IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALPHONSO CAVE,

Appellant,

CASE NO. SC03-95

v.

STATE OF FLORIDA,

Appellee.
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ALPHONSO CAVE'S INITIAL APPELLANT'S BRIEF

Lower Tribunal: The Circuit Court of the Nineteenth Judicial Circuit, In and For Martin County, Florida

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A. NATURE OF THE CASE

The instant presentation is Alphonso Cave's direct appeal from the denial of his Motion to Vacate Judgments of Conviction and Sentence of death, R. VII.1037.[1]

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

B. COURSE OF PROCEEDINGS

This is the direct appeal from the denial of a Motion to Vacate the third sentencing of death. Mr. Cave's Motion to Vacate and accompanying Memorandum of Law were filed September 26, 2000, R.IV, 441, 447, and he supplemented that Motion on March 15, 2001. An evidentiary hearing was held on the Motion to Vacate on March 6 and 7, 2002. R.I,II,III. The parties presented their respective Closing Arguments in writing on April 29, 2002. R.VI, 899; R.VI, 851. Mr. Cave filed a supplement to his closing argument May 29, 2002. R.VI, 929. On June 25, 2002, Mr. Cave submitted the newly decided case of *Ring v. Arizona* as supplemental authority. R.VI, 931.

The defendant sought a stay of the briefing schedule in order that this Court

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[1] The Record will be referenced by "R." followed by the appropriate volume number and page number.

might apply *Ring*. R.VI, 952c. The state did not oppose the stay as requested by the defendant. R.VI, 952a. Based upon *Ring v. Arizona,* the court entered its Order Requiring Supplemental Response on July 28, 2002. R.VI, 951. Subsequent to this Court's decisions in *Bottoson v. Moore,* and *King v. Moore,* the state moved to dispense with supplemental briefing. R.VI, 953. The Court entered its Order denying the Motion to Vacate on November 20, 2002. R.VII, 1037 *et seq;* 1075. That Order denied all relief. Mr. Cave moved for reconsideration urging reopening of the hearing based upon evidence discovered at the hearing which revealed that on his deathbed, codefendant Bush related to his counsel that Mr. Cave had not been the "shooter" in this case, and crucially, that Mr. Cave had actually attempted to withdraw from the enterprise and when he could not dissuade his codefendants to refrain from the crime of murder, absented himself from the area, returning to the car. R.VII, 1056. The state filed a Response. R.VII, 1063. The request for rehearing and to reopen was denied on December 19, 2002. R.VII, 1069. A timely appeal was taken therefrom encompassing not only the final Order denying relief, but also the Court's Order denying rehearing and for leave to amend Mr. Cave's pleadings. R.VII, 1071,1073.

A Petition for Writ of Habeas Corpus attacking appellate representation is being filed contemporaneously with the instant briefing.

STATEMENT OF FACTS

Counsel Jeffrey Garland represented Mr. Cave at sentencing hearings in 1996-1997, at which time the sentence of death was imposed. He had previously represented Mr. Cave in a 1993 sentencing and in the appeal therefrom. Mr. Garland's testimony was presented by Mr. Cave at the March, 2002, evidentiary hearing, R.I, II, and III, along with the testimony of Leutricia Freeman, the mother of Mr. Cave's deceased child; Psychiatrist E. Michael Gutman; codefendant Bush's counsel Stephen Kissinger, Esq.; and Mr. Cave's mother, Connie Hines. In this presentation Mr. Cave will attempt to categorize the various witnesses' testimony and other issues into specific subject matters for the ease of this Court.

1. MR. GARLAND'S THEORY OF PREPARATION FOR 1996 SENTENCING

At the time of the 1996-1997 resentencing, Mr. Garland fashioned his defense around his fears of: opening the door to nuclear issues; and of opening a Pandora's box of facts concerning the co-defendants. He wanted to avoid the testimony of a jailhouse informant Michael Bryant; and limited his presentation to fit into what he believed to be the "circumstantial evidence rule." R.I, 46, 47.

In light of the unsuccessful presentation in 1993, something different was required in 1996. R.I, 45. Testimony from Cave about remorse and conversion,

coupled with the circumstantial evidence rule, would be enough to avoid the death penalty–he would need no more evidence. R.I, 105. Although Cave was the centerpiece, Garland did not tell Cave until immediately before he put Cave on the stand that he was going to testify. He advised Cave to be himself and to portray himself as the 1996 version–free of drugs, higher functioning mentally–rather than the 1982 version of Cave–drug addicted with a borderline IQ. R.I, 108. All of the aggravating information put on by the State dealt with the 1982 Cave. R.I, 110.

Mr. Garland based his preparation for sentencing on information from Mr. Cave, absent independent investigation, that Cave had only experimented with drugs and was using alcohol and marijuana on the day of the offense. R.I, 43, 44. Mr. Garland's recollection was firm: Mr. Cave had worked "real" jobs, not just day labor jobs. R.I, 43.

Defense witness Leutricia Freeman was a young woman who bore a child from Mr. Cave. During the time that she knew him, he never worked. R.III, 269. When she was involved with Cave, he was 19 or 20 and she was 14. R.III, 278. She supported them by her using her sister's ID to get a job as a maid. Her mother helped them. R.III, 284. When she was pregnant, sometime during the year of 1979, she came into their rooming house and saw a "spike," that is a needle with heroin, stuck in the arm of the passed-out Cave. R.III, 271. Freeman's brother told her that Cave had been

a long drug user. R.III, 272. Cave admitted to her that it was heroin which he was using. R.III, 285.

Freeman saw Cave regularly until 1980 and a couple of times later, once two months prior to the crime. R.III, 273. She knew that he was on drugs the day that he came to see her. R.III, 273. She reached out to the Cave family and told his mother that he was on drugs. R.III, 274. She did not recall whether she spoke with his brother, but knew that Cave's brother was aware of his drug problem. R.III, 274. During their relationship, Cave was using drugs every day. R.III, 275. She saw the effects–Cave sitting with a drooping head and other indices of lethargy. R.III, 276. Freeman was willing to be a witness in the 1982, 1993, and 1996 trials and sentencings but was not called. R.III, 276. She was both available as a witness and locatable because she was in prison in 1996. R.III, 287.

She had been convicted of theft and of cocaine possession R.III, 286.

Mr. Garland firmly believed that Cave was not addicted to heroin, rather that he used it like one would social drinking. R.II, 189.

Mr. Cave admitted to Defense Expert Witness Dr. E. Michael Gutman that he was using drugs and stayed high through the entire decade of the 1970's, and had used a day or two before the crime. R.III, 339, 342, 344. Cave admitted to using alcohol and heroin, shooting heroin, shooting cocaine, using LSD, other

hallucinogens and alcohol R.III, 343-344. Cave believed that he contracted Hepatitis from injecting himself. R.III, 345.

Dr. Gutman testified within a reasonable degree of medical certainty that Cave was in a state of drug influence and habituation prior to the offense. R.III, 350. Cave used heroin three to five times per week as opposed to every day. R.III, 351. Habituation is more of a psychological need, rather than a physical dependence. R.III, 352. Cave was psychologically dependant. R.III, 353.

Garland admitted that he would have had to consider information about heroin addiction from Leutrecia Freeman–that Cave was a substantial heroin user for a substantial period of time. R.II, 256. Garland did not recall whether he asked Alonzo Cave whether his brother was a regular user of heroin. He tried to locate where Lutrecia Freeman was, not to find out about Cave's life including information to be presented to the sentencing jury, but only to find out where their son was so he could put the son on the stand to humanize Cave. Garland could not subpoena Freeman. R.II, 134. He did not check the Department of Corrections to find out whether Freeman was incarcerated. R.II, 257.

Mr. Garland admitted that he had no evidence in his hands as of the 1996 presentation that Mr. Cave had prolonged substantial drug use including heroin. R.II, 132. He did not speak to Leutricia Freeman, R.II, 133, the mother of Mr. Cave's

child. He interviewed some people including some family members and girlfriends. R.II, 134. He did some work to try and find the girlfriend with whom Cave had been living, R.II, 134-135, not to talk about drug use, but to obtain evidence about how he assumed his responsibilities as a father. Garland admitted that knowing that Cave was a severe drug addict in 1982 and times prior to that would have been an important thing to know, but he failed to find that out. R.II, 135.

2. INVESTIGATION, MENTAL HEALTH ISSUES AND EXPERTS

Jeffrey Garland had represented Cave through two sentencings. His observations of Cave and his personal belief as to Cave's intelligence and Intelligence Quotient results in general, R.I,132, led him to do and to refrain from doing certain things with regard to evidence of mental health, drug use, etc.

In the 1993 sentencing, the only mental health issue permissible was that of Intelligence Quotient. R.I, 22,23,R. II, 154.

He evaluated the concept of "suggestibility" only in the context of a confession to robbery, Mr. Cave's belief that the young woman would be released unharmed, and his lack of knowledge of the criminal backgrounds of the codefendants. R.I, 37. He did not consider suggestibility in the context of a reason for Cave's involvement.

A new psychologist was retained for the 1996-1997 resentencing, Dr. Alegria. R.I, 48-49. Mr. Garland did not know how many times the doctor saw Mr. Cave;

but did recollect that a low/normal IQ was found. R.I, 50. Dr. Alegria was not called as a witness in 1996. R.I, 52.R. II, 202. Since Cave discussed the other issues with Dr. Alegria, Garland feared that calling Dr. Alegria would open doors, so all mental health evidence was abandoned. R.II, 204.

The decision not to put on any evidence of mental health status, IQ, and suggestibility was made because of a fear of "opening a door." R.I, 53. Rather, Mr. Garland believed that none of the "open door" evidence could be introduced if Mr. Cave himself presented the evidence to the jury. R.I, 54.

Mr. Garland might have used other medical evidence had he not been guided by his understanding the "circumstantial evidence rule." R.I, 77. Garland knew that Dr. Rifkin had established Cave's IQ as between 70 and 80. R. II, 170. This consisted of a verbal IQ of 77, a performance of 79, and a 76 overall R.II, 173. Dr. Krop had arrived at an IQ of 72. R.II, 190. Prior to the 1996 sentencing, a newly appointed Dr. Alegria was available to testify.

Dr. E. Michael Gutman, a double boarded forensic psychiatrist, evaluated Mr. Cave for the present proceeding and testified therein. Dr. Gutman stated that Cave had matured since he'd been incarcerated and was clean of drugs, R.III, 299, leading to the raising of the IQ score. R.III, 300. Sobriety, maturation and education impact a person's IQ. R.III, 302,314. Drug addiction clouds and colors the whole person

R.III, 306. The Cave of 1982 is the important Cave. R.III, 307.

Dr. Gutman testified that Mr. Cave's beliefs and statements in 1982 that he was not a drug addict were not to be relied upon because drug addicts are frequently not aware of their own capacities to think and recognize. R.III, 301. Their perceptions are skewed and influenced by the intoxicating drugs in their systems. R.III, 301.

Dr. Gutman testified that people who are abusers of drugs such as heroin could lack motivation, have no drive and be influenced easily and craving their drugs that they will easily "sell themselves to the devil," R.III, 303, and Cave's denial of drug use to Dr. Rifkin in 1982, may have been for many reasons, including that admitting to drug use was a very bad thing and not en vogue. R.III, 315. Dr. Gutman said that this IQ of 76 was borderline, where retarded would be 70 or below R.III, 318. He does respect the fact that Dr. Alegria's more recent evaluation of 90 is also consistent with the truth R.III, 320. He believed it was not unreasonable for Dr. Krop to rely on Cave when he did his report. R.III, 320. Dr. Gutman did not testify to the lack of intent but merely to the impact of drugs. R.III, 321.

Dr. Gutman also opined that even though Cave testified in 1996 that drugs and alcohol were no excuse for what he did, that did not imply that he fully understood or could make the distinction between criminal responsibility and intoxication R.III, 329.

3. THE FAILURE TO PRESERVE BUSH'S TESTIMONY OR TO INTRODUCE EVIDENCE OF HIS DEATHBED CONFESSION.

In the 1996 resentencing Garland acknowledged that it was Cave's prior statement to the police that was the State's main piece of evidence. R.II, 156. Cave walked the young woman from the car, released her, and began the return to the car. It was at that time that Parker passed him going toward the young woman. Cave returned to the car. Parker subsequently killed the victim. R.II, 158. Cave played no part in either the killing by Parker nor the stabbing by Bush.

Mr. Garland along with co-defendant Bush's lawyer, Steven Kissinger, entered into litigations to secure the attendance of Mr. Bush as a Cave witness despite of the fact that a death warrant had been issued for Bush. RI, 99. They were not successful. Garland took no actions to perpetuate Bush's testimony through deposition because, according to Garland, the prior statements of Bush–not the 1996 statement–were not helpful to Cave. R.I, 100. Garland believed as they entered the 1996 sentencing with Bush already dead that Bush's statement spoke only to the fact that Cave was not the triggerman. R.I, 107. Kissinger was not called as a witness to relate the dying declaration because, according to Garland, it would have opened the door to other, sometimes inconsistent, statements made by Bush. R.I, 103, R.II,125.

Garland did not depose Bush because the State could then have used the

deposition because it would not have been hearsay as long as they established relevance. He felt that taking Bush's deposition would be irresponsible of him. R.II, 142. Mr. Garland, working on the premise that this was going to be a statement that Mr. Cave did not shoot as its *only feature*, did not consider the issue as important because the State conceded that Cave was not the shooter. Garland felt that the Bush testimony was moot. R.II, 243.

Garland, after Bush's death and his deathbed declaration, did not speak with Bush's lawyer, Kissinger. Kissinger would have established that there was more to the Bush statement than Garland believed: Cave withdrew from the enterprise, announced that withdrawal, and removed himself from the area.

Kissinger testified, R.III, 383, that Bush's deathbed declaration contained information which he considered relevant and material. Kissinger testified that Bush related information regarding Cave's relative role, R.III, 386, when he spoke to him shortly before his death, perhaps the day before. Bush knew that his last legal proceeding was over and that he would be executed the next morning as scheduled R.III, 387-388.

Bush told Kissinger what happened that night. Parker directed Cave to provide him with a firearm which Cave had in his possession. R.III, 392. Parker was running the show. R.III, 393. When it became obvious that Parker was going to kill the young

woman, Cave became upset and told Parker he didn't have to do this, [the killing]. Since Cave was unsuccessful in his attempt to stop what appeared inevitable, Cave went back to the vehicle, got inside, joining Johnson, and left them behind. It was at that time that Parker had Bush stab the victim and Parker shot her. R.III, 393-394.

In questioning by the court, Mr. Kissinger stated that following Bush's execution, Kissinger called Garland to tell him about the statements made at Bush's sentencing as well as the declaration the night before the execution. In spite of this, he was never called as a witness R.III, 401. Mr. Kissinger was surprised that he was not called to the third resentencing by Mr. Garland because he had called Garland, made a specific effort to tell him about the statements Bush made, and the circumstances under which they were made.

The statement contained new information that Cave had made an attempt to withdraw from the activities of Bush and Parker. Kissinger believed that was very important and something Garland should know. R.III, 404.

4. PENNSYLVANIA RAPE

Mr. Garland admitted that his investigator had gathered information about a rape involving Cave in Pennsylvania R.II, 116. Garland did not remember introducing the rape in his direct examination of Cave. R.II, 119. He believed he introduced the records showing that this was a case that was nolle prossed because the victim would

not testify. R.II, 120. Mr. Garland said that he discussed with Cave the analytical framework of tradeoff between proceeding on the statutory mitigation of minimal criminal history vis-a-vis the issues which could be raised on cross examination. He also believed that Cave could not talk about his life without talking about the rape accusation. R.II, 121. Garland believed that Cave had nothing to hide from the rape. R.II. 122. Garland admitted that he did not file a motion to eliminate and keep out this rape evidence R.II, 123. He admitted that when the identification of the crime as rape was brought up by the State in cross-examination by Colton, it should have been objected to. R.II, 124,228.

5. MR. GARLAND'S CONCERNS ABOUT CERTAIN "NUCLEAR" ISSUES AND THE CIRCUMSTANTIAL EVIDENCE RULE

Counsel Garland informed the trial court that he structured his presentation with a belief that he was benefitting from certain evidentiary presumptions but that this Court shifted the review standard from "circumstantial evidence to competent and substantial evidence," R.I,67, and that shift harmed and prejudiced Mr. Cave.

Garland would have considered other evidence had he not misunderstood the standard of review. R.I,74. All of his decisions were impacted by his understanding. He would have approached Cave differently, R.II,237, and would have told Cave to put on all the evidence of duplicity and false statements if he were not trying to avoid

the circumstantial evidence rule. R.I,70

Because of the circumstantial evidence rule, Garland chose to put forth mitigating information from Cave directly and limit the State to using circumstantial evidence of the aggravating factors. R.I, 55, 56. Cave himself was to be the only witness as to his own impaired judgment, inexperience, poor education, lack of criminal background, drinking, smoking and marijuana because that direct testimony did not open any doors. R.I57

Garland avoided any direct evidence of the statements of codefendants because of the fear that the information would be rebutted. R.I,59.

Garland said that merely introducing the prior criminal histories of the co-defendants would not in any way injure Mr. Cave, but if he had opened the door to nuclear evidence they could have found there was a man attacked in a restroom that same night. R.II, 127.

Contrariwise, Garland admitted that the State could have taken off from the information that he had entered into the record of Bush and Parker and then put on the nuclear jailhouse witness as he feared. R.II, 129. Garland's and Cave's theory of the defense again was circumstantial evidence of aggravators and maximum evidence of mitigators R.II, 129. With regard to whether Mr. Cave would testify or not, Mr. Garland says that it was his own personal decision. R.II, 232.

A few concrete facts emerged from the discussion of evidence-- circumstantial, nuclear, and otherwise.

The defense came down "to what one person said, and that person was Mr. Cave." R.I, 53,55.

Garland believed that if only Cave testified and there was no other testimony, a jury could only find aggravators if it credited the circumstantial evidence presented by the State rather than the direct testimony of Cave. R.II,239. In other words, to dispute Cave one would have to rely on circumstantial evidence. R.II, 261.

Garland would put on no evidence of the mental state of Cave, his near-retardation at the time of the crime, his extensive drug abuse, his non-working lifestyle, unless it came from the mouth of Cave. Garland believed that psychological testimony would have opened the door to the jailhouse witness Bryant. R.I,56,57.

Garland feared what he called "nuclear"issues–presumably those which could explode and harm Cave. Foremost and perhaps singular among these nuclear issues was testimony from the jailhouse witness Bryant, R.I, 56, who, at the most, could have testified that he heard someone accuse Cave of being a principal and Cave did not respond. Also he would say that Cave was mean to him.

Garland had not analyzed whether the "nuclear" issues could have been used by the State as impeachment no matter from whom the evidence was received. He

was sure that there could be no use of another's statement. R.I,64-65.

Garland was sure that putting on the testimony of a psychologist because it would open doors. R.I,76.

To be sure, Garland was unsure about many things. For instance, although his understanding of the circumstantial evidence rule impacted on all of his decisions R.I,74, he wasn't sure whether it really impacted on his case. R.I.,75. Perhaps he would not have called a psychologist at any rate.

6. MRS. HINES

Garland knew that Ms. Hines, Cave's mother, had given a deposition before on at least one occasion and he provided her copies of those R.II, 143. She was the woman who had Cave confess, R.II, 144, and she wanted to see her son as more intelligent than he was. R.II, 145. She herself could not read. R.II, 145. The fact that she could not read caused her to have a confrontation with the prosecutor. R. II, 145-146.

Ms. Hines testified that she took her son three times to enroll in the Army when he was a young man and he could not pass the test in spite of the three opportunities R.III, 365-367. She never knew whether he had a driver's licence. She did not remember whether Lutrecia Freeman told her he was a drug user, R.III, 367, but Alonzo did not tell her R.III, 368. She was given only 10 or 15 minutes to look

through her deposition. R.III, 371. Mr. Garland did not speak to her regarding the plea offer but Alphonso himself did. R.III, 370.

Ms. Hines had a few conversations with Garland R.III, 374. She did not believe she ever spoke to an investigator from Garland's office except when he took him on the trip to the actual sentencing.

7. VOIR DIRE

Garland admitted that voir dire time was a difficult time for him because it was very quick, not much slower than a home movie. R.II, 136. Colton, the State prosecutor, was outstanding at voir dire. R.II, 137. R.II, 138. It is clear that the State did not announce nor did Garland ascertain whether the theory of prosecution would be that Cave had been the killer or that this was a felony murder. R.II, 139. Garland did not recall and actually thought that he had objected each time Mr. Colton began one of his dozens of questions with the hypothetical, "if it were to be shown that Mr. Cave was not the shooter." Many potential jurors had trouble executing a non-triggerman and Colton had those people excused before Garland actually entered the fray. R.II, 240-1. Garland admitted and then rescinded his own admission of deficiency of representation but does say that he could have done better.

8. MR. GARLAND'S DEFERENCE TO MR. CAVE.

Garland says that he spoke with Cave about every decision and made every

decision with him and Cave agreed about the circumstantial evidence. R.I, 67-8. The explanation was limited by Cave's ability to understand R.I, 77 Garland says that he consulted with Cave on every major issue. R.II, 250.

Although Garland admitted that Cave was not insightful, R.II, 252, he spoke with him about issues such as the circumstantial evidence rule, IQ, the plea offer R.II, 253.

9. OBJECTION TO COMMENTS BY THE STATE

Mr. Garland, recognizing that Mr. Colton made a "false statement of the law" in closing argument–that mitigating circumstance of lack of prior criminal record did not deserve any weight and did not even exist based on the evidence in the case, agreed that he should have objected. R.II, 140.

D. DISPOSITION IN THE LOWER TRIBUNAL

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

When a man, innocent of killing, is awaiting his death at the hand of the state, it is a situation of extreme moment. Mr. Cave has been on death row for twenty-one years.

It was not until last year that evidence which had been readily available to his last sentencing counsel but not used was uncovered. At the last sentencing the state finally admitted that it had been wrong and Mr. Cave had not murdered anyone. However, it persisted in its position that he was a leader in order to justify its request for death.

Evidence which would have firmly established that Mr. Cave was not a killer or a leader, and that he withdrew from the group's actions after he made every attempt to stop the killing, was ignored due to the ineffectiveness of his counsel. This evidence would have changed the outcome. In other words, Mr. Cave did not foresee, could not have foreseen, and did not participate in this young woman's death. These facts speak to actual innocence and new substantive trial. Most certainly, at a minimum, they speak to the requirement of an immediate new sentencing.

As if this evidence of ineffectiveness and its ultimate impact on the jury and the judge were not enough, there is clear, convincing, evidence that sentencing counsel failed to investigate material matters relevant to the imposition of death such as that Mr. Cave was a drug user for a dozen years before the crime and was a heroin abuser. This failure, acknowledged by counsel, resulted in a death sentence. Ignorance of the facts and failure to obtain the available facts are not tactics but ineffectiveness.

Another layer of complexity is the recent acknowledgment by the U.S. Supreme Court that factors which increase a penalty are to be decided by a sworn jury using the standard of beyond a reasonable doubt. Here the sentence was imposed solely upon the finding of a trial judge, a process which no longer withstands Constitutional scrutiny.

F. ARGUMENT

I. THE COURT BELOW ERRED BY FAILING TO ORDER A NEW TRIAL OR A NEW SENTENCING HEARING ON THE BASIS OF COMPETENT TESTIMONY, MATERIAL TO THE ISSUES OF GUILT AND PUNISHMENT, THAT CAVE HAD WITHDRAWN FROM THE ENTERPRISE AND THAT THIS WITHDRAWAL HAD BEEN COMMUNICATED TO THE OTHER MEMBERS OF THE ENTERPRISE.

Mr. Cave raised several challenges to the effectiveness of the representation he received from his trial counsel, Mr. Garland. One of these issues addressed Mr. Garland's failure to investigate or act to perpetuate the testimony of codefendant John Earl Bush. At the March 2002 hearing on his 3.850 motion, Cave called AFPD Steven Kissinger, the attorney who represented Bush. Kissinger testified about Bush's testimony at his own resentencing hearing, which provided the "leads" that Mr. Cave believed his own lawyer should have pursued, but did not. This aspect of Kissinger's testimony was expected, but Kissinger went on to disclose Bush's declarations in anticipation of his imminent demise, declarations that revealed material

evidence as to Cave's mind frame.

The U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002), addressed the issue implicated by Bush's dying declaration:

> Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was Magoch's actual killer or if he was "a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life." App. to Pet. for Cert. 46a-47a; see *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (Eighth Amendment requires finding that felony-murder defendant killed or attempted to kill); *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (qualifying *Enmund*, and holding that Eighth Amendment permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a "major participa[nt] in the felony committed" and who demonstrated "reckless indifference to human life").

Because of the significance of Kissinger's revelations to both Cave's conviction and to his sentence of death, Mr. Cave filed a motion asking the court below to reevaluate its decision and to grant rehearing in light of this newly discovered evidence. R.VII, 1056. This motion was denied on December 19, 2002. R.VII, 1069.[2]

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[2] Mr. Cave is aware of this Court's decision in *Walton v. Florida* and *Walton v. Crosby*, 847 So.2d 438 (Fla. 2003). That case is readily distinguishable. Firstly, Walton's claim was cast as newly discovered evidence and Cave acknowledges that his counsel could have and should have located the information and would have but for his ineffectiveness. He also argues other aspects of the omission of Bush's statement including whether *Ring* impacted on this set of facts. Walton's ineffectiveness claim, in pertinent part, speaks to his trial counsel's failure to rebut the role assigned to Walton with statements made by the state in companion cases, a situation not at issue here.

Cave's initial challenge to his lawyer's failure to investigate Bush's recantation.

Reduced to its essence, Mr. Cave argued below that the testimony of his codefendant Bush was evidence of such a nature that it would have changed the outcome of the trial. When he made this argument, he was relying on information provided by Bush's attorney, information that Bush would testify that Mr. Cave was not "the shooter," that is the person who actually committed the act of murder.

Walton introduced evidence at his second 3.850 hearing *through Van Royal's counsel* that Van Royal had told his attorneys that Walton was "merely a bystander." However, unlike in the instant case, Van Royal was available.

Here the unavailability of Bush was procured by execution but his words were still heard from the mouth of the prosecutor in his hypothetical in closing argument where he pretended to present to the jury the "argument" that a dead Bush would have made for his own leniency. (Trial Tr 170401705) The state brought Bush into the courtroom

After reviewing the body of conflicting statements by Van Royal, this Court declared that the evidence was not newly discovered but "simply a new version of the events from a witness/participant...." Van Royal was untrustworthy and this Court held that the evidence, if introduced, would be of negligible effect because of the body of impeachment evidence of Van Royal's credibility.

On the other hand, Bush's statements, on the eve of his death carry the index of reliability as more fully discussed herein. Cave's statements about the events of that fateful night remained consistent. Bush verified and supported what Cave had said all along and it was ineffective not to present this available evidence to the jury. In a close case such as this, where it was conceded by the state that Cave killed no one, this important information would surely resulted in a life sentence.

However, the evidence that emerged at Cave's 3.850 hearing was much more dramatic and far more material to the question of the fundamental trustworthiness of both the conviction and the sentence of death imposed on Mr. Cave. This evidence speaks not only to the size difference between a life and death sentence, but to Mr. Cave's very complicity in the murder committed by Bush and Parker.

Mr. Garland sought a stay of Bush's execution so that Bush's testimony could be brought to Cave's sentencing jury. When he was unsuccessful in keeping Bush's execution from taking place, Garland abandoned his pursuit of this important and perhaps dispositive testimony.[3] Cave's challenge to the effectiveness of his counsel and his failure to pursue and preserve Bush's testimony turned out, in light

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[3] If Bush's testimony was sufficiently significant to justify a petition to the Supreme Court of the United States to stay an execution, it would have been sufficiently significant to, failing a stay of execution, seek the taking of a deposition to preserve Bush's testimony. Garland took no such action. Mr. Garland testified that he did not depose Mr. Bush because he had a good idea of what he would have said. R.I, 142. Mr. Garland believed that Bush would testify that Cave was not the triggerman. R.I, 102. While this information was important, the State ultimately conceded this fact, and did not seek death on the grounds that Cave was the shooter. Nevertheless, Mr. Garland's false confidence that he was in control of the facts inured to the detriment of Mr. Cave. What Bush actually said in his dying declaration, as opposed to what Garland expected he would have said if deposed, was not discovered until Kissinger's testimony at Cave's 3.850 hearing.

of Mr. Kissinger's testimony, to be prophetic.

Attorney Steven Kissinger's testimony about John Earl Bush's dying declaration.

Succinctly, Mr. Kissinger said that Bush admitted when faced with death that Cave not only did not want to kill the victim, but he attempted to dissuade the others from this course of conduct and, ultimately, withdrew from the endeavor. Cave got in the car, just as Johnson had. Johnson was the only codefendant who received a life sentence *ab initio.*

Kissinger admitted that he was surprised that he had not been called as a witness at Cave's resentencing hearing because he "made a specific effort to contact Mr. Garland and tell him of the statements that Mr. Bush had made to [Kissinger] and the circumstances under which they were made." R.III, 404. Specifically, Mr. Kissinger made it clear that Mr. Bush would testify that Mr. Cave was not the shooter. R.III, 403. The circumstances of Mr. Bush's declarations were clearly in anticipation of his imminent death, R.III,387:

> Q: [by undersigned counsel] Did you have any conversations with Mr. Bush about Mr. Cave which took place shortly before Mr. Bush's death.
>
> A. I did.
>
> Q. Was Mr. Bush aware that he was about to be executed?
>
> A. I informed him that his last legal proceeding had been denied and that there were no further legal proceedings and that he would be executed

in the morning.

Q. The next morning?....

It was not until Mr. Kissinger appeared, pursuant to a defense subpoena, to give testimony in the court below about what Bush had told him the night before his execution that Mr. Cave knew that there was not only external evidentiary support for his continuous and consistent position that he never intended to harm the victim, but also that he tried to dissuade the others from their path when he realized what was about to take place, and that ultimately he withdrew from the enterprise. Mr. Kissinger painted a vivid picture with information that he had learned for the first time from Bush immediately before the execution: Cave had confronted an armed Parker, arguing that the victim should be left at the scene. When it appeared that Parker would not yield, Cave completely withdrew himself from the scene and got into the car.

What Bush's declaration to Kissinger established for the first time was that the persons who accomplished the shooting and the stabbing of the victim, that is the actual murder, appreciated and understood that Mr. Cave was communicating his attempt to dissuade them, and to renounce any pretense of joint action. They understood that he was withdrawing from their further conduct. These facts have profound legal significance.

In relevant part, Kissinger related what Bush had told him. R.III, 391-193. Mr. Bush was distraught because he felt responsible for Mr. Cave's predicament. Bush said that they had robbed and kidnaped the store clerk and, when they arrived at a certain area away from town, Mr. Parker "directed Mr. Cave to provide him with a firearm that Mr. Cave had in his possession which Mr. Cave ... did. R. III, 392. Bush stated that Parker was clearly "running the show." R.III, 393. Parker said that he was going to do what he had do. *Id*. Kissinger continued, R.III, 393-394:

> At this point Mr. Cave - Mr. Bush told me that Mr. Cave became upset and that he told Mr. Parker basically that it was - that he didn't have ... to do this. Mr. Parker to my understanding repeated some statement to the effect that it became obvious that he was going to go through with it. Mr. Cave not being successful in his attempts to affirm [sic] what appeared inevitable, left Mr. Parker and Mr. Bush. And if I recall Mr. Bush's statement accurately, went back to the vehicle and got inside the vehicle and left them behind. Mr. Bush then admitted that at that point Mr. Parker told him to stab the victim, that he went over to her and that he did stab her, and that Mr. Parker then took the firearm and shot the victim causing her death.

Mr. Kissinger testified that this was the first time he was relating the statements, which he characterized as new to the "extent that it indicated that Mr. Cave...had made an attempt to withdraw from the activities of Mr. Bush and Mr. Parker, that portion of it was new and I felt it was very important and something Mr. Garland should know." R. III, 404.

This testimony should be viewed not only as a gross failure of the duty to

represent his client competently but also through the prism of newly discovered evidence. The court below charted a course that really did not reach the difficult issues, and addressed Garland's view of what he mistakenly believed Bush would have said instead of Kissinger's testimony about what Bush really said. The court below summarized the evidence in it Order Denying Motion for Post-Conviction Relief, R.VII, 1069 at 18:

> Attorney Steven Kissinger represented co-defendant John Earl Bush. According to Mr. Garland, Kissinger approached Garland and related that Bush felt somewhat responsible for Cave's predicament and would testify that Cave was not the triggerman.

Because the actual testimony given by Kissinger was much broader than that - not only was Cave not the shooter, a point conceded by the State at resentencing - but also that Cave attempted to stop the shooting and when he could not, he abandoned the endeavor, Mr. Cave filed a motion urging that the court below did not give proper weight to the evidentiary issue raised by Mr. Kissinger's testimony.

Kissinger's testimony about Bush's declaration is material to issues of guilt and punishment.

Mr. Cave was convicted and sentenced to death for murder on a theory of vicarious liability. The various theories on which guilt and punishment can be based on the defendant's vicarious liability for what someone else did, where the defendant

himself did not commit the criminal act, such as the felony murder rule, or liability for the acts of coconspirators share important commonalities. The central point is that the act of the other person was a reasonably foreseeable consequence of conduct in which the defendant voluntarily joined. Florida Statutes § 777.04(5)(c) provides:

> It is a defense to a charge of ... criminal conspiracy that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant *** (c) After conspiring with one or more persons to commit an offense, persuaded such persons not to do so or otherwise prevented commission of the offense.

Bush's statement establishes the "circumstances manifesting a complete and voluntary renunciation" of the criminal plan carried out by Parker and Bush. However, Cave was not able to dissuade Parker from his criminal purpose. Thus, the statutory defense is not fully available. See, *State v. Bauman*, 425 So.2d 32 (Fla.4DCA 1982) ("mere endeavor to dissuade coconspirators is insufficient to constitute statutory defense of withdrawal from conspiracy"). Bush's testimony established that Cave's attempt to dissuade was actually communicated to the others, and that they were aware that, failing to stop them, Cave withdrew from them, clearly communicating to Parker and Bush that he would not become engaged in murder. In *Cave v. State*, 727 So. 2d 227 (Fla. 1998), the opinion which affirmed Cave's third sentence of death, this Court stated, "[t]he trial court. . . found that Cave was a

ringleader: 'The defendant's role in the entire criminal episode . . .shows that he exercised a leadership role throughout." *Id*. at 229. Bush's statement clearly shows that the conclusion reached by the trial court was wrong. To this extent, Bush's testimony was newly discovered, and was material to issues of guilt and punishment or a statutory mitigator.

Bush's statement is material to issues of guilt or punishment. The United States Supreme Court defined materiality in *United States v. Bagley*, 473 U.S. 667, 115 S.Ct. 3375, 87 L.Ed.2d 481 (1985):

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Here, Parker and Bush, the "shooter" and the "stabber" respectively, were sentenced to death. Johnson, who stayed in the car, was sentenced to life in prison. Cave took active steps to dissuade Parker from his plan. This effort was communicated to Parker and Bush, and Bush observed not only the effort, but Cave's physical withdrawal to underline his renunciation of Parker's plan. Clearly, this newly discovered evidence impacts profoundly on the proportionality of Cave's sentence of death.

Finally, Kissinger's testimony about what Bush told him on the night before his execution is competent. Florida Statutes § 90.804(2)(b) excludes from the hearsay rule statements that are made under the declarant's belief of impending death. The rule provides: "In a civil or criminal trial, a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believe to be impending death or the circumstances surrounding impending death." The question of when the statement is made, in the face of impending death, is met. While the court below made no ruling on this matter, Kissinger's testimony, quoted above, clearly show that Bush knew that he was going to die. *See, Pope v. State*, 679 So.2d 710 (Fla.1986) (Court should satisfy itself the declarant knew death was imminent). The other element of this exception to the hearsay rule, that the subject of the statement relate to the circumstances surrounding the declarant's impending death, is also met. What Bush was discussing, after Attorney Kissinger told him he would be executed in the morning, were the circumstances surrounding his impending death.

The Law Revision Council Note to Section 2(b) refers to the reasoning of McCormick, *Evidence* § 283 (2nd ed. 1970):

> The requirement of consciousness of impending death arguably tends to guarantee a sufficient degree of special reliability, and the requirement

> that declarant be dead and thus unavailable as a witness is an ample showing of the necessity for the use of hearsay. This simple rationale of dying declarations sufficed the courts up to the beginning of the eighteen hundreds, and these declarations were admitted in civil and criminal cases without distinction and seemingly without untoward results.

Here, the guarantee of special reliability is present. The execution of Bush by the state, and his consequent unavailability, is an ample showing of the necessity for this use of this hearsay. Not only are there no untoward results that are likely to flow from consideration of this statement, failure to consider what Bush had to say will corrupt the purpose of review by this court. As Justice Anstead said, dissenting to *White v. State*, 664 So.2d 242 (Fla.1995):

> The thoroughness and quality of this Court's review is relied upon by our society as an important safeguard for preventing executions where a serious question remains as to the fairness of the proceedings leading up to the imposition of the death penalty.

Fairness of the proceedings leading up to the imposition of the death penalty for Mr. Cave require that the case be remanded for retrial or resentencing with due consideration of Mr. Cave's withdrawal after his efforts to dissuade the others, and his communication of both his disapproval and his withdrawal to the others.

It would be wrong to execute Mr. Cave on a theory of vicarious liability when the facts do not support such a theory. Rather the facts support actual innocence of murder and require vacation of the sentence. In the lesser alternative, a new

sentencing trial is required before a jury with all indices of due process.

II. THE FLORIDA DEATH PENALTY SENTENCING SCHEME VIOLATES THE FLORIDA AND UNITED STATES CONSTITUTIONS. *RING v. ARIZONA* REQUIRES THAT ANY FACT WHICH ENHANCES A SENTENCE BE FOUND BY A JURY. THIS PRONOUNCEMENT, WHEN APPLIED TO FLORIDA LAW, REQUIRES THAT ANY AGGRAVATING FACTOR WHICH COULD JUSTIFY THE IMPOSITION OF DEATH BE DECIDED BY A JURY TO THE EXCLUSION OF A REASONABLE DOUBT JUST AS ANY OTHER ELEMENT OF A CRIME. ELEMENTS OF A CRIME MUST ALSO BE INCLUDED IN THE INDICTMENT AND BE THE SUBJECT OF PROPER INSTRUCTION TO THE JURY TO WITHSTAND FEDERAL AND STATE CONSTITUTIONAL SCRUTINY.

Mr. Cave is not a newcomer to his recognition that the role of the jury in finding the elements of the crime are sacrosanct. In his moving papers, he cited to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for the proposition which was the holding in *Apprendi* and had been foreshadowed by *Jones v. United States,* 526 U.S. 227 n.6 (1999), that any fact which increases punishment must be found beyond a reasonable doubt by the jury. R.IV, 505. He continued, "[a]ny lesser standard, or any other factfinder, abrogates the jury function and violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution as well as the Florida Constitution." R.IV,505.

Mr. Cave's position also spoke to the lack of unanimity required under the current death penalty scheme; the fact that the recommendations by the jury were not clear and therefore not reliable; that no special verdicts were utilized to assist the real

sentencer–the court; that this particular sentence was unreliable because not only the eleven jurors cannot be said to have agreed on any particular points, but also the trial court itself disagreed on at least one of the aggravating factors. R.IV, 506. In sum, Mr. Cave's argument was that the death penalty scheme could not withstand Constitutional scrutiny. R.IV, 506.

Mr. Cave submits that his position was a correct one when taken and *Ring v. Arizona*, validated his reliance on *Apprendi*.

The United States Supreme Court decided a case of singular importance when it decided *Ring v. Arizona*, which placed death penalty sentencing squarely under the ambit of *Apprendi v. New Jersey*. These cases reaffirm that the place of a jury in determining all elements of a crime is a bedrock of Anglo-Saxon law.

The watershed nature of the changes wrought by *Jones v. United States* and *Apprendi* have echoed through the federal and state court systems for four years. At the time that *Jones* was decided, it appeared to be the consensus of the pundits that it was merely a "statutory construction" case and that, in footnote 6, the Supreme Court merely engaged in a foray into dicta. Although litigators raised in various courts in this land the *"Jones"* argument that no matter the labeling, if a fact increased the potential penalty for a crime, it was an element, that position was soundly rejected. In other words, lower courts seemed to be telling us that the Supreme Court did not

mean what it said in footnote 6.

Courts were reluctant to make the determination that a particular fact–previously comfortably within the purview of sentencing judges–fit into the *Jones* definition, because when that fact was recognized as an element, many and varied consequences flowed therefrom, not the least of which was that the fact must be pled in the Indictment and must be established unanimously before the jury beyond a reasonable doubt. Absent such allegation and proof, the exclusion of an essential element of a crime from the state's proof, rendered the evidence of the crime insufficient as a matter of law.

Now, this reading of *Jones* was not universally accepted nor honored. In fact, the decisions of the various courts across the land–in cases which were not squarely on point–spoke to the narrowness of *Jones*. In other words, *Jones* was thought to speak to the federal carjacking statute or, perhaps, it could be stretched to other federal statutes identically written.

The United States Supreme Court in the following Term made clear that footnote 6 in *Jones*, was not a mere aberration nor a suggestion. It was the law. If a fact increased the penalty for a crime, it was an element.[4] *Apprendi*, of course,

[4] Omitted from this discussion, but nevertheless important to some of the discussion *infra*, is the exception to *Apprendi* for the traditional sentencing factor of

spoke to the increase of sentence for a New Jersey defendant because the trial court found–without benefit of jury and not to the exclusion of a reasonable doubt–that the offense was a hate crime. This raised Apprendi's incarceration period by two years.

None of the myriad of arguments of the State of New Jersey were accepted as justifying the increase of Apprendi's sentence because the finding of hate crime was by a trial court *judge* alone. The state argued that had the defendant been sentenced to an aggregate for the hate crime and the other crimes of conviction his sentence would have been justified. The state argued that the hate crime finding was labeled a sentencing consideration/enhancement so it must be a sentencing factor not an element. Those were rejected along with the argument that a sentence increase of two additional years of incarceration was *de minimis*.

Concerns were raised by litigants after *Apprendi* that *its holding logically applied to death penalty imposition due to the aggravating circumstances* which, at least in Florida, were not specifically pled in the Indictment, were not proven beyond a reasonable doubt, and that were merely a part of the "advisory" rather than decision-making process of the jury. These concerns were, and continue to be, the subject of frequent and heated debate presumably because of the potential

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prior conviction for a violent felony. See, *Almarendez-Torres v. United States*, 523 U.S. 224 (1998).

ramifications to the system.

And then came *Ring v. Arizona*. The death penalty scheme in Arizona has been referred to by the United States Supreme Court as without distinction from the Florida scheme. See, *Walton v. Arizona* (overruled in pertinent part by *Ring).*[5] The state would have this relegated to an archaic bit of dicta.

Ring, in finding that the element of the existence of an aggravating factor cannot be established solely by the trial court, set off a firestorm of Florida litigation.

The positions have solidified both on this Court and between the litigants before this Court. (See extensive discussions in *Botteson* and *King* and their progeny.) It would be presumptuous for Mr. Cave to delineate what he believes the thought processes of this very Court in those very recent opinions. Instead, recognizing those positions, Mr. Cave would like to explore what he believes *Ring* requires of Florida. There is the school of thought that Arizona's capital scheme was so different from Florida's that equating them was without reason. It continues that because Florida has decided–post *Apprendi*, pre-*Ring*, that Florida's maximum statutory sentence for first degree murder is death, Florida and Arizona are worlds

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[5] "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*Walton,* 497 U.S. *at* 648.

apart. *Mills v. Moore*, 786 So2d. 523 (Fla. 2002).

Mr. Cave would suggest that the real difference between Florida and Arizona is that the Arizona jury does not make a recommendation in a proceeding–far from our traditional understanding of a trial regarding the penalty. If aggravating circumstances are to be found, the judge must make that determination. Florida differs only because it provides to the sentencer the non-unanimous recommendation of twelve people. The procedural observation is made that most defendants have lost their opportunity to raise this issue on varied procedural grounds.

The majority of this Court has found that there is no reason to grant relief for current claimants under *Ring*. Implicit in these decisions is that the Florida Death Scheme is Constitutional. Some appear to take the position that it needs no changes or merely minor tweaking to make it comport with the "non-changes" wrought by *Ring*, and the solemn deference being given to the fact that the Supreme Court of the United States did not *literally and officially* overrule certain decisional law which would mandate reconsideration of the scheme.

Another line of analysis concludes that Florida's statute needs substantial changes but litigants who have been convicted and sentenced need not be given relief.

Good faith concerns about the upheaval which a true recognition of what is both patent and latent in *Ring* cannot be used to support this system which does not

any longer comport with the United States nor the Florida Constitutions. Death is Different and we all know it.

As an initial consideration, Mr. Cave would like to address the "practical implication" concerns which have been expressed. Mr. Cave would respectfully submit that the natural hesitance to overturn the death sentences of a substantial number of Florida's death row inmates would, under the proposed reading of *Ring,* require new sentencing hearings and is not a legal basis on which to decide whether *Ring* is applicable. Although an understandable reaction, it is respectfully submitted that factoring in the "catastrophic effect on the administration of justice" should not play a part in whether *Ring* should apply to Florida. To the extent that these extraneous considerations may have impacted on Post-*Ring* decisions, those cases should be reconsidered. See, for instance, the special concurrence of Justice Wells in *Bottoson*. ("Extending *Ring* so as to render Florida's capital sentencing statute unconstitutional as applied...would have a catastrophic effect on the administration of justice in Florida and would seriously undermine our citizens' faith in Florida' judicial system).

Mr. Cave, without belaboring the differing views between the members of this Court on the *Ring* issue, would like to make his position clear–recognizing that *Bottoson, King,* and their progeny do not support Mr. Cave's reading of *Ring*.

King and *Bottoson* were per curiam opinions with extensive substantive discussion in concurrences. The U.S. Supreme Court did not direct this Court to reconsider the cases in light of its decision in *Ring*, hence they were affirmed.[6]

Mr. Cave submits that:

- *Ring* must be extended to the Florida Death Penalty Scheme
- *Ring* requires that statutory aggravating circumstances must be pled in the Indictment and proven to the jury unanimously and beyond a reasonable doubt
- This Court should recognize that an advisory rendition from a jury is not a finding on an element of a crime nor does it make the jury the sentencer
- Our death penalty scheme, to withstand scrutiny under *Ring*, must provide for the submission of all factors which may justify the imposition of the sentence of death rather than life (with parole possible in 25 years in Mr. Cave's case) to the jury
- *Mills v. Moore*, 786 So.2d 532 (Fla.2001)'s distinction between statutory maximum was not informed by the U.S. Supreme Court's overruling of *Walton* nor its decision in *Ring*.

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[6] It is respectfully suggested that the lifting of the stay, at least at the time when *Bottteson* and *King* were being considered, was equally consistent with the appropriateness of a review of the death penalty scheme by this Court.

- Proper jury instructions must be given
- The jury must hear and find unanimously which if any aggravating circumstance was established beyond and to the exclusion of a reasonable doubt.

A fair reading of the Florida Statute reveals the inescapable conclusion that it is not the jury at all that sentences the defendant to death. Both statutory and decisional law establish that the jury is merely an advisor to the judge who bears the real burden of deciding whether a human lives or dies; the jury is not required to render a unanimous recommendation let alone a verdict; it is not even required to render a verdict such that any reviewer can ascertain the split on any of the issues decided.

There should exist no question but that the decision of the jury in the penalty phase is of such a different nature–unanimity and finality as starting points–that it is not even a cousin of the "recommendation" arrived at after the penalty phase and *before the sentencing.*

The hearing is not the actual sentencing and the advice given by the jury is not a real verdict. After the recommendation from the jury, the trial court sets a sentencing hearing at which the defendant and the State may present evidence. This step would be superfluous if the jury had decided the sentence, or at most, would be a re-evaluation of the factors actually found by the jury.

As further proof that the jury is not the sentencer, the trial court when it *actually sentences the defendant* is required to analyze *its decision-making process* for this Court's review. It cannot know the decision-making process of the jury, and this Court's review function could not exist without the *Judge's Sentencing Order* analyzing his findings and his decision-making process.

Since there is no record of the evaluative process of the jury, the sentencing court necessarily must begin its decision making from the beginning–the only difference being the split of the jury to guide it. Since it may override the jury recommendation, and since it is not guided in any way as to the split on particular issues or other deliberative matters which resulted in the split, it must start from its own review of the evidence and its own decision on whether there is proof beyond a reasonable doubt as to the aggravating circumstances, and whether statutory or other mitigating factors were established and how they fare in the weighing process.

It cannot be said after *Ring* that the possibility of a death sentence is encompassed by the jury's determination of guilt. The pre-*Ring* decisions to the contrary cannot withstand a *Ring* analysis. No person may be sentenced to death unless an aggravating factor is found beyond a reasonable doubt *by the trial judge in his findings.* If a conviction of the crime standing alone does not automatically equate to a death sentence, *Ring* requires some other beyond a reasonable doubt

determination.

It is respectfully suggested that this Court's decision in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), did not completely consider or decide the necessary implications of *Ring*. Mr. Cave's 1996 sentence of death must be vacated because an element of the crime–aggravating factors–were found by the sentencing judge rather than, under the proper standard, by the sworn jury.[7]

"Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi* 530 U.S. at 494, n. 19, the Sixth Amendment requires that they be found by a jury." *Ring*, at 577. This is the bare bones holding of *Ring*. However, its impact is not nearly so narrow.

One of the most important functions of all courts is to do justice. It is also an important societal goal that the citizenry *perceive* that justice has been done. Imposition of the death penalty is a socially, religiously, morally and ethically charged area of the law–one in which the recognition that "death is different" must be spoken to by our courts in clear, unambiguous terms.

The right to have a jury determine the fate of all defendants is a sacred and

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[7] Mr. Cave recognizes that members of this Court have upheld the death sentences in *Bottoson, supra*, and in *King v. Moore*, 831 So.2d 143 (Fla. 2002), because the US Supreme Court did not *specifically* overrule *Spaziano* and *Hildwin* in *Ring*, and because of the findings of prior violent felonies by the respective juries.

time-honored one. As Justice Scalia noted in his concurring opinion in which Justice Thomas joined, there is an accelerating "propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is ok,...." *Ring* at 578.

Unfortunately, although *Ring* sounds loudly and clearly that those aggravating factors encompassed in the imposition of the death penalty must be proven to our citizens, not cast in the role of considerations solely for a court, Florida continues this process.

Justice Scalia expressed his concern that "our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge found* that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." *Id.* at 579. (Emphasis supplied).

The US Supreme Court spoke in five voices. It did not resolve all questions and it appears that it raised as many questions for this Court as it decided.

We know that *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990). This is so because of the intervening U.S. Supreme Court's decision in *Apprendi*. In 1990 the additional facts necessary to find that a death sentence was justified in Arizona were found by a judge. *Apprendi* changed all that. *Ring*, at 588. We know that Arizona has a system which if not identical to Florida's literally, is identical in its practical application. *Ring*, at 588.

Arizona law forbade the imposition of death unless a trial judge conducted a separate sentencing hearing to determine aggravating circumstances. If no aggravating circumstance was found, there was no death penalty. If one or more aggravating circumstances was established, a weighing of that/those circumstances against all mitigating evidence was had and only if the aggravating circumstances outweighed the mitigating evidence was death possible. See, *Ring*, citing to Arizona Statutes § 13-703 and § 1105(C) (West 2001), at 593. That Statute is virtually identical to the Florida Statute except that Florida interposes a jury recommendation process *before the judge decides the sentence.*

The two aggravating factors found by the *Ring* sentencing court were HAC and pecuniary gain. *Id.* at 595. Ring, like Cave, was found guilty of felony murder and was not the shooter of this victim. Ring was told on appeal that the US Supreme Court had upheld Arizona's very sentencing scheme in *Walton v. Arizona*,497 U.S.

639 (1990) and that *Apprendi changed nothing.*[8] *Id.*

Based solely on the conviction for felony murder–absent any judicial determination of aggravating circumstance–both Ring and Cave were subject to the maximum sentence of life.[9]

What was decided in Ring is that the jury must find as an element of the crime the aggravating circumstance which gave rise to the possibility of a death sentence. *Id.* at n.4. Justice Scalia encapsulated what *Ring* required: "What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so–by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination

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[8] Justice Stevens dissented in *Walton*, urging that the Sixth Amendment required that aggravating circumstances were elements of capital murder in Arizona because when they are not established, the death penalty was unavailable. *Ring*, at 599.

[9] Mr. Cave has presented an issue of great importance which deals with the first learned statement of Bush that Mr. Cave withdrew from the enterprise and attempted to dissuade the participants from harming this young woman. He believes that that issue, which should be dispositive of the instant appeal, requires not only a new sentencing but also a new trial. When the issue was presented to the trial court, the Motion for Rehearing was denied–we contend erroneously. By seeking resentencing under the current set of circumstances, he in no way waives his desire for a new guilt phase based upon this heretofore unknown and undiscoverable evidence of his substantive withdrawal from participation in the death itself.

(where it logically belongs anyway) in the guilt phase. *Id*. at 3.

Ring should be applied to Florida's sentencing scheme and Mr. Cave should be granted a new sentencing trial with all appropriate due process safeguards.

III. COUNSEL ABROGATED HIS DUTY TO INVESTIGATE AND TO PRESENT SUFFICIENT MITIGATION FACTS BEFORE MR. CAVE'S SENTENCING JURY.

Jeffrey Garland knew Alphonso cave since at least the beginning of his representation in 1993. He testified that he spent untold hours with Cave. Undoubtedly, he did gather some evidence for the sentencing presentation, yet his investigating action was cursory because he let his own personal biases color his perceptions and failed to conduct the most rudimentary follow-up investigation. Garland had a fictionalized picture of Cave in his mind and wished to present this person to the jury–surely they would not sentence this man to death. Perhaps not, but while indulging in his fiction, Garland failed to gather relevant material information which would have persuaded the jury that Cave was, at the time of the offense, of marginal intelligence, easily persuaded, stoned on drugs during the entire decade of the 1970's, using drugs immediately before this crime, had such poor judgment–probably due to drugs–that he could not evaluate the sway held over him by his cohorts, did not hold a traditional job for any length of time, and was using drugs excessively the night of the incident.

Instead the fictionalized Cave was intelligent but had been reared in unfortunate circumstances so that his true intelligence did not shine through; was a hard, steady worker; was an occasional, recreational drug user and did not "use" such drugs as heroin as a "drug" but instead only as a businessman might the traditional cocktail.

Whether these perceptions were well-meaning begs the question. Because Cave was smart, no evidence of his borderline retarded functioning in 1982 was presented. Because Cave worked hard, no investigation was done into the actual lackluster work record and the fact that while Ms. Freeman was pregnant with his child, and only 14 years old herself, she had to work to support them or beg from her mother because rather than work he stayed home completely oblivious to the world shooting heroin and its companion drugs. Because Cave was only a recreational drug user in the eyes of Garland, no contact was made with the mother of his child or his 1993 girlfriend and lackluster attempts were made to do so *only* to either find his now-deceased son to humanize Cave or to establish that he had provided for his son–not to learn new information, but to verify a preconception.

Mr. Garland recollected that the medical records introduced in the 1993 hearing demonstrated that Mr. Cave was borderline retarded, which was consistent with his review of school records. However, Mr. Garland interposed his own belief that Mr. Cave was not retarded, rather that his upbringing and family support were lacking,

causing the retarded test result. R.I, 30.

Mr. Garland's working theories in both sentencings included the projection of a portrait of Mr. Cave, not as retarded at the time of the offenses, R.I, 38, but rather as a person who had bettered himself while incarcerated. R.I, 33. He did not agree with the proposition that the IQ of Mr. Cave at the time of the offense was the relevant IQ to be used by the jurors for their analyses. R.I, 34.

Had Garland used the tools of which he was aware: psychological examinations contemporaneous with the offense, school records, the observations of his brother and the mother of his child, rather than rely on his own unsupported eleven-year-later observations, Cave would have had a meaningful mitigation presentation. Failure to locate the facts is not strategy, it is ineffective assistance of counsel.

Rather than marshal this evidence, Garland and Cave decided together–according to Garland– that testimony directly from Cave about remorse and conversion, and only circumstantial evidence of aggravating circumstances, would be enough to avoid the death penalty - no further evidence would be necessary. R. I, 105. Garland did not want to present the 1982 version of Cave who was a drug addict and had a borderline IQ. Not surprisingly, all of the aggravating information put on by the State dealt with the 1982 version of Cave which went virtually unchallenged. R.I, 110.

The complete picture of the 1982 Cave would have carried the day, a man who was neither shooter nor moving force in the crime, a man who was not eligible for the death penalty.

Garland based his preparation for the 1996 sentencing on information which came directly or indirectly from Mr. Cave concerning his drug use. Absent independent investigation, Garland was operating under the presumption that Cave had only experimented with drugs and was using alcohol and marijuana on the day of the offence. R.I, 43, 44. Had Garland conducted an investigation into this aspect of Mr. Cave's life, taken what Cave told him with skepticism, a different picture of Cave would have emerged. It is not a disservice to Cave to recognize that a man who has been a drug abuser for at least the twelve years previous to a crime might not be the best source of information about that drug use. Neither might be his mother. Couple those observations with the natural fear felt by Mr. Cave when he found himself fighting for his very life, and the limited intelligence and experiential framework through which Cave saw life, as well as his desire–inculcated by then-fifteen years of incarceration–to conform his conduct to those in authority, and one can readily understand why Mr. Cave's version should have been confirmed.

Leutrecia Freeman was the woman who knew the Cave of the late 1970's and early 1980's, who gave birth to his son in 1979. Had Garland spoken to her he would

have discovered that during the late 1970's Cave was regularly using heroin, admitted to her that he used heroin, a drug of more moment than the marijuana and alcohol use acknowledged by the picture of Cave carried by Garland into the sentencing. Freeman was willing to be a witness not only in the 1996 sentencing, but in the substantive trial and in 1993 as well but was never called. R. III, 276. Ms. Freeman was both willing to testify and easily locateable in 1996 because she was in prison. R. III, 287.

Confirming Ms. Freeman's observations was Defense Expert Witness Dr. E. Michael Gutman. It is certainly conceivable that Mr. Cave had more confidence and had a steadier relationship with Mr. Garland than Dr. Gutman who had just recently met. Yet Cave admitted to Dr. Gutman that he was using drugs throughout the entire 1970's. R. III, 339, 344. Dr. Gutman testified within a reasonable degree of medical certainty that Cave was in a state of drug influence and habituation prior to the offense. R. III, 350. Cave used heroin three to five times per week. R. III, 351, and was psychologically dependant. R. III, 353.

Garland admitted that he proceeded under the belief that Cave was not addicted to heroin, rather, that he used it like someone would drink socially. R. II, 189. In recognizing the failings of his investigation for the resentencing, Garland admitted that he would have had to consider information about Cave's heroin addiction from

Freeman R. II, 256. Garland admitted his own lack of preparation and investigation: he had no evidence that Cave suffered from substantial and prolonged drug use R. II, 132.

His investigator did little except drive the family from the East to the West Coast in order that they could testify. He did not check with the records of the Department of Corrections or otherwise try to locate Freeman or presumably others. If he had, he would have found that Freeman was incarcerated and readily available. R. II, 257. This, despite the fact that Garland had available to him with leave from the court any reasonable expenditures for investigation and /or experts.

The recent U.S. Supreme Court decision of *Wiggins v. Smith* is dispositive of this issue. In *Wiggins*, the defense team relied upon the presentence report as well as a social services report both of which contained background on Wiggins, much as Garland relied on old, incorrect or incomplete mental status reports.[10] The Supreme Court noted that because counsel were aware of some aspects of Wiggins' background that knowledge did not excuse them from further investigation, but rather triggered an obligation to look further into the defendant's background. In this case Garland had been working with Cave since 1993. Garland's actual knowledge of the

[10] Use of the more recent evaluation caused Garland to worry about opening doors.

deficient intelligence quotient of Cave in 1982, and the cursory knowledge that he had concerning some drug use should have *put him on notice to investigate.* Instead Garland proceeded exactly in the manner which the Supreme Court has found is flawed, fashioning a defense on lack of knowledge.

"[R]ather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself unreasonable*." *Wiggins* vs. Smith, 123 S. Ct. 2527, 2537 (2003).

Although, as here, substantial evidence existed which spoke to the penalty phase of his death case, Wiggins' counsel failed to engage a forensic social worker to prepare a social history because Wiggins' counsel had decided to conduct the penalty phase by focusing their efforts on retrying the factual case. That focus did not excuse the necessity to investigate the mitigation phase just as Garland's created image of Cave did not excuse him meeting the real Cave of 1982.

The United States District Court, which ruled on *Wiggins'* Motion to Vacate under Title 28 USC § 2254, soundly rejected the State's argument that "retrying the case" was a valid strategy. In order to be a valid strategy, it must be reasonable, based on correct principles of law, and based on information gathered *after* conducting a reasonable investigation.

In this case, Garland's decisions regarding Cave's 1996 sentencing cannot

easily be dismissed as "strategic decisions." As *Wiggins* instructs, strategic decisions can only be made after a reasonable investigation. Garland's failure to investigate precluded the introduction of mitigating evidence concerning Cave's drug use.

Garland recollected that the medical records introduced in the 1993 hearing demonstrated that Mr. Cave was borderline retarded, which was consistent with his review of school records. However, Mr. Garland interposed *his own belief* that Mr. Cave was not retarded, rather that his upbringing and family support were lacking, causing the retarded test result. R.I, 30. This deficiency is on two fronts - Garland operating without reliance of professional medical evaluators, and his failure to fully investigate.

Mr. Garland's working theories in both sentencings included the projection of a portrait of Mr. Cave, not as retarded at the time of the offenses, R.I, 38, but rather as a person who had bettered himself while incarcerated. R.I, 33. He did not agree with the proposition that the IQ of Mr. Cave at the time of the offense was the relevant IQ to be used by the jurors for their analyses. R.I, 34. The State knew better.

Garland cannot be excused in his duty to investigate because of his stated fear of "opening a door." R.I, 53. He had to have the evidence in hand, evaluate the

evidence, discuss the evidence with Mr. Cave and then and only then could there be any reasonable decision to use or not to use the results of the investigation. This failure is perhaps no more clearer then in Garland's failure to procure and introduce the evidence of co-defendant Bush who stated before he himself was executed that Cave was not the leader and in fact tried to dissuade the others from shooting the clerk.

Wiggins has made clear that the principles of *Strickland* are indeed 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. In this case, the decision not to prepare a mitigation case was based not only on poor investigation, but based on a incorrect legal principles.

There can be no meaningful argument made that Cave waived this dispositive though ignored mitigation although the failure to present this meaningful information spoke to the ease with which the jury could impose death.

Because the law requires investigation in order to arrive at justifiable strategy decisions, counsel's failure to investigate relevant information, and the necessary impact which this information would have on the sentencer, requires a remand for resentencing.

IV. MR. CAVE'S TRIAL COUNSEL WAS INEFFECTIVE AND THAT

INEFFECTIVENESS SO GUTTED THE DECISIONAL PROCESS THAT THE SENTENCE OF DEATH SHOULD HAVE BEEN VACATED. THE EVIDENCE PRESENTED TO THE POST-CONVICTION COURT WAS SUCH THAT PATENT INEFFECTIVENESS AND RESULTANT PREJUDICE WERE ESTABLISHED.

> People who are well represented at trial do not get the death penalty. . . I have yet to see a death case among the dozens coming to the Supreme Court on the eve-of-execution stay applications in which the defendant was well represented at trial.
>
> Justice Ruth Bader Ginsburg.

Comments made April 9, 2001, in a lecture at the University of the District of Columbia, *The Champion*, June 2001.

This case is before this Court on appeal from the denial of post-conviction relief. Mr. Cave has been sentenced to death three separate times. Mr. Cave urges this Court to set aside any exhaustion of patience with this case. Mr. Cave was "not well represented" at this sentencing trial. For the first time at the evidentiary hearing from which Mr. Cave appeals, the trial court had before it testimony, albeit deathbed hearsay, about the relative roles of the three defendants sentenced to death, evidence absent from the sentencing solely through ineffectiveness of his counsel.

Before this it was a free-for-all with each other defendant minimizing his role and with the state changing its theories of prosecution from trial to trial and from defendant to defendant. Now it was admitted by the state that its initial guess that Cave was a

killer was wrong. He was sentenced to die nonetheless for a leadership role. Now it is clear that this second erroneous guess is equally wrong. Let there be no doubt: Mr. Cave did not kill anyone and he was not a leader.

Although Mr. Cave's recitation of the offense has remained constant because it has the consistency of truth, now we have added to that the words of the dying codefendant Bush. Unfortunately, this case must return for a fair sentencing. The sentencing was unfair because trial counsel, although this information was available to him, failed to present the judge or the jury with the virtually dispositive evidence from Bush: Cave not only is not a murderer, he had absolutely no leadership role-that was left to Parker; he took all steps possible to dissuade his codefendant Parker from killing the young woman, and when Parker refused to listen to reason, Cave withdrew to the car with Johnson.

This appeal may be the last time for this Court to make a meaningful, fully informed, analysis of the proportionality of his sentence. Should Cave be executed with the shooter Parker and the stabber Bush, or isn't it now apparent that he is no more culpable than Johnson who received a life sentence? The Bush statement goes to the very heart of what due process requires in order for the state to kill someone who himself is not a killer.

Counsel's ineffectiveness, taken incident by incident, screams out for relief.

Each area of ineffectiveness to be discussed itself supports such a finding and taken together no question remains: Cave's sentencing was not fair and death requires a fair proceeding.

Counsel's representation fell below the standard required by *Strickland v. Washington*, 466 U.S. 387 (1985). "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact....Therefore, both components are subject to independent review. See *Stephens v. State*, 748 So.2d 1028,1034 (Fla. 1999)." *Allen v. State*, 2003 Fla. LEXIS 1156 (July 10, 2003). It is respectfully suggested that this Court's independent review will reveal that the ineffectiveness of counsel, created an atmosphere where Mr. Cave could not and did not get a fair trial.

Because of ineffectiveness of trial counsel, the jury nor the judge heard the most compelling evidence in existence: the words of a participant that Mr. Cave was not a killer, that he tried to stop the killing, and that he withdrew from the enterprise when the leader Parker would not desist.

Mr. Cave discussed, in Issue I, the error of the court to consider the statement of Bush and its import to the actual innocence of Mr. Cave. In the ensuing section, Mr. Cave establishes that not only was the court wrong when it failed to grant a rehearing on this issue but this was one of the singularly most important instances of

ineffectiveness of sentencing counsel.

The failure to call Bush or to preserve Bush's testimony, or to call Bush's counsel to present to the jurors and the judge the words of an actual participant was to leave the decision-maker without crucial evidence. Had the jurors known that Bush, who knew he was to meet his Maker, wanted the world to know that Mr. Cave was innocent of murder (see discussion at Issue I), and that Cave tried to stop the killing and when he could not, physically, legally, and morally withdrew to the car, their recommendation would not have been for death. Had the sentencer known, he would have placed Bush in the same category as Johnson, not in the same category as Parker and Bush. Had this Court had the advantage of review of this testimony, it would not have found that Cave was a leader, would have reweighed the evidence

in light of this new evidence and would have imposed the death penalty.[11] Mr. Cave killed no one.

Let us first remove from the scene any thought that Bush was merely trying to help Cave. Firstly, to find that Bush did not have dispositive evidence to present to

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[11] To be sure, Mr. Cave seeks vacation of his conviction for murder on the vicarious liability theory of felony murder as he abandoned the joint enterprise and cannot therefore be held responsible for its actions.

the sentencing court would be to say that the litigation before the trial court, this Court and the U.S. Supreme Court were mere sham actions not taken in good faith. Garland must be credited with the fact that he *really* wanted Bush to testify.

If he *really* wanted Bush to testify as a defense witness, it must have been to present evidence favorable to Mr. Cave. This makes Garland's abandonment of this important evidence baffling–the only rational explanation is ineffective assistance of counsel. Garland conceded that he would have preferred to introduce Bush's statement through a nice, clean lawyer's testimony. He abandoned that effort as well although that nice, clean lawyer made a concerted effort to relate the deathbed statement to Garland.

Why did Bush make the statement at the last moment. The ethical and rather practical underpinnings of deathbed statements and their reliability speaks to this. No one wants to meet his Maker without atoning for his wrongs and attempting to make them right. There are no Atheists on Death Row. Since Mr. Bush wished to make peace with his Maker, it is inconceivable that he would have exonerated Cave's complicity in the murder and yet sealed the fate of Parker, his own relative. This index alone speaks to the truth of the statement.

Mr. Garland admitted that he, assisted by Bush's lawyer, had attempted to writ Mr. Bush to the third resentencing, taking the matter up with both the Florida and

United States Supreme Courts. R.I, 99.

These efforts were undertaken even though prior to the deathbed statement, Mr. Garland believed that the limit of Bush's statement was that Cave was not the triggerman. R.I, 102. He later rationalized the failure to present this evidence because, *after jury selection he was advised that a felony murder theory would be pursued*. This remained an issue for so long because Mr. Garland did not even attempt to force the state to disgorge its theory of prosecution. Did he believe that it was better to prepare for any eventuality? The landscape of the case revealed that the state had taken many and varied positions on the role of Cave and one thing is clear: At the time that Bush was alive and at the time that he made his deathbed statement, *Garland did not know that the evidence that Cave was not the shooter was not the pivotal evidence in the trial.* This makes his failure to pursue it clear evidence of his ineffectiveness, rather than his later-day rationalization that the evidence was "moot" because the state litigated on a felony murder theory. Mr. Garland also testified that he did not depose Mr. Bush because he had a good idea what would be said but that the dying declaration was kept confidential until the instant proceeding. R.II, 142. In other words, he made a guess that the only thing that Bush could say was that Cave was not the shooter,"only" indeed. His guess was wrong. Mr. Cave may die for it.

Mr. Garland next tried to explain away his ineffectiveness in not deposing Bush

by saying that he really didn't want him as a witness–a position which he most certainly did not take at the litigation before this Court and the U.S. Supreme Court to enforce his writ ad testificandum to secure the testimony of Bush at Cave's sentencing.

Instead, Mr. Garland in 2002 said that his plan was to use Mr. Kissinger because he believed that the same quantum of impeachment would not apply to Mr. Kissinger–an incorrect reading of the law.[12] Because of this he did not take the deposition of Bush.

Mr. Garland also now rationalized that he would much rather present "a nice looking, reasonable sounding attorney to say this is what he told me right before he was killed." R.I, 102. He chose not to call Mr. Kissinger because the statements of Bush were not introduced into evidence. R.II, 142. It is certainly true that Bush's statements were not introduced by the state. The point is that Bush's deathbed statement was not explored nor introduced either through Bush's words from deposition or through his counsel. This was Garland's ineffectiveness.

Mr. Garland admitted that the state could have independently introduced the

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[12] It is certainly not novel or cutting edge law that when hearsay is permitted, the relating witness may be impeached by what ever information would be appropriate to impeach the original speaker.

statements of Bush,[13] yet he never spoke to Bush *although he did not know until the end of the sentencing that Bush's statements would not be introduced by the state.* If he believed that the state could introduce the prior statements of Bush, why did he fashion his defense to avoid any evidence which could have permitted the state to introduce the codefendants' statements. These are logically inconsistent positions.

However, Steven Kissinger, Codefendant Bush's counsel at the time of the third resentencing of Cave, testified. He previously was employed by Capital Collateral Counsel. R.III, 383-384. He consulted with and litigated beside Mr. Garland in the matter of enforcing a Writ of Habeas Corpus Ad Testificandum in order that Mr. Bush could testify at Mr. Cave's resentencing. Kissinger knew that Mr. Bush had relevant evidence which exculpated Mr. Cave in the actual murder and had the extraordinarily important information that Cave had confronted an armed Parker, arguing that the victim should be left at the scene. When it appeared that Parker would not comply, Cave completely withdrew himself from the scene and got into the car.

Mr. Kissinger stood ready to testify in 1996. After Mr. Bush's execution, he contacted Mr. Garland and told him that additional statements had been made on the night before the execution. R.III, 401. He was never subpoenaed nor called as a

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[13] There is some limitation on this. *See, Walton v. State*, 481 So. 2d 1197 (Fla. 1985).

witness. R.III, 403, 401. Kissinger was surprised that he was not called as a witness because he "made a specific effort to contact Mr. Garland and tell him of the statements that Mr. Bush had made to me and the circumstances under which they were made. R.III, 404.

Precisely, the following testimony, and the circumstances under which Bush made the statement to Kissinger was presented to the trial court. It is respectfully suggested that had this testimony been presented to the trier of fact it would have changed the outcome of the proceeding. Firstly, Mr. Kissinger made it clear that Mr. Bush would testify that Mr. Cave was not the shooter. R.III, 403.

> Q. (by undersigned counsel) Did you have any conversations with Mr. Bush about Mr. Cave which took place shortly before Mr. Bush's death.
> A. I did.
> Q. Was Mr. Bush aware that he was about to be executed?
> A. I informed him that his last legal proceeding had been denied and that there were no further legal proceedings and that he would be executed the next morning.
> Q. The next morning?...

R.III, 387.

In relevant part, Mr. Kissinger related what Mr. Bush had told him. R.III, 391-393. Mr. Bush was responsible for Mr. Cave's predicament because he had never previously told the truth. Mr. Bush had related to him that they had robbed and kidnaped the victim and that when they arrived at a certain area away from town, Mr.

Parker "directed Mr. Cave to provide him with a firearm that Mr. Cave had in his possession which Mr. Cave...did." R.III, 392. Mr. Bush stated that Parker was clearly "running the show." R.III, 393. Parker then *said that he was going to do what he had to do*. R.III, 393. Kissinger continued:

> At this point Mr. Cave–Mr. Bush told me that Mr. Cave became upset and that he told Mr. Parker basically that it was–that he didn't have...to do this. Mr. Parker to my understanding repeated some statement to the effect that it became obvious that he was going to go through with it. Mr. Cave not being successful in his attempts to affirm [sic] what appeared inevitable, left Mr. Parker and Mr. Bush. And if I recall Mr. Bush's statement accurately, went back to the vehicle and got inside the vehicle and left them behind. Mr. Bush then admitted that at that point Mr. Parker told him to stab the victim, that he went over to her and that he did stab her, and that Mr. Parker then took the firearm and shot the victim causing her death.

R.III, 393-394.

Kissinger characterized the Bush statements as new to the "extent that it indicated that Mr. Cave...had made an attempt to withdraw from the activities of Mr. Bush and Mr. Parker, that portion of it was new and I felt that it was very important and something Mr. Garland should know." R.III, 404.

When asked about the clemency statement made by Mr. Bush where he exculpated himself and inculpated Mr. Cave, Mr. Kissinger noted that this was basically an attempt to convince the State that Mr. Bush was not particularly culpable so that they would, as a matter of mercy, save his life. R.III, 399. In other words,

Bush was trying to help himself. On his deathbed he wanted a clean slate. He told the truth about both Cave and Parker.

Mr. Garland guessed that the only statement would be that Cave *was not the triggerman*. R.I,102. He was fatally wrong. Mr. Garland's plan was to use Mr. Kissinger as a witness because he believed that Kissinger could not be impeached. Mr. Garland stated that he would much rather present "a nice looking, reasonable sounding attorney to say this is what he told me right before he was killed." R.I, 102. Mr. Garland did not depose Mr. Bush because he had a good idea what would be said but that the dying declaration was kept confidential until the instant proceeding. R.II,. 142. He was fatally wrong. Garland seemed to believe that if something can be impeached in part that that justified not utilizing the evidence.

Unfortunately, the argument has gained some favor. Error in excluding evidence from a highly impeachable declarant has been approved. *Walton, 847 at 442.* Here there was clear evidence, which was not being given at a time when Bush could benefit from it, which was important to Mr. Cave. Because cross examination could be mounted, litigators do not abandon the evidence. Mr. Garland knew of the evidence and did not use it. It would have been easy to explain to the jury the clemency process and to establish that dying declarations are given credence historically because of the index of reliability which can be given to the statement of a dying man who has no

motive to lie before meeting his Maker.

Why was *Bush's dispositive testimony not brought before the sentencing jury*? Certainly "strategy"[14] cannot be the reason. Bush either had important information or he did not. He did, evidence which speaks loudly not only to the difference between a death and a life sentence, but to Mr. Cave's very complicity in the murder committed by Bush and Parker.

Mr. Cave stresses is that the breadth and strength of Mr. Bush's statement was not known to sentencing counsel at the time of the 1996 sentencing but proper preparation *would have revealed the evidence before the beginning of that sentencing*. It was not until Mr. Kissinger *sat before this Court* and explained what Bush told to him on Bush's deathbed that Cave *personally* knew that there was now external evidentiary support for his continuous and consistent position: he never intended to harm the victim; tried to dissuade others who did when he realized what was about to take place; and ultimately withdrew from the enterprise.

It is for this reason that Mr. Cave personally takes the common-sense position that this evidence is newly discovered.

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[14] See discussion, *supra*, of the most recent thinking in this area by the U.S. Supreme Court. In essence, strategy cannot be a crutch when the facts are not ascertained. It was not strategy not to obtain Bush's testimony, and no meaningful strategical decision can be based on this incident of ineffectiveness. *Wiggins.*

Mr. Kissinger testified that this was the first time that he was relating the statements which he characterized as new to the "extent that it indicated that Mr. Cave...had made an attempt to withdraw from the activities of Mr. Bush and Mr. Parker, that portion of it was new and I felt that it was very important and something Mr. Garland should know." R.III, 404. This Court should view this "newly discovered" evidence in the light which would speak to its importance to a jury. It is newly discovered because of the ineffectiveness of sentencing counsel in discovering it. It would change the outcome of the trial and the sentencing.

One cannot say that a jury would have found this insubstantial or incredible. When a man is acutely aware of his death, the last thing which he would logically do is lie. If he has any hope of meeting his Maker, he does not want to die with a lie on his lips, and a lie which would have helped a "guilty" person. He did not lie. Cave is not a "guilty" person. Cave rather is a person who should benefit from the truth–he withdrew, is not a murderer, and does not deserve a death sentence. A jury had the right to know this and to weigh it. But for the ineffectiveness of his trial counsel he would have had this evidence. To say that this glaring omission is "strategy" is to defile the real strategy decisions made every day in good faith.

The post-conviction court erroneously based its opinion in pertinent part upon the "limited" nature of the potential Bush/Kissinger testimony:

> ...Attorney Steven Kissinger represented co-defendant John Earl Bush. According to Mr. Garland, *Kissinger approached Garland and related that Bush felt somewhat responsible for Cave's predicament, and would testify that Cave was not the triggerman.*

Order Denying Motion for Post-conviction Relief. R.VII, 1054.

Because the actual testimony given by Kissinger was much broader than that–not only was he not the shooter–a point conceded by the State at this sentencing–but also he attempted to stop the shooting and when he could not he abandoned the endeavor, it is respectfully submitted that this Court did not give proper weight to this issue.

The jury never hearing of Cave's innocence is inextricably intertwined in the ineffectiveness of Garland in jury selection is the failure of sentencing counsel to appreciate the impact of the hypothetical questions being asked by the state–tools to prepare the jury to sentence Cave to death whether they chose or did not choose to paint him as the shooter this time around. The series of questions asked by the state in voir dire in which it implied that it *might or might not* present evidence that Cave shot the young woman remained unobjected to and tainted the proceedings. The reason for this questioning line is apparent: the state wished to exclude those who would have any qualms about killing a man who himself had killed no one. The reason for failure to object to this tactic can only be ineffective assistance of counsel.

The defense never objected when the State couched its voir dire in the hypothetical–"If it were to be shown that Mr. Cave was not the shooter...?" RII, 138. He did not remember if he objected, but if not, it was because the Judge would have denied his request. *Id*.

This alone would suffice to require a new sentencing for Mr. Cave. The voir dire process, particularly in capital cases, is of utmost importance. Mr. Colton recognized this. He made an effort either to "inform" the jury of the "possibility" that Cave was the shooter. Rather than clearly acknowledge that he was attempting to have Mr. Cave put to death even though he was not the killer–on a theory that he was somehow in control of the situation--the entire process was muddied by these *inaccurate* hypothetical questions. To believe that they were asked in good faith is to believe that the State Attorney did not know his theory of the prosecution when he entered into jury selection. These hypotheticals should have been objected to by defense counsel, and Garland in his own questioning should have made clear that it was uncontroverted that Mr. Cave was not the shooter. Garland admitted that he should have objected. RII, 137. He admits that he could "have done better" in jury selection R.II, 241.

It is clear that Garland's misperception of where and when and for what purpose hearsay is admissible drove the defense. Utilizing this clouded prism, counsel

hoped that by "laying low" and having all evidence come from only Mr. Cave, he could avoid any direct impeachment or rebuttal. This is in spite of the fact that he himself put the criminal arrest of his client and the records of the codefendants at issue. The things which Garland feared would come out were appropriate under the rules of impeachment or of fair argument of the implications of the evidence.

Add to that the concept that limited hearsay could arguably be presented by either side. In a sentencing proceeding, within limits, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant if the evidence has probative value. This is so regardless of the evidence's admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. *Fla. Stat.* § 921.141(1).

In *Perri v. State*, 441 So. 2d 606 (Fla. 1983), the defendant was convicted of murder and was sentenced to death. The defendant contended that the trial court had erred when it incorrectly allowed two police detectives to testify as to details of two prior convictions. *Id*. at 607. This Court ruled that as long as a defendant is given a fair opportunity to rebut hearsay statements, hearsay evidence is admissible in penalty proceedings. *Id*. at 608. This Court, quoting *Alvord v. State*, 322 So. 2d 533, 538-39 (Fla. 1975) stated:

> In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. In fact, one of the statutory mitigating circumstances is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Perri, 441 So. 2d at 608.

The law was well established concerning this issue when Garland undertook the representation of Mr. Cave at the 1996 sentencing. To be ignorant of both the Florida statute and case law concerning this issue is clearly ineffective assistance of counsel.

Several years before the instant crime, Cave and others were arrested in Pennsylvania and charged with rape. Those charges were promptly dismissed. This is the *only criminal history–if it is to be called that–of Mr. Cave.*

When we are seeking justice, we must look to the entire contextual nature of the error to attempt to assess its prejudice to the defendant. The defense was seeking the statutory mitigator of no significant criminal history. Counsel also wished to compare Cave's lack of criminal history with the rather substantial criminal histories of the codefendants. Unfortunately Mr. Garland was comfortable with the fact that he introduced the evidence about the criminal histories of the codefendants and sought to have Mr. Cave distinguish his background from theirs. R.I. 47. The issue of rape

arose in two separate contexts–a codefendant's conviction and Cave's dismissed charge.

Part of the evidence presented *by defense* in seeking the statutory mitigator of no significant criminal history was that the defendant was associating with two rather brutal felons, one of whom had served a sentence of incarceration for a prior rape.

However, the State followed up the evidence of these men's histories–including the rape in one instance–comparing it with the arrest of Cave in Pennsylvania for rape. This was introduced by Mr. Cave's *counsel-which he did not even remember*.–R.II,119. "Rape" rang in the ears of the jurors–the Codefendants committed substantial previous crimes and Mr. Cave was arrested for a rape but "let go." Mr. Cave's lonely word that the arrest was a mistake would be the only proof on this issue, an issue which should never have been before the jury.

The way in which this information came before the jury highlights the ineffectiveness of counsel. Mr. Garland engaged in the following colloquy with Mr. Cave:

> Q. Now before April 26th of 1982 had you ever been convicted of any crime?
> A. No, I have not.
> Q. You were arrested one time, weren't you?
> A. Before 1982? Oh, yes. Yes I was.
> Q. Was that a–were you guilty of what you were charged with?
> A. No, that was in Stren, Pennsylvania and no I was not guilty.

Q. Were you released on your own recognizance?
A. Yes, I was.
Q. Were charges dropped?
A. Yes, they were.
Q. So apart from that particular incident in Pennsylvania, had you been arrested at any time?
A. No, never been arrested.

1993 Sen. hearing, V. 21, pp 1361-1362.

This error before the jury by defense counsel was compounded by Mr. Colton who cross examined Mr. Cave, tying together for the jury the rape background of his codefendant with the arrest in Pennsylvania:

Q. You didn't know anything about his criminal past? [Parker]
A. No.
Q. Now did you know Bush, though?
A. Bush went to school with me, same school when we was in the 7th grade....
Q. But you didn't know anything about his criminal past?
A. No.
Q. You didn't know he had any kind of record for I think what was brought out, rape and robbery?
A. No.
Q. And when you got in the car with them on April 27th, with the three of them, you didn't know anything about their criminal past?

A. No.
Q. You didn't know that Bush had this conviction for robbery and hid this conviction for rape?
A. No, sir.
Q. Now you had an arrest, your lawyer brought out that you had an arrest. What was that for?
A. That was in Pennsylvania.
Q. And what was the charge?

A. The charge was rape.
Q. But that was dropped?
A. That was not only dropped, sir, that [sic] proven to be a false charge.
Q. Okay.
A. Okay.
Q. But as opposed to these other guys, they had been convicted?
A. Yes.
Q. But you had not? But in your mind they weren't really any different than you because you didn't know about their charges?
A.. No, I never knew about their criminal past. I knew they smoked reefer like me.
Q. So you had no idea. You didn't think at the time that you were hanging out with them, you really didn't think that they were any different than you, did you?
A. As far as what, you mean [sic]?
Q. As far as contact with the law or criminal record?
A. Oh, no.
Q. Being criminals?
A. No I never knew that they had done those charges.

Sentencing transcript, V. 22, pp. 1450-1453.

The most remarkable thing about this exchange is that the defense attorney remained silent while his client was painted as an associate of rapists and an accused rapist himself. Of course Mr. Garland remained equally quiet when Prosecutor Colton summarized his position on the mitigator of no significant criminal history in his closing–the mitigator which opened the door that Garland had not even recognized:

> Now, again, the one that deserves little weight as the first one by his prior criminal record, that's true. But it doesn't deserve much weight. This mitigating circumstance I submit to you ***does not even exist based on the evidence in this case.***

R.I, 140, quoting from Sentencing Transcript 1732 through 1733.

Mr. Garland would not admit that his recollection was refreshed by his viewing the above, but he accepted the veracity of the transcript. R.I, 119.

How did things get so far out of hand? Certainly, if it had been "strategy" to bring out all of the worst on direct, and Garland had a well-founded belief that the rape was part of the body of evidence introducible by the state, would have recollected this path and it consequences. These words would have rung in his ears even 6 years later: I made a mistake; I never realized that I was opening the door." His error is patent yet still unacknowledged. Mr. Garland was sure that the rape dismissal would have come out because it "came out every time we tried to work with it." R.II, 122. Rather than work harder, he accepted this. He admitted that, although he had filed dozens of motions in limine he did not address this important issue with such a motion. R.II, 123. It is respectfully submitted that he did not address it in limine because he never foresaw the consequences of seeking this mitigator which received little weight. Garland had a duty to weigh the potential downside of seeking the mitigator and he clearly did not.

It is equally clear that counsel never understood nor meaningfully analyzed the pitfalls of seeking the mitigator of no significant criminal history vis-a-vis the tremendous impact on the jury of hearing that Mr. Cave had been accused of rape.

Counsel many times in his testimony stated that he was doing all possible to avoid "nuclear" issues, though himself he brought up the issue of Cave's prior rape arrest without seeking the benefit of a court's ruling in limine that no identification of the nature of the offense could be introduced in the proceedings. RII, 123.

Mr. Cave submits that in addition he should have attacked the constitutionality of the aspect of the mitigator which provides that mere bad acts as well as other crimes may be introduced in order to refute the mitigator. As the case law has developed, the defendant is presented with a Hobson's Choice: seek what the Legislature has provided as a mitigator at the peril of any prior act or unjustifed encounter with the law coming in to paint the picture of a person of bad character.

Counsel got the mitigator, it got no weight, and the jury learned that Mr. Cave had been accused of rape. If we are to look at this situation from a practical standpoint where there are four young men who rob a young woman and after the robbery is completed take her to a remote area, even though there was no rape, jurors could not be criticized for wondering. Couple this with evidence introduced by defense counsel of the prior rape conviction of a codefendant, and this is not strategy but self-destruction. But for this ineffectiveness, the jury would have sentenced Cave to life not death.

As Mr. Cave has noted, Mr. Garland's duty included evaluating the viability of

the statutory mitigator of no significant criminal history. Even if Mr. Cave had never been arrested, it was incumbent on Garland to investigate and demand notice of any other crimes or bad acts which the state might wish to use to refute the mitigator. Had he done so he could then have made a strategic decision on whether to proceed. The failure to obtain information is not strategy. *Wiggins, supra*.

Next Mr. Garland was required, if he wished to pursue this mitigator, to see if he could enlist the court by way of a motion in limine to restrict the rebuttal thereto. Mr. Garland admitted that he filed many motions in limine in this case but for some reason he chose not to address this, rather to press forward blindly.

Next in his analysis should have been that the permissible rebuttal rendered the mitigator unconstitutional in its application. The permissible evidence under the case law admissible to rebut this mitigator uses the analytical framework of the Williams Rule.

Section 90.404 of the Florida Statutes permits introduction of evidence of other crimes or bad acts under very tight strictures. The leading case on these strictures is *Williams v. State*, 110 So.2d 654 (Fla.1959). Although there are proper uses by both sides of so-called Williams Rule evidence, it is clear that no such evidence can be introduced to establish the purported bad character of a witness or his propensity for violence.

A careful reading of this section is in order:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

§90.404(2)(a), Fla. Stat. (1997).

This Court has taught that in order to introduce evidence of collateral crimes or acts there must be some unique characteristic or combination of characteristics which sets the two apart from other offenses. *Heuring v. State*, 513 So.2d 122 (Fla. 1987). Of course the fear is that the jury will wish to punish the defendant for the other act rather than the charged act or that the jury will infer that the defendant is a bad person because of the extrinsic evidence. See, also, *Billie v. State*, 2003 Fla. App. LEXIS 11416 (July 30, 2003).

In the context of death penalty, the only logical Williams Rule evidence should be evidence of other killings under similar circumstances. Here to read the "material fact in issue" language to address no significant criminal history is to gut the strictures of the rule.

The underlying purpose for bad acts evidence addresses the crime itself on which the state has the burden of proof. This Court approved, in a direct prosecution,

the introduction of evidence of a prior attempted murder and sexual assault when there was significant evidence that the assailant was the same identified individual, the reason for the presence of the defendant and the victim was the same, the same means were used to entice and to subdue the victim were utilized. See, *Conahan v. Florida*, 844 So.2d 629 (Fla. 2003). The facts in that case established a "unique modus operandi sufficient to establish the identify of [the victim's] murderer. *Id.* at n.1. Such evidence is appropriate if the state is trying to prove that a robber consistently picked fights when drunk in the context of a bar fight assault arrest, there is an argument that to meet its burden of proof the state should be able to bring in witnesses to establish that when this man is drunk, he picks fights, hits people–even though he has never been involved with the police for such actions.

Here the statutory mitigator addresses a different concern–whether this man deserves to die. The state is not trying to meet its burden of proof; the defendant is trying to persuade the judge that he is not one of these people who have been arrested dozens of times and never been adequately punished. The application in this case where there was one arrest, promptly dismissed, which was for a politically, emotionally and racially charged issue, denied Cave due process.

Mr. Cave respectfully submits that the statutory mitigator of no substantial criminal history should be narrowed to actually speak to criminal history–convictions--

and that the conceded breadth of possible rebuttal evidence renders this statutory mitigator no more than a death trap, particularly without strict judicial scrutiny of the evidence from both sides.

Even if the statutory mitigator is not unconstitutional as written, an evidentiary analysis of the cases law as the potential prejudicial impact of the evidence should have been undertaken. It would have revealed distinctions between the defendants in those prosecutions and Mr. Cave. Mr. Cave would ask this Court to keep in mind the following:

- Mr. Cave was arrested and promptly the charges were dismissed
- There was no discovery from the State that it would seek to introduce the arrest.
- The state did not address the matter in its opening statement
- The state did not present any witnesses or other extrinsic evidence of the arrest or of the dismissal
- Defense counsel did not seek an *in limine* ruling from the trial court as to the admissibility of the nature of the crime before the sentencing jury
- Defense counsel raised the issue of prior arrest himself on direct examination.
- The only proof at the sentencing hearing was from Mr. Cave's own mouth.
- The state brought up the fact–in a discussion of the rape *conviction* of a

codefendant that Cave was also arrested for the crime of rape

- The state argued that the mitigator did not even apply in this case.

To support its position in the post-conviction Court, the State cited to three inapposite cases easily available at the 1996 sentencing: *Lucas v. State,* 568 So.2d 18 (Fla. 1990) cert. denied 510 U.S. 845 (1991); *Walton v. State*, 547 So.2d 622 (Fla. 1989) cert. denied, 493 U.S. 1036 (1990); *Washington v. State*, 362 So2d 658 (Fla 1978), cert. denied, 441 U.S. 937 (1979).

Lucas is a direct appeal from a sentence of death. The relevant portion of the discussion concerned the dangerousness of evidence introduced under Section 90.404(2)(b)(1). It was submitted by Lucas that the evidence of a *testifying witness' accusation of burglary* was unduly prejudicial. The Court began its analysis with a review of the reasons underlaying the cautiousness with which any prior crimes' evidence should be heard by the jury.

> [a] verdict of guilt on a criminal charge should be based on evidence pertaining specifically to the crime. The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about unrelated matters.

Craig v. State 510 So.2d 857, 863 (Fla. 1987) cert. denied 484 U.S. 1020 (1988).

In *Lucas* the mention of other crimes was inadvertent and not initiated by a lawyer but rather in response to a question by a lay witness. The murder victim's

mother was testifying. It apparently had been clearly established that the defendant had been arrested in the home of the victim and the witness a few days before the murder. The witness stated that Lucas "had broken in [in] some way or another." *Lucas* at 20. The Supreme Court spoke to the common sense recognition that a lay person "whose locked home has been entered by an uninvited person might well say that the home has been broken into." *Id*. It was at this juncture that it dropped a footnote stating:

> n6 One of the statutory mitigating circumstances is: "The defendant has no significant history of prior criminal activity. [citation omitted] Arrests and other evidence of criminal activity, without convictions, *may be* "significant" and may rebut this mitigator.

Id.. (Citations omitted)(emphasis supplied).

The nature of the prior bad act was not rape as it was in Cave. The reference was inadvertent and not particularly prejudicial. Here the word rape was truly a "nuclear" issue, even if not one recognized by Garland.

It is patent that the *Lucas* factual situation is so different from that of Mr. Cave as to be non-applicable, hence we must look to what *Lucas* cites as authority for its footnote: *Walton* and *Washington.* In the direct appeal in *Walton, supra*, the defendant argued that the State could only rebut a defendant's evidence of no significant prior criminal history with convictions. This Court disagreed and stated that the State could rebut the mitigator with "direct evidence of criminal activity." *Id.* at

624. Here there was a dismissed charge, hardly "direct evidence of criminal activity." Since there was no reason to believe that Cave had any culpability. In reality one state said that he should not be charged and this state says that his innocence should be used against him. This is irrational and a violation of Cave's right to due process.

Another telling distinction between *Walton* and Mr. Cave is that "direct evidence" was presented against Walton. Two witnesses testified.. One testified that he had himself purchased marijuana from Walton on three occasions and that he had seen a codefendant carrying a fifty-pound bale of marijuana toward Walton's house. The second witness testified that he had seen Walton sell marijuana.

Contrast that with Mr. Cave's case where the evidence did not come from an eyewitness or a co-conspirator or accomplice but rather the fact of arrest was introduced by the defense in its case-in-chief through the testimony of Mr. Cave and followed up on by the state to assure the jury that it would know that it was rape not some other crime about which Cave was speaking.

In the most recently decided case of *Walton*, 847 So.2d 438, supra, this Court reaffirmed its approval of the introduction of Walton's marijuana escapades as rebuttal to the mitigator of no significant history of prior criminal activity. However, Walton, as does Mr. Cave, urged that his trial counsel was ineffective when introducing evidence to establish this mitigator "because it opened the door for the State to

introduce evidence of Walton's previous illegal conduct including Walton's 'rap sheet,' which included ..." references to his marijuana past.

This Court evaluated this claim from the prong of prejudice without making a finding on the ineffectiveness claim. That may have been appropriate in that factual situation. However, here, the (1) nature of the crime of rape, (2) the emotional responses elicited by mention of rape which was never explored in jury selection, (3) the rapidity with which the charges were dismissed, (4) the coupling of the dismissed rape allegation with the rape conviction of a codefendant, (5) the circumstances of the crime with four young men and one young woman were in a remote area, and (6) the only evidence being presented being the word of Mr. Cave made this a very different situation indeed. This was not a man who may have dealt or smoked marijuana. Even if the *Walton* jury believed that, it didn't carry with it the emotional, legal, moral and ethical baggage which all jurors bring to the table when rape is mentioned. Perhaps if rape had been a feature of either voir dire, and this Court could explore the stated conceptions of the jurors, this would be different. It is not different. Rape is next to murder in the emotional responses which it engenders. Mr. Cave's defense was swamped by this tidal wave.

In *Washington* the defendant confessed to 4 murders and a string of burglaries for profit. *Washington* argued as Cave does today that a conviction was required

before the State could introduce evidence of prior crimes. This Court disagreed. More illustrative of the reasoning behind prohibiting the introduction of "bad character" or "other acts" evidence, although not on all fours, is *Dragovich v. Florida*, 492 So.2d 350 (Fla. 1986). Dragovich was sentenced to death. The conviction was upheld but the sentence was reversed because of the State's overreaching in its attempt to rebut the mitigator of "no significant history of criminal activity." *Id.* At 354. Dragovich introduced a "rap sheet" showing that he had no prior arrests or convictions, along with witness testimony as to his good character. When the State cross examined these witnesses it asked about Dragovich's "involvement in several fires." *Id.* The Supreme Court found that the clear implication of these questions was to that Dragovich had intentionally burned restaurants and other property to collect insurance proceeds. The clear implication of the State's question here was to paint Mr. Cave as a rapist who associated with other rapists, and who "got away with it."

In its rebuttal case in *Dragovich,* the state presented the victim's children to establish that the defendant had a reputation as an arsonist; and a policeman to testify that the defendant was the suspect in six separate arsons.

This Court reflected that death sentencing was different from all other proceedings; that "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether

the ultimate penalty is called for in his or her particular case." *Id.*

The State argued that the reputational evidence was admissible because the defendant had put into issue his lack of significant criminal history; arguing as they do here, that this was proper rebuttal. The Court reasoned that the reputation evidence was not evidence of actual involvement in such criminal activity, "does not rise to the level of evidence of criminal activity;[15] and denies defendant the fairness in the weighing process that the statute contemplates and that justice mandates." *Id.*, at 354.

The Court stated:

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: improper considerations will enter into the weighing process. The state may not do indirectly that which we have held it may not do directly.

This Court vacated the death penalty *because it could not determine the effect that the testimony had on the jury.*

Likewise, here we do not know the precise impact of the evidence of the prior arrest for rape but we do know that the jury heard such evidence. The jury's recommendation of death, at 11-1 was worse than the recommendations of the previous

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[15] Mr Cave recognizes that this particular premise may somewhat be eroded by subsequent decisional law.

two juries who did not hear such evidence.

We are not simply arguing, as did Dragovich, that such evidence should not have been introduced as it surely should not have, but it is clear that a competent trial counsel would not have ventured into this forbidden area. There was no benefit and there existed the potential for disaster. There was no potential strategical explanation for informing twelve citizens that this man had been previously arrested for rape while also presenting evidence that one of the codefendants had served time for a previous rape.

Juries are savvy. They know that things take place out of their presence; they realize that Bench Conferences are not broadcast to them. It is reasonable to believe that they "suppose" what it is that they are not being told. Here there is testimony of rape allegations about two of the defendants; the third defendant has a substantial criminal history and Mr. Cave is associating with these men. It would be fair to say that the jurors believe that the litigants have superior knowledge of the facts. The State's argument that no minimal criminal history as a mitigator is not apposite speaks to its "superior knowledge" of the facts. Even though the jury is told that argument is not evidence, argument exists for a purpose–persuasion.

The fact that the Court found the mitigator but gave it little weight speaks to the taint which obtained from the evidence. Clearly Mr. Cave had a clean record. Clearly

at least two of his codefendants had substantial criminal histories–one for rape. Clearly Cave killed no one but he received the death penalty.

Mr. Cave was unprepared to testify and this lack of preparation was exacerbated by his lack of intellectual and practical abilities.

It was in the emotionally charged atmosphere of the third resentencing of Mr. Cave that Mr. Garland made the decision to place his client on the stand. Although Mr. Garland believed that he had spent enough time preparing Mr. Cave, that would only been possible if one were to assume that the conversations that they had over the years were retained by Mr. Cave and were sufficient to prepare him for the eventuality of testifying in this life or death matter.

It appears that there is no dispute between and among the doctors who evaluated Mr. Cave that he was of an IQ which ranged from the 70's upon incarceration to 90 at the time of the third resentencing. However, Mr. Garland and Dr. Gutman both testified that Mr. Cave only thought in concrete terms and that he had an inability to understand abstract ideas. He was not prepared thoroughly to testify.

The second area of profound error was admitted by Mr. Garland. He prepared this case, evaluated evidence, evaluated witnesses, conducted his investigation, fashioned his presentation based upon the theory that if the State merely introduced circumstantial evidence of the Aggravators, and he presented direct evidence in rebuttal

and he lost, no reviewing Court could uphold the sentence because it was based on circumstantial evidence.

He characterized the upholding of Cave's death sentence as a change in the law which occurred during the course of the Cave litigation–Cave's was a "pipeline" case, one within the system during a change in the law when that change of law injured Mr. Cave's chances of prevailing. It is clear that he persisted in this belief through the appeal; the petition for certiorari; and as he testified before the trial court.

Although the particulars of the areas of effect varied, Mr. Garland was consistent in explaining that his analysis of the case was colored by his understanding of circumstantial evidence and its effect in the review process. This was compounded by the apparent lack of total discovery.

Mr. Garland did not explain why he was not more familiar with the theory of the prosecution in 1996 but it was clear that he was unsure when he entered the courtroom whether witnesses such as Michael Bryant–whose testimony could cause a mini-trial in itself–would be presented by the State. R. I., 54. This lack of knowledge colored his presentation. He waived opening statement. He was concerned with "opening doors." R I., 54. He admitted that he was using Michael Bryant as a "representative of the entire thing." R I., 55. That is that since he didn't know where the State was going, he remained unprepared and unsure.

> I didn't want the direct evidence of, you know, what any co-defendant said and I didn't want other types of compromising stuff that would–would contradict any portion of Mr. Cave's statement when he testified. In other words, I wanted Mr. Cave's statement to be an unrebutted direct piece of testimony which if a circumstantial evidence standard review applied, then the jury would have had to accept it.

R I., 59.

In spite of the fact that the entire fashioning of the defense was related to this perception of the circumstantial evidence rule and its place in the appellate review process, Mr. Garland was unsure–had not thought through–how this compromised the defense. "I don't know for sure, but I'm going to suggest to you that with the exception of Michael Bryant the State could not impeach him on what somebody else said at a different time–that most of that stuff would not have been proper impeachment. Had the State breathed any of it would have been reversible error.... it's not opened just by him testifying." R I., 65.

Mr. Garland admitted that he would have counseled Mr. Cave differently if he had known that the circumstantial evidence rule would not protect the defense case.

> A. I could have said to Mr. Cave, if there's any competent and substantial evidence, then they're going to not even look at the rest of the evidence because it just doesn't matter. If there is any competent substantial evidence, then if the death penalty is imposed, there's no review. So you might as well put the evidence of duplicity and false statement in front of the jury showing that State operators and witnesses that said things that either were exaggerated or perhaps untrue....

> ...if we had been, or should have been reasonably certain that the circumstantial evidence rule is out the window and wasn't a factor, then Mr. Cave could have evaluated whether or not to introduce that type of evidence based on a different scenario. And he didn't have that opportunity....
>
> But what I suggest to you is that the choice was taken from Mr. Cave when they changed the rule midstream, and ultimately that's where the prejudice factor comes in. It was procedural prejudice, because he didn't have the choice. The choice was made for him. And I think that that's unfair....
>
> ...The choice was that if he did not seek to introduce certain types of evidence, then a circumstantial evidence evaluation should be made, and that was not the case.

RI., 70-73.

To recognize the impact of his understanding of this rule, interspersed with the above statements were his ruminations that perhaps he wouldn't have introduced some of the evidence anyway but the taking of the choice from Mr. Cave was unfair. He saw the rule as solely an appellate issue and wasn't "sure" whether it impacted on his presentation and later stated that he didn't think that there was a difference. RI., 77. However, Mr. Cave would respectfully suggest that any incorrect perception of the law which impacted on evidence to be presented and to be avoided of necessity impacted on the presentation.

Garland's defense was crafted "by putting together as many mitigating circumstances as we possibly could while presenting a certain–while limiting the

State's case to a circumstantial evidence of the aggravating circumstances and then challenging the sufficiency of that circumstantial evidence on appeal." RI., 54. He called this error a "strategy" but it was simply an error. "And I felt that that was a very viable strategy. That it would at once limit the State's evidence overall. It would not limit *most of the mitigation*, and it would permit us to challenge the sufficiency and the weighing on appeal. Unfortunately the standards for review changed." RI., 56. Emphasis supplied. His comment inexorably leads to the conclusion that at least some mitigation was precluded–at least in his own mind–by his pursuit of that theory. Mr. Cave would suggest that failure to know the law just like failure to know the facts is not a strategy. We know at least one error was impacted by Garland's prism. Because of this erroneous theory Mr. Garland chose to introduce evidence through Mr. Cave rather than through medical professionals.

Mr. Garland chose to put Mr. Cave on the stand rather than "open doors" because the subjects of drinking heavily, smoking pot, having impaired judgment because of inexperience or poor education and no criminal background and of course heroin use, if Garland had learned of it – would best be presented through Mr. Cave himself. "And I don't think you have to be a psychologist to understand the impact of those things. And those arguments don't open doors." RI., 57.

However, they are unpersuasive when coming from the defendant only and not

a medical professional. Rather than hear Dr. Alegria testify as to the progression of Cave's mental faculties, rather the jury heard Mr. Cave testify that he was in slow learner's classes; that he dropped out of school; and that he could barely read. Sentencing Vol 21, p. 1339. For unknown reasons, Mr. Garland believed – without basis – that everyone was wrong about Cave but Garland. Cave was bright, hard working and only an occasional drug user. These were demonstrably false premises (*See Wiggins* discussion *infra*.).

Mr. Garland fashioned his defense by presenting the "new" Mr. Cave while glossing over the realities of 1970-1982. Even Cave himself didn't support the theory of a fully employed man supporting his family. Mr. Cave himself said that he worked part time for Minute Maid farming, in the laundry room at Lawnwood Medical Center, as well as a CETA job with the city. Sentencing Tr. Vol. 21, p. 1340.

Mr. Garland conceded that "encouraged him [Cave] to be himself as he was at that time because it was that person who was testifying." RI., 108. In spite of this he recognized that the State's presentation was focused on the time of the crime—"You would agree that the aggravating evidence which was produced by the State focused on the actions and mental state of Alphonso Cave in 1982 rather than 1986?" To this he responded, "Of course." RI., 110.

With regard to the potential consequences of drug use, Mr. Cave stated that "it

makes you do, you know, do stupid things....makes me forget, you know. Reflex is slow and stuff like that." Sentencing Tr. Vol. 21. P. 1349. He then further explained that he would not have done what he did had he not been drinking and smoking marijuana, Sentencing Tr. Vol. 21. P. 1349, that he used drugs from "maybe '78 or something like that, you know, like I said, I called it brain dead. I'm just walking around. I done quit school." Sentencing Tr. Vol. 21. P. 1360. He concluded that, "[W]ithout a doubt I made a stupid dumbass mistake. Did a dumb thing." Sentencing Tr. Vol. 21. P. 1365. This was Cave on Cave.

This discussion of Mrs. Freeman is included in the *Wiggins* issue, however, it bears repeating. Ms. Freeman was the mother of Mr. Cave's now-deceased child. She lived with Mr. Cave from some time in 1978-1979 for several years. RIII, 268-9; 280; 293. She was a young woman who was writted to Court by the defense; who candidly stated that she did not read nor remember well; and who was a convicted felon several times over.

She had relevant evidence but was never contacted by any counsel for Mr. Cave. She filled in an integral part of Mr. Cave's background that he apparently was reluctant to admit until some time immediately before the hearing before this Court. She knew Cave was a herion abuser and found Mr. Cave actually shooting heroin: "...I came home and he had a spike in his arm. He was shooting heroin." RIII., 270-271.

She continued that he was "hung over and slobbing from the mouth. He didn't even notice that I was in the house...." RIII., 271. She said that her brother confirmed to her that Mr. Cave's heroin addiction/usage was "bad" and that he had "been shooting it for a long time." RIII, 272. Cave used drugs every day, the result was Mr. Cave being "down and drooping over.... RIII 275. Cave may have used marijuana, but heroin was clearly his drug of choice. R III., 289.

Mr. Garland readily admitted that he had no knowledge of heroin addiction and that it would have impacted on his presentation had he known. "That would have been an important thing to know." RI., 135. Mr. Cave was admittedly borderline retarded at least at the time about which he would be speaking with Mr. Garland. RI., 43. Mr. Garland clung to the belief that Mr. Cave merely "experimented" with drugs other than alcohol and marijuana. RIII., 44. However, Ms. Freeman made it clear that they were a part of his daily life and due to the effects of those drugs he could not function as a breadwinner for the family.

Ms. Freeman was incarcerated at the time of Mr. Cave's trial and that she was willing to testify on his behalf had someone asked her RIII., 275.

Mr. Garland's assessment was that "the psychological testimony would have likely opened the doors. Even if it had not opened the doors, it did not ultimately add much to the case. The psychological testimony would have come down to what Mr.

Cave said about this and what Mr. Cave said about that, and it's all interpretation of many years after the fact." RI., 57. Contrast this with Dr. Gutman's finding that Cave used heroin and used drugs until at least a day or two before the crime. RIII., 345.

Mr. Garland tried to couch errors as strategic decisions. It is clear that the decision as to whether to place Mr. Cave on the stand had not been made when the hearing began.[16] Mr. Garland appeared to concede all other areas of importance when he stated: "But when the final analysis came down to what one person said, and that person was Mr. Cave." RI., 53. He was wrong. Psychological and Psychiatric professionals were the proper individuals to place Mr. Cave in the proper context at the relevant time–1982. Although an explanation as to how he had improved himself would be nice, it is the young man who participated in these crimes who the jury was

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[16] One of the points raised by Mr. Cave which he believes is more striking in its importance after the hearing, is the fact that Mr. Garland failed to make an opening statement. Mr. Garland conceded that the prosecutor was a superior lawyer in voir dire in getting his theory across, yet he failed to outline his case for the jury before he began the presentation. Thus the jury was permitted to know in detail the theory of the state through voir dire but was at a loss as to unifying theory to be presented by Mr. Cave. This speaks to lack of a decision on what the evidence to be introduced did consist of: would there be psychological evidence from Dr. Alegria which would explain how Mr. Cave had improved himself from 1982 to 1996; would Mr. Cave testify. Mr. Cave would submit that these questions were clearly unanswered at the beginning of the sentencing proceeding.

evaluating. It appears uncontested–but also "unintroduced"–that he was a school dropout who had a borderline retarded IQ. To evaluate him in this context is to be able to give the proper weight to the aggravators and mitigators. Because of the error–not the strategy–of Mr. Garland, this was not done.

Mr. Garland concluded that Mr. Cave "performed better than he tested on that I.Q. test." RI., 30. Mr. Garland believed the only person to be seen by the jury was the "new" Cave. RI., 31. Dr. Gutman also spoke to the IQ issue. In sum, Dr. Gutman testified that there had been a maturation process, coupled with a physical cleansing of drugs from Mr. Cave's body, which gradually permitted him to improve his IQ. RIII., 313. He was a different man in 1996 than he was in 1982. RIII., 299. However, we would submit that the 1982 mental capabilities of Mr. Cave were relevant to whether he should die. Improvement was just additional evidence to establish that he could prosper if permitted to live.

His lack of ability to function on a minimally "normal" level was established starkly by his mother: Mr. Cave failed the entrance test to the Army on at least three occasions. RIII, 365-366. Garland neither discovered nor produced this evidence.

The trial court posed an interesting question as to how it could find that Mr. Cave received ineffective assistance of counsel when Mr. Cave did not disclose the extent of his heroin use to his lawyer. It is true that lawyers are not seers, however,

when a death penalty lawyer establishes that the IQ of his client was deficient – at least at the time of the crime–and that the family was one which did not value education, and simple interviews with the mother yielded that the man could not even pass an Army entrance examination, and the mother of his child was clear that she knew that he was shooting heroin so that it ruined their lives, how can a lawyer not dig deeper than if he were representing an educated, lucid, experienced individual? Mr. Garland chose instead to rely on the man with the 50 IQ. This was an unreasonable reliance and led to ineffective assistance of counsel.

Mr. Garland was insufficient in presenting unprepared testimony from Mr. Cave's mother. Mrs. Hines, Mr. Cave's mother, testified that she had little time with Mr. Garland before her testimony RIII, 378; that she was presented with a thick statement or deposition RIII., 371 and that she, along with her husband and sister, began reviewing it from the beginning. RIII., 373. She was called to testify before she could complete her reading. Mr. Garland recognized that Mrs. Hines was unprepared for her cross-examination and that as a consequence Mr. Cave was prejudiced. Mr. Garland, however, testified that he had an assistant prepared to help Mrs. Hines with the preparation as he recognized that Mrs. Hines could not read but she stated that she would not have anyone read it to her. RI., 147. Mrs. Hines categorically stated that the document was just handed to the three family members

and no assistance was offered. Tr. 372.

CONCLUSION

For the reasons more particularly set out at the *ad damnum* clauses following each issue, Mr. Cave seeks a new trial, or in the lesser alternative vacation of his sentence of death and a new sentencing trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Appellant's Brief has been sent via U.S. Mail this 4th day of August 2003, to ASA Lawrence Mirman, Esq., 411 S. Second Street, Ft. Pierce, FL 34950; and to AAG Melanie A. Dale, Esq., 1515 North Flagler Drive, 9h Floor, West Palm Beach, FL 33401-3428.

BY:_____
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CERTIFICATE OF COMPLIANCE

Mr. Cave'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.