplementary and evidentiary reports of Detective Ore were inaccurate.[19]

There are two areas which must be addressed–the faux check exemplars and the "Wanda" note exemplars. These two bodies of evidence lacked authentication thus were of no evidentiary value. An examination of the check issue is called for. Thirty-one check exemplars were introduced into trial evidence. Trial Trans., 696; R. VI, 1014-1024. The Ore Reports are wrong. R. VI, 1025. His evidence report stated that 34 samples were submitted. If four consisted of the form and three notes, had 31 check exemplars been taken that day, 35 not 34 items would have been included on the evidence sheet. Mr. Brown would submit that there were *no* check exemplars taken from him on November 7th.

Ore's reports are equally equivocal. When Ore spoke of his involvement in the blood samples in his report, he spoke in the active voice, with an assuredness. In the same report, when speaking of the handwriting, he deliberately changed to the

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[19] Although not of record, it can be assumed that Mr. Gruber made these arguments only after consultation with Mr. Brown and it is a logical conclusion that Mr. Brown's intention was to testify specifically as to this issue.

passive voice. Mr. Brown would submit that that shift of voice signaled a calculated design to obscure the fact that Mr. Ore was absent and could not provide the required authentication. He was not questioned on this. This either was a machination by the state or ineffectiveness of counsel or both. The state cannot authenticate check exemplars through Ore if he was not there.

His absence on November 7, 2000, is significant because State Attorney Investigator Tom Spate, according to Doyel, was present– as he told the hearing court, we "can take it to the bank." Spate never testified at the trial and was deceased by the time of the hearing. Add to these questions, that the alleged submission by Ore of the November 7th samples into evidence was not established by a records submission form[20]. Mr. Brown submits that the form does not exist because Mr. Ore did not take the exemplars. Its absence speaks loudly to the lack of a chain of custody for the November 7th exemplars. If there is no chain of evidence, no authentication, the checks are of no evidentiary value

Since the check exemplars were a feature of the trial, and since no evidentiary chain was established at the trial, there was specific ineffectiveness in counsel's failure to challenge this insupportable evidence . Counsel was ineffective and

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[20] The blood evidence, taken by a technician, was properly and *contemporaneously* submitted to the evidence custodian.

only a thorough evidentiary hearing where all witnesses who would have been in the chain of evidence give testimony can this matter be resolved. Of course since check evidence was not authenticated, it was wrong for these documents to have been submitted to a questioned documents examiner for comparison.[21] There can be no comparison with an unknown document. Because their evidentiary trail fails, the evidence itself fails.

This alone requires reversal and remand for a new evidentiary hearing.

However, the checks were not the only example of ineffectiveness. Doyel also failed to challenge the pedigree of the "Wanda" note, another piece of documentary evidence which to which the jury looked because it had no direct evidence T h e court should have entertained this argument.

Mr. Gruber also noted that the state–after the exemplar processes described above–requested via motion additional samples of handwriting. He analyzed that had there been this super-abundance of the later-claimed thirty-one exemplars given, trial counsel would have argued that more exemplars would be unduly burdensome as he argued that three note exemplars was sufficient. Mr. Gruber also noted that–contrary to the requirements of chain of custody–no discovery ever

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[21] The argument carries equal force with regard to the "Wanda" note to be discussed hereinbelow.

evidenced this number of exemplars being placed in the chain of custody on the date taken–November 7, 1990. R. 1004.

Mr. Gruber noted that there was no foundation for the admission of these exemplars at trial and that trial counsel neither objected nor conducted voir dire to establish the pedigree of this evidence. This is evidence which was ignored by the hearing court when it entered its ultimate Order denying. Mr. Gruber also argued that a letter written from the prosecutor to the lead detective established the state's requirement for handwritten not printed samples.

The language of the prosecutor's letter was specific about the type of and procedures for obtaining these signatures. R. VI, 1052. Mr. Gruber, weaving in the question of when Good–whom Mr. Brown submits is an invader in the defense camp doing the bidding of the state–began doing the state's work, noted that virtually the exact language of the prosecutor's letter to Detective Ore appeared in Goodwin's affidavit. R. VI, 1053. The prosecutor's letter stated ". . . the analysts prefer that when a note is copied, it be read to the defense and let him write as you read. When one exemplar is complete, it should be removed from the defendant's sight, before he starts the next one." R. VI, 1052. Goodwin's affidavit states: I read the words to Mr. Brown and he wrote them as I read them to him . . . I never showed him the document from which I was reading, and to the best of my knowledge, he could not see the

documents from which I was reading. R. VI, 1053. Doyle did not have this form. Doyel did not give these instructions. This leads to the logical conclusion that Linda Goodwin was an invader in the defense camp. She was doing this to ingratiate herself to the state. Several other facts militate toward this conclusion. After the trial Goodwin had a friendship with Tom Spate and with Robert Ore. Her friendship with Spate was such that when a friend saw them together, Spate told him that "he hadn't seen this." Of course, the relationship with Ore was a full blown affair. Goodwin also testified that she went to the races with the two on several occasions. She actually went in the police academy at some point after Doyel fired her. She would have us believe that the Spate and Ore relationships only occurred after the trial's conclusion. To believe that, we would have to believe that *when* she had the opportunity to be around these men every day, she did nothing and then within a week to three weeks after she was already in the physical relationship with Ore. It stretches credulity.

Ms. Goodwin admitted obtaining the handwriting exemplars but said that it was at trial counsel's request and stated that it was the state that wanted the exemplars. 1st Supp. Vol., 113. Detective Ore denied asking her for exemplars and did not know why she filed an affidavit "submitting several handwriting samples," 1st Supp., Vol. 1, 114., on the day before Ore took his samples. Detective Ore stated that her exemplars were not used as evidence and that he himself took "further" handwriting samples. 1st

Suppl. Vol. 1, p.114.

Mr. Gruber quoted from trial counsel's testimony that he "must have assumed" that it was his job to gather these signatures at the time of the affidavit. R. 1006. Doyel did not remember the taking of the exemplars but did not believe that his office would not have had an affidavit form containing the language of Ms. Goodwin's affidavit. R. 1006.

Mr. Gruber argued that the testimony of trial counsel and his legal assistant taken together established a breach of their duties to Mr. Brown and were examples of acts adverse to the interests of the defendant. R. 1007. This went unaddressed.

Mr. Gruber argued that if Ms. Goodwin's testimony were to be discounted, in other words she was working for the state and was an invader in the defense camp, trial counsel's testimony would and could be taken at face value–he had no idea what she was doing. That would lead to the inescapable conclusion that Ms. Goodwin acted for reasons of her own to procure information for the benefit of the state.

Mr. Gruber also raised the issue of ineffectiveness in the failure of trial counsel to challenge credit card receipts for which Mr. Brown could not have been liable–the victim was still alive. R. VI, 1010.

Next, the note must be addressed. Pre-trial the importance to trial counsel of this note was that it reflected, at its worst, another crime–theft of a license plate. He made this a subject of discussion with the court. Its importance was greater than that. Through its contents, it placed Mr. Brown in Nashville, Tennessee, and reflected his use of another name. This again is something "tangible" in which a jury can place inordinate and undeserved importance in reaching its conclusions. Of course the importance of the note was stressed at the trial's closing arguments by the state. This evidence should never have been before the jury and it was only through ineffective assistance of counsel, coupled with a brashness reaching misconduct, that the evidence was even submitted to the trier of fact.

Setting aside the irregularities in the taking of handwriting exemplars for a moment, and the lack of reliability of the exemplars submitted, counsel failed to perceive and react to the "note" situation as it developed at trial. He had objected to the note's introduction because it referred to the license plate theft--the "other crimes" analysis. However, he failed to recognize that this note carried absolutely no evidentiary validity–it could not be authenticated–and should never had been introduced into evidence nor given to the handwriting expert as if it were a known exemplar of Mr. Brown's handwriting

In fact *no one* testified that Mr. Brown had written it. Detective Ore testified

that it was sent to him by Bobby Ellison. No hearsay objection nor authenticity objection was made to this testimony. However, Ellison never testified. Ellison's testimony was essential to establish the authenticity of the note *if even he* could do so, but certainly Ore could not. Without Ellison, the note was no more than rank hearsay. Since it was not authenticated, elements of the note could not be introduced for their truth nor published. It is without dispute that no exception to the hearsay rule applies to a writing such as this which is introduced for the truth of the matter asserted. See, § 90.803, Florida Statutes.

In order to introduce a written document into evidence the proponent offering a document has to lay three separate foundations: authenticity, best evidence, and hearsay exception.[22]

Here, the state's efforts as directed to the note fail completely. There was no testimony introduced from anyone who actually observed the document's creation; no testimony from anyone who was personally familiar with Mr. Brown's handwriting or printing style. This was not a reply letter. No other index of reliability was established. Rule 90.901, *Florida Statutes.*. In other words, there is no one who gave testimony who can authenticate the note. See, for instance *Evidentiary*

[22] Since the original appears to have been in the courtroom, there is no best evidence discussion necessary.

Foundations , Imwinkelried, Edward J., LEXIS Law Publishing, 1998, 43-47. It is without question that there was no witness as to the execution of the note by any person, and neither was there was evidence from anyone who was personally familiar with Mr. Brown's handwriting or printing style. Clearly, this is not a reply letter. Equally clear is that this does fall into any hearsay exception nor any category of self authentication Section90.803 or Rule 90.902, *Florida Statutes.*

Apparently, here the state tried to bootstrap this evidence by appearing to lay a foundation through Expert Witness Outland. However, expert opinion testimony is forbidden unless it can be applied to appropriate evidence at trial. Section 90.702, *Florida Statutes.* Here, since there was no foundation for the note, there was no admissible evidence. The state cannot take a document which has no foundation and submit it to an expert as the known handwriting of the defendant. What is forbidden and what happened at this trial without . Additionally, an expert can only utilize as the basis of his opinion facts or data which are perceived by or made known to the expert before trial. *section 90.704, *Florida Statutes.*

Here there is no verifiable "evidence" that Mr. Brown wrote this note; the expert was not present when it was written, there is no evidence that he spoke with anyone who saw the note execute and in fact there was no evidence of anyone who say this note written, hence there is nothing upon which he could have himself authenticated

the document. Parties cannot be permitted to submit evidence to experts and ask those experts to rely upon the evidence to render an opinion unless there is a good faith belief that the validity of the document will be established before the trier of fact.

As it turned out, the note was introduced into evidence without any evidentiary foundation, published to the jury, and no objection was made by trial counsel to the authenticity, foundation, or hearsay nature of the document.

The introduction of this document which carried no index of authenticity through the hearsay testimony of its detective witness, was a bad faith act. There could be no good-faith basis for believing that the authenticity of the chain of custody for this document could be established without the testimony of, at a minimum, Mr. Ellison. They did not have Ellison as a witness. A death penalty prosecution which is based entirely on circumstantial evidence is no place for this type of bad-faith tactics. It is also no place for such deficient representation that the note comes into evidence without objection. For these reasons alone, there must be a finding of ineffective assistance of counsel.

The hearing court should have entertained argument because establishment of the beginning of the Ore-Goodwin affair was also crucial. Both people, conveniently, had no recollection of when they began their tryst. However, there was ignored deposition testimony that Goodwin told the local police that she was involved with Ore

"during the trial." Ore and Goodwin were clear and consistent only on the fact that would save themselves–"it happened after the trial." The court precluded the defense from gathering extrinsic evidence of the time of the affair. This denial prejudiced Mr. Brown and was compounded by a limitation of discovery into the affair.

At the *Huff* hearing, the Court, when presented with evidence that there had been an affair between the lead detective investigating the Brown case and the court paid paralegal considered a discovery request. It erred and continued that error through its final Order.

The court opined that whether this affair took place during the trial or after the trial would only be of evidentiary importance if trial counsel was aware of it and the court seemed sure that trial counsel would say that he didn't know. 2nd Supp, VOL I, 13.

> THE COURT: Well, there's also going to have to be some showing that Mr. Doyel [defense counsel] either knew about it or should have known about it...
>
> THE COURT: Why don't you depose him first because he's going to say that he didn't know–
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> 2nd Supp., VOL I, 13-14.

Of course, had Goodwin and Ore begun their relationship before or during the trial, the prejudice would be of such a nature that it was presumed. It would

have struck at the heart of the confidentiality between lawyer, including his staff, and client. This is particularly true here where the other partner of a love affair was the very detective investigating the Brown case. The defense had the right to use the court's processes to depose witnesses who had relevant evidence or had evidence which could lead to relevant evidence. See, for instance, *Trepal v. State*, 754 So.2d 706 (Fla. 2000).

This discussion occurred during a request for leave to depose the wife of the officer–whose name had been prominently mentioned as having been aware of the affair. In fact evidence was introduced that the detective took his wife to the home of Goodwin's mother and told the two women to work out the situation. He left.

The defense had alleged that the Ore-Goodwin relationship existed and that it was of particular importance in this case where there was improper delegation to this young legal assistant. This only made the request for discovery more compelling.

The court found that the relationship did exist but it took place after the representation of Mr. Brown was terminated. It relied on the word of those involved and who could suffer harm from one learning that the relationship began earlier: Ore, Goodwin, and Doyel. The court also ignored the facts from the three depositions which were introduced into evidence which cast doubt on the brevity and relative

insignificance of the relationship as portrayed by the two participants and actually established that Goodwin told the police that she and Ore had a relationship during the trial while she worked for Doyel.

This invasion into the defense camp strikes the very heart of the justice system, and Mr. Brown submits that this should be evaluated, rather than under *Strickland,* standard, *supra.*, under the more stringent standard *United States v. Cronic*, 466 U.S. 648 (1984), as an instance of per se ineffectiveness of counsel.

VI. The order based its finding on incomplete evidence with regard to the book and song deal.

There were allegations made that trial counsel entered into a contract for a book and for certain poems of Mr. Brown. Again, the timing is crucial. If the contracts were negotiated while the representation was ongoing, the ethical prohibition itself would be proof of the conflict of interest and should justify the immediate granting of the writ.

The court's Order conceded that such a business relationship is precluded by Rule 4-1.(8)(d) of the Rules Regulating the Florida Bar. That Rule forbids a lawyer from *making or negotiating* an agreement prior to the conclusion of representation.

RULE 4-1.8 CONFLICT OF INTEREST;

PROHIBITED AND OTHER TRANSACTIONS

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

...

(d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

However, on this important issue the court accepted trial counsel's testimony even though Goodwin testified that it had been trial counsel's objective "always" to obtain the poems "because e wanted his wife [sic] turn them into songs." 1st 1st Supp,Vol. 1, 108. The evidence suggests that there were *negotiation*s before the conclusion of Doyel's representation, an act precluded by the Rule. The Order did not discuss the testimony of Goodwin that: "[M]r. Brown presented no evidence or

testimony to the contrary demonstrating that Mr. Doyel was actively representing conflicting interests." 1st Supp.VOL I, 107.

Trial counsel's testimony itself almost guarantees that the deal was under negotiation during the representation. It is inconceivable that the defendant, on the most important day of his life, would have–unsolicited–given poems and discussed a music deal with trial counsel. It is without question that there was a discussion on the morning of sentencing, from trial counsel's own testimony, of doing a book and the fact that *that he was on death row would make the book more interesting.* R. IV, 763**.** These actions alone become more questionable because Doyel admitted to doubts as to the competency of Mr. Brown.

Since no record was made by either party or the court of the testimony which Mr. Brown was precluded from giving by the failure of the courts and the State to provide him with adequate medical care, this reliance was misplaced. It appears logical that this was an area in which Mr. Brown would have wanted to be heard as it is a one-on-one situation where the court is hearing only one side of the equation. That cannot equal the conclusion reached.

The court also failed to note the prohibition against *negotiation* for book or song rights during representation. It seem to believe that only a full fledged contract in which the lawyer actually obtained rights would breach the rule. When discussing

whether Doyel attempted to obtain the poems to enhance the performing career of counsel's wife, the court saw the issue as whether Doyel *had any proprietary interest during his representation ...to the detriment of his client*. 1st Supp. VOL 1, 107. Without discussion, the trial court rejected in total the testimony of the legal assistant, accepted the testimony of now-Judge Doyel, and ignored the fact that Brown did not testify due to health problems which the judge himself could have ameliorated.

Interestingly, Judge Doyel did not continue his representation of Mr. Brown after the sentencing, turning over the direct appeal to another court-appointed lawyer.

CONCLUSION

For the reasons stated above, Mr. Brown seeks reversal of the Order entered subsequent to the hearing on his post conviction motion in its entirety. Mr. Brown further seeks entry of an Order granting his Motion to Vacate granting him a new trial; or in the lesser alternative reversal and remand for an evidentiary hearing on all issues presented in the moving papers and in any amended moving papers; or in the second lesser alternative for remand for an evidentiary hearing on the issue of the efficacy of the waiver of appearance.

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via United States mail this 15th day of July, 2003 to John Aguero, Esq., Assistant State Attorney, PO Box 9000, Drawer SA, Bartow, Florida 33831-9000, Robert J. Landry, Esq., Assistant Attorney General, Office of the Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida 33607.

BY:_____
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF COMPLIANCE

Mr. Brown's Initial Appellant's Brief is submitted in Times New Roman 14 typeface in compliance with the requirements of this Court.

BY:_____
MARY CATHERINE BONNER, ESQ.