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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APPELLANT ALPHONSO CAVE'S REPLY BRIEF

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

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STATEMENT OF THE CASE AND THE FACTS

Mr. Cave would rely on his initial presentation for both the procedural and factual history of this matter. Specific factual and procedural matters will be discussed in detail in the body of the presentation herein if further information is required.

SUMMARY OF THE ARGUMENT

At Mr. Cave's 1996 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.

The 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.

As if these failings were insufficient, defense counsel himself brought out from Mr. Cave that Mr. Cave had once been accused of a crime and then failed to object when the State defined this accusation as one of rape. Couple that with the defense's introduction of the rap sheets of the codefendants, one of whom had been convicted of the crime of rape, and with defense counsel's total failure to object when the State tied the two together, ineffective assistance of counsel is defined.

ARGUMENT[1]

[1] Mr. Cave is attempting in this presentation to highlight his overall positions and to discuss the presentation of the State. He wishes to make it clear that merely because he does not specifically address a particular point, he in no way concedes that the State is correct in its presentation.

Issue I of Mr. Cave's Initial Appellant's Brief

> 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.

On his deathbed the night before his execution, Mr. Cave's codefendant Bush, the man who actually stabbed the young woman, in an apparent effort to make peace with his Maker, told his lawyer, Stephen Kissinger, that Mr. Cave was innocent of murder and had been totally unaware of the desire of a third codefendant Parker to kill the robbery victim. Further Bush admitted that Cave tried to dissuade Parker from his course; and, when he was unsuccessful in so doing; retreated to the car and remained with the fourth codefendant Johnson[2] while the others stabbed and shot the young woman.

Rather than acknowledge the importance of this evidence, the State attempts to focus this Court on issues other than ultimate guilt and ultimate culpability. This is the same prosecution which initially proceeded on the theory that Mr. Cave was the killer

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[2] Johnson received a life sentence. It now is apparent that Bush stabbed the woman and Parker shot her. Messrs. Bush, Cave and Parker received the death penalty.

and later changed that theory to the current theory that Mr. Cave was a criminal mastermind.

The trial court's Order is not supported by fact or law on this point. The trial court said:

> The defendant maintains...that his attorney was ineffective as a result of his failure to preserve John Earl Bush's testimony before he was executed, and as a result of his failure to object to the state's closing argument that if Bush were alive, he would be testifying that he did not deserve the death penalty. Attorney Steven Kissinger represented...Bush. According to Mr. Garland, Kissinger approached Garland and related that Bush ... would testify that Cave was not the triggerman. Garland agreed to work with Kissinger in an attempt to save Bush's life, but once all avenues of relief were exhausted, Garland testified that he made a conscious decision not to perpetuate Bush's testimony. Bush's statement to Kissinger about Cave's innocence, was in stark contrast to his statement to the parole board, and to other statements he had made which were not favorable to Cave. Although Bush supposedly made a deathbed statement to Kissinger, Garland testified that he did not subpoena Kissinger for Cave's 1996 trial because he did not want to open the door to Bush's other statements. Garland testified without rebuttal that he made this decision after consultation with Cave. The Court concludes that under the circumstances of this case, it was a reasonable trial strategy for counsel not to perpetuate Bush's testimony and not to call Kissinger as a witness.

Order at pp. 18-19.

Mr. Cave submits that it is clear that the trial court erred. He will set out a few

of his disagreements in an effort to clarify his position.

- Codefendant Bush's testimony, but for the ineffectiveness of counsel, would have been known and should have been presented. Any "decision" not to introduce the Bush testimony cannot be predicated on trial counsel's ignorance of the existence of the statement and cannot be based on any "waiver" by Cave after consultation with trial counsel Garland. Garland did not know about it because he was ineffective. He could not have spoken to Cave about it because he did not know of it. He could have known of it by a simple return telephone call to Bush's counsel.
- The court never addressed the serious issue of the State procuring the absence of Bush and then introducing Bush as a "witness" in the State's own argument and the defense's failure to object to this grave error. It put words in the mouth of the dead Bush and then asked the jury to hypothesize along with the State.
- The court's summary of the evidence made it clear that it was considering only the testimony that Cave was not the triggerman. In fact, the entire withdrawal by Mr. Cave was ignored in the court's Order.
- The court omitted reference to the testimony of Mr. Kissinger that Bush told him that Cave did not know that they were going to commit the murder; that he tried to dissuade Parker from doing so; and that, when he was unsuccessful in

so doing, he returned to the car, thus withdrawing himself from the crime in the only way that circumstances permitted.[3]

- The court found that Mr. Garland made a conscious decision not to perpetuate Bush's testimony. What was omitted from this calculus is that Garland never interviewed Bush and *never found out what Bush's testimony was.* Had he known the nature and quality of the testimony, he could have *then* made a considered decision. A decision made in ignorance cannot be justified as a "conscious decision." This error should not prove fatal to Cave.

Firstly, Bush's counsel Kissinger made it clear that Bush would testify that Cave was not the shooter,[4] R.II, 403, and equally clear that Mr. Bush was sure that

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[3] To ask Mr. Cave to go through the formal steps for a formal withdrawal is to ignore the factual context of his withdrawal. They were in a secluded area, two of his codefendants were armed; Parker had made it clear that he intended to kill the young woman. In fact, the statement by Cave and his ultimate withdrawal to the car were brave steps in the face of the armed Parker. Mr. Cave's consistent position–because it is the truth–is that they took the young woman from the store in order to let her go in the country so that they would have some lead time before the police were called. It was a deserted time of night. Cave asked her to keep her head down although there was no one else to see her. He asked her to keep her head down because he did not want her to too easily ascertain where she was when she was released.

[4] It is important to note that that two errors revolve around the failure to utilize this statement: the failure to recognize the importance of a codefendant exculpating Mr. Cave from any premeditation, motive or desire to see the young woman die, and the incorrect reading of the law that if the Bush statement, and *only if the Bush statement* through his own words could evidence of Bush's other statements come into play at

his own death was imminent.

> 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.

R.II, 387.

Mr. Kissinger's relation of this deathbed confession would have changed the outcome of the sentencing. Mr. Bush felt responsible and *was in fact* responsible for Mr. Cave's predicament.[5] Mr. Bush had related to Mr. Kissinger that the *four*

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the Cave 1996 sentencing. Of course, of paramount importance, is the gross ineffectiveness of trial counsel in not completely interviewing Mr. Kissinger–had he done so he would have learned that Mr. Cave performed all elements of the defense of withdrawal which could be performed in that factual situation.

All of these factors must also be viewed through the prism that all of Mr. Garland's sentencing preparation was done *before he knew that the State would change its theory of prosecution and now admit that Mr. Cave was not the shooter but rather the "mastermind."*

[5] The State attempts to convince this Court that the matter was moot because the State did not proceed on the theory that Cave was the shooter was the thrust of Bush's statement. State Brief at pp. 43-44. Firstly, that may have been Garland's "hunch" about what Kissinger would tell him, but it was not what Kissinger was going to tell him. Secondly, Garland made it clear that he had no idea until after jury

men had robbed and kidnaped the victim, taking her to a remote area. When they were in the farm country, Mr. Parker "directed Mr. Cave to provide him with a firearm that Mr. Cave had in his possession which Mr. Cave...did." Tr. 392. Mr. Parker was clearly "running the show.[6]" Tr. 393. Parker then said that he was going to do what he had to do. Tr. 393. Mr. 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.II 393-394. (Emphasis supplied).

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selection that the State was proceeding on the new theory that Cave was not the shooter but rather the mastermind. The totality of his preparation for the sentencing was impacted by this incorrect factual "guess." To permit the State to keep from the court and the defense the theory under which it would proceed and then to argue that because it chose one of two possible strategies the issue of who was the actual shooter was moot is to permit obfuscation.

[6] Of course this controverted another of the State's many-changing theories. Mr. Cave was not a prime mover in this enterprise.

Mr. Cave, due to his withdrawal from the enterprise, is factually innocent. Johnson received a life sentence and there exists no evidence that he attempted to dissuade the others from committing murder.[7] The young woman was in the back seat between Johnson and Cave. Cave was unlucky enough to be the man to open the door and get out. It could as easily have been Johnson who, presumably, had no more or less intention of harming the young woman.

Mr. 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.II, 404. It is without question that the *newness* of the statement by definition reflects that Bush made other statements without explaining the role of Cave as not being willing to assist Parker or Bush.

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[7] Of course, this conviction cannot now stand even upon a "mastermind" theory. The State itself cited to this Court's decision in *Duboise v. State*, 520 So.2d 260 (Fla. 1988) for the proposition that there are instances in which the participation of the defendant can be so overwhelming or where the defendant is the "mastermind" that the death penalty can be sustained on a non-killer. However, a reading of the facts of *Dubois* reveals that that defendant was an active participant. That was a kidnaping during which Dubois raped the victim and *watched all of his companions rape and strike the victim with a piece of lumber.* Contrast this with Mr. Cave who, when he recognized that Parker was going to kill the young woman, tried to stop the enterprise and then withdrew from it to the best of his abilities in the situation. Although not cited by the State, *Jackson v. State* 575 So.2d 181 (Fla. 1991) distinguishes *Dubois* and remands for a life sentence.

Garland knew of the other statements when he litigated to present Bush as a defense witness.

Several factors must be kept in mind by this Court when considering the many arguments of the State which attempt to deflect this Court from considering the import of this evidence to twelve laymen:

1. The State changed its theory of prosecution due to either evolving necessity or in reflection of its learning of evolving facts.

   For some unknown reason, and certainly not in the service of justice and fair play, the State did not disclose its latest evolvement of Cave as a non-killer until *after the sentencing jury was picked* in the 1996 sentencing. That left the defense, either through ineffectiveness or machination of the State, in the position of not knowing whether the State was proceeding on the theory which it previously favored: Mr. Cave was the shooter; or the ultimate incarnation: Mr. Cave was present and, although he neither stabbed nor shot the victim, he was of such import to the "scheme" that he was the "ringleader" and should receive the death penalty through the theory of vicarious liability. If he were the ringleader Parker would have had to listen to him and the young woman would yet be alive.

2. The State fought desperately and successfully to prevent the testimony of Bush at the Cave resentencing. Now it is fighting to keep the words of Bush from the ears of a sentencing jury by invoking a "technicality." The State would have us accept the premise that the total failure of Garland to introduce the Bush evidence was some misguided "strategy," on one hand. On the other hand the evidence of innocence must be ignored by this Court because it was known to trial counsel or could have been known but his failure to utilize it was not ineffective assistance of counsel. One way Cave loses, the other way Cave loses– the ultimate loss.

3. All defense preparation was tainted by the fear that Mr. Cave would once again be called the shooter. When the State *ultimately* revealed its new theory, counsel did not re-think how to proceed effectively; had already bungled voir dire, and had declined to make an opening statement.

4. All defense preparation was filtered through the fear that if a door were opened by the defense, unwanted evidence would be introduced by the State–nuclear issues such as a jailhouse informant saying that Cave was the shooter. The State itself said that Cave was not the shooter. To do or fail to do anything to avoid this "nuclear" issue is to misperceive the

facts to such an extent that ineffective assistance of counsel was rendered. Another of the things to avoid was the history of the codefendants. However, in a stunning move, defense counsel himself introduced "rap sheets" into evidence, thereby informing the jury that these were bad men, one of whom was guilty of rape and both of whom had done significant jail time. In other words, a real defense was not mounted because it would open the door. Then the defense intentionally opened the door. This is not strategy but ineffectiveness. The State followed up by tieing the record of the rapist codefendant with Cave's dismissed rape accusation.

5. All defense preparation was filtered through defense counsel's misperception as to the state of the law of circumstantial evidence. The incorrect theory, which colored all presentation, is that is, if Mr. Cave himself were (1) the only witness, (2) presented evidence favorable to himself regarding his history, his mental state, his drug use, and his participation in the evidence *and* (3) the State presented only *circumstantial evidence* of the aggravators, even if the trial court imposed death, this Court would have to have relied on Cave's testimony as the only evidence of these certain facts. Even Mr. Garland, who at the

evidentiary hearing stood on the "merit" of his decisions, conceded that he was flat wrong in his understanding of the law on this point and that every decision which he made was predicated on this error. Although in another context, Mr. Garland admitted that "evidence is not weak because it's circumstantial, it's weak because the circumstances are not sufficient. Circumstantial evidence can be quite strong." R.II, 238-239. He admitted that he would have considered other evidence had he not been wrong on the law, R.I,74, and would have put on all evidence of duplicity and false statements. R.I,70. A specific and disastrous choice made because of this legal error was that Mr. Garland believed that if he did not put on direct evidence of the statements of the codefendants, the State could not rebut such information or produce such evidence R.I,59, and that his introduction of the codefendants' criminal histories could not injure Mr. Cave. R.II,127 He admitted that he was wrong about this. R. II, 129. A second disastrous choice was that he believed that all evidence of Cave's mental abilities, drug use, poor education, lack of criminal record, should come in through Cave because that would preclude any rebuttal through the dreaded "open door." R.I,57

These, and other factors discussed in the previous and the instant moving

papers, when considered in their totality, establish that the cumulative effect of the errors made by sentencing counsel denied Mr. Cave effective representation and thus due process.

In response to the State's assertions, Mr. Cave recognizes that he may present a claim of "newly discovered evidence" without the strictures of the timeframes established in Florida Rule of Criminal Procedure 3.850 or 3.851.

In his Initial Appellant's Brief, he stressed that the failure to present the deathbed evidence from Bush's trial lawyer--that Cave had made all reasonable efforts to dissuade the others and to withdraw from their enterprise, was, standing alone, sufficient evidence of ineffective assistance of counsel to warrant immediate remand for a new sentencing procedure. He maintains this position and asks this Court to grant him a new sentencing because of the failure of counsel to present such evidence to the jury or to the trial court.

In another attempt to deflect this Court's consideration of the entirety of the facts, the State has argued that the procurement of the ultimate absence of a defense witness–the execution of Bush–was litigated on direct appeal and should be procedurally barred. State Brief at p.22, and n.3.

There are at least two reasons why there should be no procedural bar: Mr. Garland was appointed to represent Mr. Cave; he was once again chosen to represent

Mr. Cave on appeal. Mr. Garland apparently believed then as he did at the hearing, that he was absolutely right in not deposing Mr. Bush or calling his counsel to the stand. In his representation on direct appeal from the imposition of death in 1997, Mr. Garland raised the issue of whether the trial court erred when it refused to stay the execution of Bush. If the position of the State is now to be given credence, the law would be saying that when an ineffective lawyer who does not realize his own ineffectiveness raises in general terms what he considers to be a viable issue, the *real* issue is forever foreclosed. That position is inconsistent with notions of due process and with all precepts of fairness.

The State discussed what happened between Kissinger and Garland upon the approach of the execution of Bush in its brief. Garland requested that Mr. Kissinger get a "death bed" statement from Bush regarding what happened the night of the murder (R100-101). Mr. Kissinger relayed to Garland the Bush's "death bed" statement was that Cave was not the triggerman (R 102). Garland did not depose Bush because he was afraid that the State would use Bush's words; and he decided to present the evidence through the lawyer rather than directly through Bush.

The State, the trial court, and Garland were wrong. Garland was wrong when he "assumed" that all Kissinger could tell him was that Cave was not the shooter; the state and the trial court were wrong when they did not factor this important new

evidence into their thinking. The state characterizes the testimony of Kissinger as: "Cave became upset and told Parker "that he didn't have to do this" (R393). When Cave was not successful in convincing Parker, he left them and went back into the car R. 393). State Brief at pp.24-25.

We have proof that Mr. Garland really was ineffective–not, as he would have us believe, utilizing some unseen, unknown, illogical strategy--when he refused to depose Bush and refused to call Bush's counsel when Mr. Kissinger had information which bore on the very culpability of Mr. Cave in the death. This is why we know that it was not a strategy.

- Mr. Garland went before the sentencing court and asserted that the testimony of Bush was so crucial to the fairness of Cave's sentencing process that the trial court should stay the execution of Bush in order for him to testify. This argument was made in the face of and with full knowledge of the many conflicting statements which Bush and the others had made over the years–opening the feared door. Because Mr. Garland said that he wanted to stay Bush's execution, it can only be believed that he wanted to use Bush and his testimony even with the "baggage" which

came with Bush,[8] or the litigation would have been a sham to keep a person, not his client, alive.

- Mr. Garland came before this Court arguing in essence the same thing based upon the same premises.
- Mr. Garland went before the United States Supreme Court and argued in essence the same thing based upon the same premises.
- Prior to Bush's execution, it is logical to assume, that Mr. Kissinger would have permitted Mr. Garland to interview Mr. Bush–at least at the last moment, when all modes of attack on the death sentence were exhausted. Mr Garland apparently never attempted to do so and his own words so establish. This mode of gathering facts could only help Cave yet it was not done.
- Prior to Bush's execution, Garland had the opportunity to perpetuate the testimony of Bush to ascertain for the record, with the benefits of cross examination. It would then have been directly clear to the sentencing jury what Cave's non-role in the killing was. Bush had no motive to lie to

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[8] When defending himself against accusations of his ineffectiveness, Mr. Garland claimed that he only knew that Bush would say that Cave was not the triggerman and that, since Bush was a problematical witness, they did not want to rely upon his testimony for the defense case. R. 102.

save Cave. He didn't lie to save his own relative, Parker. He tried to inculpate Cave at other times to exonerate himself. Bush's position was important to perpetuate. Garland failed to do so. The failure to gather these most relevant facts is not a strategy but a dereliction of duty owed to Mr. Cave.

- Mr. Garland, in an attempt to justify not deposing Bush, said that it would be preferable to have Bush's counsel testify as to what Bush had said about Cave's culpability–not the position taken at the habeas litigation. Perhaps so, but a deposition to preserve testimony would not have been attacked as unsupported hearsay. And, importantly, *whether it was better to have Bush or his counsel testify, Garland never called either one.* He tells us that he thought through the situation; that Bush was an undesirable witness; that Kissinger was a clean-cut, articulate witness to the same information; that he perceived no evidentiary distinctions utilizing one vs. the other; that he then *for no apparent reason completely abandoned his duties and failed to call Kissinger as a witness.*
- Mr. Kissinger had called Mr. Garland after Bush's deathbed confession and reported that he had new information from the deathbed interview.

- Mr. Kissinger was surprised that he was never approached again as a defense witness.
- Mr. Kissinger testified not only to the "presumption" that Garland labored under– that Bush would say that Cave was not the **shooter–but also that Cave made an affirmative effort to dissuade the others from harming the victim and, when unpersuasive, withdrew** from the scene to the car.

The trial court's Order and the State's argument supporting this position, was that Garland employed reasonable strategy in not deposing Bush or calling Kissinger–presumably in large part because Garland's position had been informed by consultation with Cave–reviewing their options through the prism of "circumstantial evidence." This is incredible as a matter of fact.

Mr. Cave had no education, let alone a legal education. His mental prowess had been called into question on may occasions. No one really understood the "circumstantial evidence" theory of Mr. Garland. Mr. Cave could not have made an informed decision on its use or abandonment when he was receiving faulty legal advice. His lawyer was wrong, consulting with Cave and telling him what the lawyer understood the law to be, at best, would have educated Cave on an incorrect legal theory. This is not strategy but rather fundamentally flawed representation.

The State addressed the questions of whether Bush should have been deposed and/or whether Kissinger should have been called jointly rather than as separate decisions and separate errors. Perhaps these were merged because then the argument could be made that the Bush issue had been litigated on direct appeal. For whatever reason, these are two distinct errors, neither of which is barred from presentation.

The reason stated for the lack of deposition of Bush was that Garland did not want the State to obtain evidence to use against Cave at the resentencing. Of course at least three courses of action were available: interview, deposition for discovery purposes; discovery for the purpose of perpetuation of testimony. Garland first failed when he did not interview Bush. That would not have opened any doors but would have been a reasonable part of his investigation of a crucial witness' testimony. Failing that, Garland could have sought to depose Bush. To do nothing is error. Mistake cannot be labeled "strategy" and fulfill Constitutional commands.

The direct testimony of Bush was made unavailable by Bush's execution, but Mr. Garland knew that the Bush statements could come in through his counsel as dying declarations and he has stated that he preferred that method. However, as Mr. Cave previously pointed out, the same impeaching evidence which can be used against a testifying witness can be used to impeach someone relating admissible hearsay of the declarant. In other words, there was no distinction between putting on the direct

words of Bush and putting on the words of Bush through Kissinger–the same impeachment was available. To have made such a distinction is to speak to a total lack of understanding of hearsay and impeachment. This is but one more instance where the profound lack of knowledge of extant law tainted the representation of Mr. Cave.

Mr. Cave agrees with the State's position that ineffective assistance of counsel claims are to be reviewed *de novo* by this Court, with deference to credibility assessments. *Stephens v. State,* 748 So.2d 1028 (Fla. 1999); *State v. Reichman*, 777 So.2d 342 (Fla. 2000) and *Cherry v. State*, 781 So.2d 1040 (Fla. 2000). *Stephens*, a conflict certiorari case, recognized that the standard of review by any court must be independent and less deferential than that stated in *Grossman v. Dugger*, 708 So.2d 249 (Fla. 1997), because ineffective assistance of counsel claims are Constitutional in nature and are mixed questions of fact and law.

However, here the *de novo* review must result in a finding of ineffective assistance of counsel. Dispositive evidence was available from a to-be-executed codefendant. Defense counsel fought long and hard to obtain that evidence. He failed to preserve it though he knew that Bush would be executed and then failed to put the evidence on through Bush's counsel Garland not only failed to produce the evidence to the jury but also failed to present it to the judge at a *Spencer* hearing.

Based on the hereinabove errors of fact and law, this conviction should be

reversed based upon newly discovered evidence, or, in the lesser alternative, it must be remanded for a new sentencing hearing.

ISSUE II

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 disagrees with the State and with the position of this Court. It is respectfully suggested that the briefing of these two totally parallel and non-intersecting views of *Ring* are sufficient to inform this Court of the respective positions of the parties.

Mr. Cave would only comment that one must look to the large picture, especially when one is considering the imposition of death. It appears that the State is uncomfortably squirming to narrow *Ring* at each turn. It argues that Mr. Cave is barred although he raised the issue below; it argues that the statute provides for death, therefore we should ignore the realities that the jury is told that it is not making a decision but rather merely making a recommendation–minimizing the role of the jury

to that of a fellow shopper who is asked if the dress one is trying on looks "good." The fellow shopper has no responsibility so can another without studied reflection with no "harm" coming therefore. Here the jury is told that it is a mere functionary, given to believe that it is not important enough to even require any analysis outside of a raw split.

Let us clearly delineate the areas of disagreement between Mr. Cave and the State and, in some instances, this Court.[9]

- Mr. Cave asserts that his *Ring* claim is not procedurally barred because he preserved it at the post conviction proceedings and because it meets all criteria for retroactive application–going to the very heart of the conviction. This is irrespective of the rulings to the contrary of this Court or of the United States Court of Appeals for the Eleventh Circuit. He specifically disagrees with the position that either plain error or structural error must be present to support retroactivity of a watershed decision of the United States Supreme Court.

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[9] Mr. Cave was quite candid in his recognition of and disagreement with this Court's analyses and rulings on *Ring*. The State incorrectly states that Mr. Cave states that *Almarendez-Torres,* 523 U.S. 224 (1998) did not survive *Apprendi.* On the contrary, Mr. Cave believes that *Almarendez-Torres should not survive Apprendi*, but recognizes that that remains an open question. See Initial Appellant's Brief at fn 4, p 35. However, Mr. Cave submits that "contemporaneous" felonies must be treated differently from "prior" felonies. To do otherwise is to negate the plain meaning of the concepts.

- Felony murder should not sustain a death imposition. Mr. Cave understands that there are some limited circumstances in which the United States Supreme Court has stated that it is so sustained. However, for the State to note that the penalty for first degree *felony murder* in Arizona is life, thus the two statutes are "very different," disserves complete analysis. State's Brief at p. 45.
- The argument that the statutory penalty for murder *could* reach death ignores the reality that every person convicted of first degree murder is mandated by law to receive a life sentence if aggravating factors are not established. The language "a defendant is *eligible* for the death penalty if he or she is convicted of a capital felony," cited by the State from *Shere v. Moore*, 830 So.2d 56 (Fla. 2002), it is respectfully submitted, defines the non-automatic nature of the death penalty. *Automatic death-eligibility, not-automatic death-penalty.* What must transpire to obtain the death penalty is that at least one aggravator must be found by the trier of fact beyond a reasonable doubt. Mr. Cave merely wants the Florida procedure to comport with Constitutional muster: elements of the crime to be alleged and found beyond a reasonable doubt by the trier of fact with proper instruction.
- To argue as the State does that merely because a defendant is convicted of a contemporaneously charged felony, the jury of necessity would have imposed

the death sentence is faulty logic. Mr. Cave understands that, if one were to assume arguendo that it was appropriate for a contemporaneous felony to be defined as a prior felony, one aggravating factor would have been established by the jury verdict. However, to argue as the State does that the fact of the contemporaneous conviction *establishes that that jury would have imposed the death penalty* is logically faulty and factually inaccurate–otherwise there would be no need for a penalty phase at all where the defendant was convicted of a contemporaneous felony–automatic death no matter the mitigation.

Mr. Cave submits that *Ring v. Arizona* requires that this Court reverse the decision of the trial judge and permit Mr. Cave a retrial at which any aggravating circumstances could be pled in the Indictment, or in the lesser alternative, resentencing at which appropriate safeguards as to charging, unanimity and standard of proof are extant.

ISSUE III

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

The only issues before this sentencing court were those revolving around the conduct of the 1996 sentencing. Mr. Cave raised and the trial court recognized and

ruled upon the issues of lack of preparation and presentation of available evidence at that sentencing hearing. Among these issues was the failure to address any medical, psychological or psychiatric testimony, the failure to address drug and alcohol abuse, low intelligence and suggestibility. See, Trial Court's Order at pp. 8-10 as well as Amended Motion to Vacate at, *inter alia*, issues 3,6.

Mr. Cave believes that the respective briefs adequately set out the relative positions of the parties. However, he would like to point out particular disagreements.

- The State has taken the position that Cave–with all of his intelligence concerns–was duty-bound to tell his lawyer if he knew anything relevant about himself. Garland was not duty-bound to look beyond the self-analysis of Cave as to his intelligence, mental health, limitations, and addictions. If Cave didn't raise it, Garland had no duty to investigate it. A quick consultation with the mother of Mr. Cave's child would have revealed that Cave was a drug addict whom she had to support .[10] Mr. Cave himself told Dr. Gutman that he had remained in a drug induced stupor through the entire decade of the 1970's. The State shifts the lawyer's professional duty to the client. In other words the State

[10] To suggest as did the State that the striking testimony that Ms. Freeman came home and saw a "spike" (needle) sticking from the arm of the passed out Cave *might have been* suppressed even if located because it was outweighed by the fact that Cave fathered the child while Ms. Freeman was thirteen years old, is illogical.

would have us believe that Cave provided ineffective assistance of client but Garland did not provide ineffective assistance of counsel.

- Cave had a borderline IQ, no education, no work history yet both the trial court in its Order and the State before this Court justifies Garland's ineffective investigation and presentation by Garland's after-action report that "we" decided to do or not to do certain things. Garland should have consulted with Cave. However, even if we accepted the premise that if the client–no matter his mental status–approves of a lawyer's actions, there can be no violation of the Constitutional requirements for effective counsel–Garland admitted, as the State admitted, that the "consultations" were filtered through Garland's misunderstanding of the law. Their defense "strategy" was to have Mr. Cave give direct evidence ; the State present circumstantial evidence and by some magical incantations of the "circumstantial evidence rule" would result in a life sentence

- The State *in this presentation* appears to support Garland's erroneous position that the mental acuity of Cave in 1996 was the relevant consideration. State's Brief at p. 53. Of course, the trial lawyers in 1996 were no so inclined. They presented the Cave at the time of the offense. The failure to present the Cave and his abilities and disabilities at the time of the crime was a total failure to

counter the State's evidence of why Cave should die. This was ineffective assistance of counsel.

- The State makes much of the after-the-fact justification of Garland that had mental health experts testified, the Bryant and other evidence that Cave was the shooter could have been introduced. By 1996 the State had recognized and was proceeding on the theory that Cave was not the killer. How could it have introduced evidence that Cave was the shooter? He wasn't. The State by this time admitted it.

Mr. Cave's Motion to Vacate should have been granted and he should be granted a new sentencing phase.[11]

ISSUE 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

The formation of the State's issue itself damns with faint praise the

[11] Of course, because he asks for a new sentencing phase in some contexts, does not mean that Mr. Cave does not persist in his belief that the evidence presented from Mr. Kissinger at the 3.850 evidentiary hearing justifies a new trial.

representation received by Mr. Cave–not *so* ineffective .The Issue was cast thusly by the State. Cave's Trial Counsel Was Not *So Ineffective* That the Decisional Process Was Gutted Requiring Vacation of the Death Sentence. (Emphasis supplied).

The State once again takes the position that ineffectiveness of Garland was not raised in the pleadings or at the evidentiary hearing. In fact, virtually the entire litigation focused on the ineffectiveness of trial counsel at the sentencing.

Once again, Mr. Cave believes that the positions of the parties are set out in the initial presentations. However, he would like to discuss certain matters raised by the State.

- Garland abandoned his role as Cave's counsel when he failed to bring to court the compelling evidence of Bush's exoneration of Cave. This cannot be discarded or minimized as it is the centerpiece of this presentation and clear and convincing evidence that the Constitution was violated and that Cave did not receive even a modicum of effective assistance of counsel.
- Cave was never consulted by Garland on this matter.
- The State does not address, nor can it meaningfully, the absolute absence of effective assistance of Garland because he fashioned his entire defense around an incorrect premise of law: if he put on direct evidence and the State put on circumstantial evidence, this Court would not uphold any sentence of death

because of the "circumstantial evidence rule." "In other words, I wanted Mr. Cave's statement to be an unrebutted direct piece of testimony which if a circumstantial evidence standard of review applied, then the jury would have had to accept it." R.I,59.

- "...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." R.I,71
- Mr. Cave cannot pretend to fully understand the mental machinations resulting in this conclusion. However, it is without dispute that this incorrect apprehension of the law tainted the preparation for and the conduct of the 1996 sentencing and prejudiced Mr. Cave.
- Nowhere is the unconscionable decision of the State *not to inform the defendant or the jury during jury selection that it was proceeding on a new theory: felony murder* discussed or justified. A death qualification is not a game of hide and seek. Mr. Cave had to know against what he was defending. He believed, as did his counsel, that once again the State would be arguing premeditated murder with Mr. Cave as the shooter. The State's questions as to whether the jury could vote death carried forward under the presumption that

Cave was the shooter. At no point in time did the State make the simple statement that it was *not* alleging that Cave was the shooter. It waited until it had its jury to begin to discuss its theory with the defense, the court and the jury. The State ignores the facts when it unequivocally states that "the defendant's status as the triggerman was never in dispute." Garland didn't know until opening by the State. It continues, "the state repeatedly told the jury *during opening and closing* that Parker was the shooter." State Brief at p. 60. It was important that this be disclosed before opening statement.

- Mr. Cave recognizes that this Court will evaluate the facts *de novo* and stresses his disagreement with the trial court's finding that there was no evidence of ineffectiveness in voir dire. The state's improper hypotheticals and the failure of counsel to object to them resulted in ineffective assistance of counsel.
- Mr. Cave previously discussed the horrendous ineffectiveness he received when his own lawyer–the man who feared opening any door and all "nuclear" issues–asked him on direct examination if he had a prior *arrest*, introduced the rap sheets of his codefendants, and then sat silently while the State proceeded to tie together the reason for the arrest ***rape*** with the rap sheet of his codefendant who had served a period of incarceration for ***rape***. Even Garland admitted that he should have objected but this admission is minimized, and the

State argues that the trial court's opinion that the introduction of the concept of rape into this trial was a *reasonable trial tactic*, and, anyway was made with the concurrence of Cave, through the prism of circumstantial evidence. Collateral crimes evidence is not so lightly treated in Florida's courts, yet the State ignored Mr. Cave's citation to *Dragovich v. State*, 492 So.2d 350 (Fla. 1986); *Williams v. State*, 110 So.2d 654 (Fla. 1959); *Heuring v. State*, 513 So.2d 122 *(Fla. 1987)*; or *Conahan v. State,* 844 So.2d 629 (Fla.2003). It is respectfully suggested that the State could not meet the collateral crimes standard for introduction. It was ineffective assistance of counsel to bring up a prior arrest; it was ineffective assistance of counsel not to object to the State's question as to the *nature* of the arrest; it was prosecutorial misconduct to merge the dismissed accusation of rape against Cave with the rape conviction of a codefendant; and it was ineffective assistance of counsel not to object when the State did so.

- The State does not address Mr. Cave's position that there is a tension between providing a statutory mitigator of "no significant history of criminal history" and the State's ability to present rebuttal to this mitigator by introduction of acts which are not convictions or in many cases not even accusations.
- The state is clear on the law–one can rebut the mitigator of no significant prior

criminal history with *direct evidence of the defendant's prior criminal activity*. State's Brief at p. 62. Although Mr. Cave disagrees with the law, he recognizes its existence. However, the State is resoundingly silent on what the *direct evidence* was. There was no direct evidence.

- Mr. Cave fundamentally disagrees with the position of the State that "even if Garland was deficient for not objecting to the nature of the arrest being elicited and compared with co-defendant Bush's criminal history, Cave has failed to prove prejudice,...because the resentencing court found that the statutory mitigator of no significant criminal history had been proven." State's Brief at p.64. There is virtually no limit on the evidence which can be of a mitigating nature. However, the Legislature of Florida has established as *statutory mitigators* certain distinct categories of evidence. Therefore, when a statutory mitigator is considered but given little weight, the State cannot say that Cave "won" so he has no reason to complain. Surely this Court when evaluating the evidence will discard this argument and go to the heart of the issues.
- The State relies on the argument that Garland and Cave had had conversations over the years and that notifying Cave that he was to testify immediately before that testimony is no evidence of lack of preparation. State's Brief at p. 65. To take a man of minimal educational and intelligence skills and put him on the

stand with no notice defines ineffective assistance of counsel and cruelty.

- Mr. Cave would respectfully suggest to this Court that Mrs. Hines' testimony about the lack of preparation for her testimony and any meaningful evaluation of the pitfalls of that testimony should have been given credence over that of Mr. Garland who knew that her prior statement that the young woman begged for her life–coming from Cave's own mother–was sure to come out.

For the reasons stated above, the determination of the trial court denying collateral relief must be reversed.

CONCLUSION

Taken singly or jointly, the instances of ineffectiveness of counsel, coupled with prosecutorial error, require that this Court consider whether evidence discovered in the post trial litigation that Cave was innocent of actual murder and that he withdrew from the enterprise justifies a new trial. At a minimum, Mr. Cave submits that it is clear that a new sentencing is required.

CERTIFICATE OF COMPLIANCE

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

BY:_____

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via United States mail this 7th of May,2004, to ASA Lawrence Mirman, Esq. 411 S. Second Street, Ft. Pierce, FL 34950, and to Debra Rescigno, Esq., 1515 North Flagler Drive, 9th floor, West Palm Beach, FL 33401.

BY:_____
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