IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-1283

SEBURT NELSON CONNOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Connor's Amended Motion to Vacate Judgment of Conviction and Sentence and Request for Evidentiary Hearing and Incorporated Memorandum of Law. The motion was brought pursuant to Florida Rules of Criminal Procedure 3.851.

The following symbols will be used to designate references to the record in this appeal:

"R."-- Record on direct appeal to this Court, followed by page number;

"PC-R."-- Record on 3.850 & 3.851 appeal from Circuit Court to this Court.

"T"—The transcripts original appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Connor has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved in this case. Mr. Connor, through counsel, respectfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Connor was arrested on November 21, 1992 for the murder of Lawrence Goodine and his ten-year-old daughter Jessica Goodine. Thereafter, on December 12, 1992 a four-count indictment was returned against Mr. Connor charging him with the first-degree murder of Lawrence Goodine, the first-degree murder of Jessica Goodine, the kidnapping of Jessica Goodine and burglary with assault. (R. 1-3) Mr. Connor was declared indigent and the court appointed Louis M. Jepeway, Jr. to represent him. At Mr. Jepeway's request, the court appointed Eugene Zenobi as second chair.

At the conclusion of the initial competency hearing, the prosecutor suggested that there was a conflict of interest between Mr. Jepeway and Mr. Connor because Mr. Connor had filed a complaint against Mr. Jepeway with the Florida Bar and had written several letters to the Judge complaining about the behavior of both his counsel. (T. 930-31) (T. 551, 667-70) According to Mr. Connor, Mr. Jepeway and his investigator tricked his wife into giving them a briefcase containing valuable coins, watches, and jewelry as well as $25,000 to $30,000 worth of uncollected receipts from his trading business. They had kept the briefcase and its contents. (T. 556-62).

On June 20, 1996, the court discharged Mr. Jepeway (denying his requests for further inquiry of Mr. Connor) and appointed Mr. Zenobi. (T. 949-54) Mr. Zenobi did not request that the Court appoint a second chair to conduct the penalty phase of the trial. (R. 22; T. 8-9).

On February 11, 1998 the jury found the Petitioner guilty of all four Counts. (R. 629-632) During the penalty phase, which ended on February 26, 1998, the jury in an 8 to 4 decision, recommend the death penalty for the murder of Jessica Goodine and life in prison for the murder of Lawrence Goodine. (R. 1010-1011)

The Honorable Maxine Cohen Lando followed the jury's recommendations and on June 19, 1998 sentenced Mr. Connor to death for the murder of Jessica Goodine. During the sentencing hearing, the Circuit Court also sentenced the Appellant to life in prison for the murder of Lawrence Goodine and to consecutive sentences of twenty years for kidnapping and burglary. (R. 2199-2219) & (R.2227-2231)

On or about July 17, 1998, Mr. Connor filed his Notice of Appeal. (R. 2234)

Mr. Connor appealed his conviction to the Florida Supreme Court, Case No. 93,967. The Florida Supreme Court affirmed Petitioner's conviction on September 6, 2001. The Petitioner then requested a re-hearing and the re-

hearing was denied on December 17, 2001. The Mandate was issued on December 17, 2001. State of Florida v. Seburt Nelson Connor, 803 So. 2d 598 (Fla. 2001)

On March 27, 2002, the Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court, Case No.: 01-9268. Said Petition was denied by the United States Supreme Court on May 28, 2002. State of Florida v. Seburt Nelson Connor, 122 S. Ct. 2308, 152 L. Ed. 2d 1063 (2002). On May 23, 2003 Mr. Connor timely filed his Motion to Vacate Judgment of Conviction and Sentence and Requests for Evidentiary Hearing. (PC-R. 40-87) The State of Florida filed its response to Mr. Connor's post- conviction relief motion on July 22, 2003. (PC-R. 106-170) On December 1, 2003 Mr. Connor filed a motion seeking leave to amend his Motion to Vacate Judgment of Conviction and Sentence and Requests for Evidentiary Hearing and at the same time he also filed his proposed Amended Motion to Vacate Judgment of Conviction and Sentence and Request for Evidentiary Hearing and Incorporated Memorandum of Law. (PC-R. 191-270) The State of Florida filed an amended response to Mr. Connor's Amended Motion to Vacate Judgment of Conviction and Sentence on December 19, 2005. (PC-R. 275-343) The Circuit Court granted Mr. Connor's motion for leave to file his Amended Motion to Vacate Judgment

of Conviction and Sentence and Request for Evidentiary Hearing and Incorporated Memorandum of Law on December 19, 2005. (PC-R. 499) On December 19, 2005 the Circuit Court also held a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) on Mr. Connor's Amended Motion to Vacate Judgment of Conviction and Sentence and Request for Evidentiary Hearing and Incorporated Memorandum of Law. (PC-R. 496-552) At the conclusion of the Huff hearing, the Circuit Court ordered an evidentiary hearing on the limited issue of the trial lawyer's failure to present mitigating evidence of Mr. Connor's childhood during the penalty phase. (PC-R. 545) During the hearing, the Circuit Court also informed the parties that it would be denying the remaining issues presented in Mr. Connor's Amended Motion to Vacate Judgment of Conviction and Sentence. (PC-R. 545)

The evidentiary hearing took place on February 18, 2004 and April 23, 2004. (PC-R. 553-691 & 392-491) Prior to the evidentiary hearing the Circuit Court also held a competency hearing and found Mr. Connor to be competent. (PC-R. 648).

On June 7, 2004 the Circuit Court entered an order denying Mr. Connor's Amended Motion to Vacate Judgment of Conviction and Sentence and Request for Evidentiary Hearing and Incorporated Memorandum of Law.

(PC-R. 354-373) Mr. Connor filed his Notice of Appeal to the order denying his post-conviction relief motion on June 28, 2004. (PC-R. 374-375)

The Appellant, SEBURT NELSON CONNOR, Prisoner No. DC124517 is currently incarcerated at the Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4440.

STATEMENT OF FACTS

On Thursday, November 19, 1992, Margaret Goodine left for work at 9:30 a.m. Her daughters Karen and Jessica had already left for school. Mr. Goodine remained at the residence. (T. 3773). Mr. Goodine was last seen at about 2:30 p.m., when he returned to Ms. Goodine's residence after doing repair work at his other house. (T. 3933, 3945). Later that afternoon, Jessica Goodine came home from school and went across the street to Ms. Merrit's house, to play with Ms. Merrit's seven-year-old daughter Faisha Thomas. (T. 3827-28, 3934-35, 3946). While the girls were playing in the front yard, they noticed a black Cadillac at the Goodine home. (T. 3827-29, 3935). The car looked like that of Jessica's mother. (T. 3829). Jessica went home. (T.3829). Later, Jessica returned to the Merrit's house "to ask a question" (T. 3935), and to tell Faisha that she was going to leave (T. 3829). She then went back to her home. (T. 3829). Subsequently, Faisha saw her friend leaving in the black Cadillac. (T. 3830, 3957). Jessica was in the front

passenger seat. A man was driving. Faisha assumed that the man was Jessica's father, but she could only see the back of his head. (T. 3830, 3837, 3839-40). Faisha did not see Jessica enter the Cadillac, or walk up to it. She only saw Jessica after she was already in the car. She did not observe any fighting or any "words." (T. 3834-36). Jessica's sister Karen came home at about 6:00 p.m. (T. 3955). Karen called her mother, who was still at work, to tell her that Mr. Goodine and Jessica were not at home and it appeared that someone had been in the house. (T. 3776-77). The police was called (T. 3936-38), and investigated the scene between 7:00 and 7:40 p.m. (R. 123-24). Ms. Goodine came home at 9:30 p.m. (T. 3954). Jessica and Mr. Goodine were still missing. Ms. Goodine called the police and reported her suspicion that Mr. Connor had something to do with their disappearance. (T. 3777-78). At about 9:30 or 10:00 p.m., an officer made a phone call to the Connor residence. The officer said she was investigating Jessica's disappearance and spoke to both Mr. and Mrs. Connor. (T. 198-202, 244-46). The officer asked if they owned a black Cadillac and whether Mr. Connor knew the Goodine family. (T. 201, 4906-9). Miami-Dade Detective Juan Murias went to the Goodine residence at 11:45 p.m. (T. 3593). He spoke to Ms. Goodine, who relayed the events of that afternoon and evening and explained the circumstances leading to the restraining order against Mr.

Connor. (T.3955-56). Detective Murias then went to the Connor residence at about 3:00 a.m., Friday, November 20, 1992. (T. 495, 3956). A black Cadillac was parked on the property. (T. 3957). Murias told Mrs. Connor he wanted to speak to her husband. Mr. Connor was in the cottage, and Mrs. Connor went to get him. (T. 496, 3957-58). After asking Mr. Connor to step into his police car, Murias explained that he was investigating the disappearance of Jessica and Lawrence Goodine. (T. 497-98, 3959). Mr. Connor told the detective that although he had had a relationship with Ms. Goodine for about a year, he no longer wanted anything to do with her and had not seen her in the last month. (T. 499, 3960). He said he had not had contact with Jessica or Lawrence Goodine that afternoon. (T. 3960). He did not express concern about the fact that Jessica and Lawrence were missing. (T. 3960-61). He seemed calm and unemotional. (T. 3960).

Late in the afternoon of Friday, November 20, 1992, Lawrence Goodine's body was found in a wooded area near the Fort Lauderdale airport. (T. 3640-41, 3680). The body was wrapped in a quilt. The head was wrapped in a blue bathrobe. (T. 3646, 3648, 3654-56). The cause of death was multiple blunt trauma to the head. (T. 3712). Mr. Goodine had been hit on the head five times. Each of the blows would have rendered him unconscious, and each of them was fatal. (T. 3708-10, 3715-16). When his body was removed by the

police (at about 4:30 p.m.), he had been dead for about twenty-four hours. (T. 3641, 3680-81, 3683-84, 3718-20). When the Broward Sheriffs Office detectives went to the Goodine residence to report this, at 10:00 p.m., they found blood on the living room carpet near the front door, next to a wall unit, on the wall unit itself, and on a ceramic figurine in the unit. (T. 3661-62, 3665, 3963, 4003-5). Subsequent tests indicated that the blood was probably that of Mr. Goodine. (T. 4365-66). A throw rug extended over the area where blood was found on the carpet. (T. 4004, 4052-54, 4065, Exhibits 27, 29-30). Ms. Goodine reported that several comforters were missing, as well as some of her clothing, ceramic pictures, pieces of jewelry and some other items. (T. 385-86, 3955-56).

On Saturday, November 21, 1992, at 2:00 a.m., several detectives arrived at the Connor residence. (T. 315, 388, 500, 3964, 4108-9). Detectives Times and Murias opened the gate in the fence which surrounded the property, walked up to the front door, and knocked. (T. 137-38, 350, 434-35, 3846, 3848, 4109). Mrs. Connor responded. Detective Murias told her they wanted to speak to Mr. Connor. She said she would get him. (T. 391, 3964). Seconds later Mr. Connor came out of the master bedroom. (T. 392-93, 3964-65). The detectives told Mr. Connor that they were continuing to investigate the disappearance of Lawrence and Jessica Goodine.

Detective Times then "advised Mr. Connor that [she] needed to further talk to him at [her] office." (T. 4081). Connor, who was in pajamas, asked if he could get dressed; Detective Times gave him permission to do so. (T. 397, 441, 4098). He went into the bedroom for five or fifteen minutes and got dressed. (T. 397, 3969, 4118). He was alone in the bedroom and was free to dress any way he chose. (T. 4098). As they went out of the house, Detective Times asked Mr. Connor if she could search the black Cadillac that was in the driveway. (T. 398, 502, 4082, 4121). After he assented, the detective filled out a consent form, which Connor signed. (T. 399-401, 502, 4088-90). Detective Times conducted a search and saw what appeared to be blood stains inside the trunk and on the back seat of the vehicle. (T. 401-2, 4091). Connor was then taken to the Homicide Bureau.

There was a small cottage behind Mr. Connor's residence. It was very close to the house but separate from it. (T. 130, 195, 303, 3847, 4209). While Mr. Connor was on his way to the police station, Detective Murias and another detective conducted a search of the cottage, pursuant to Mrs. Connor's consent to their entry. (T. 504-5, 509, 513-15, 3901, 3909, 3965-78). It was an extremely small structure (14' 10" by 16' 2") which was partitioned into a small bedroom, a living room area, and a bathroom with a toilet and a shower. (T. 130, 3851, 3972, 3974-75; Exhibit 20). He saw

nothing suspicious anywhere in the cottage. (T. 3977). After the search, the door was locked. Detective Butchko kept the key. (T. 4454, 4464-65). Meanwhile, Detective Times was interrogating Mr. Connor at the Homicide Office. Times advised Connor of his *Miranda* rights and he signed a standard waiver form. (T. 403, 405-7, 4634-35). He was not free to leave, but he had not been told that he was under arrest. (T. 4134).

During the interrogation, Detective Times noticed that there were "very obvious" blood splatters on Connor's gold-colored socks and on his shoes. (T. 413, 4097). There was a large bloodstain on one of the socks, and what appeared to be blood around the seams of his shoes. (T. 4097). Asked how he got blood on his socks and shoes, Connor showed Times a small laceration on his leg. Times told him that the laceration was very small, and already healing, and could not account for the profuse bleeding evidenced by the blood stains. (T. 4644). Connor did not respond to this. (T. 4644). Times told Connor that she needed to take his socks and shoes as evidence. (T. 416). He signed a consent form without resistance at 4:35 a.m. (T. 416, 4102, 4645). Subsequent DNA testing showed that the blood on the socks and shoes was that of Lawrence Goodine. (T. 4359, 4364). Detective Times then asked Connor for permission to search his residence. He agreed but said he wanted to call his wife. (T. 419, 4143-44). He was allowed to tell his

wife that he had given his permission to have the residence searched. (T. 420). Connor then signed (at 5:00 a.m.) a form consenting to a search of both the residence and the cottage. (T. 420-23, 4094, 4121-22).

Detective Times called Sergeant Jimenez, who was still outside the Connor residence. Times informed Jimenez that she had obtained Connor's consent for a search of the residence, and asked Jimenez to obtain the consent of Mrs. Connor and of her daughter Garla. (T. 320-21, 323). Ten minutes later Sergeant Jimenez and Detective Vas had obtained the signatures to search both the residence and the cottage. (T. 121-24, 127-32, 4283-87). Detective Vas asked Mrs. Connor for the clothing that her husband had been wearing on Thursday, November 19, 1992. She pointed to a pile of clothing in the master bedroom. Detective Vas seized a shirt and a pair of gray pants that appeared to have bloodstains on them. (T. 4291, 4296). The bloodstained pants and shirt were taken to the Homicide Office where they were shown to Mr. Connor. He admitted that he had been wearing these clothes on Thursday. (T. 417-18, 4647). He did not respond when asked how the blood got on the pants and shirt. (T. 4647). Subsequent DNA testing showed that the blood on the pants was that of Lawrence Goodine. (T. 4359-60, 4364). Detectives Times and Bayas continued questioning the defendant. Mr. Connor denied knowing where the blood

came from, and denied knowing what happened to Mr. Goodine. (T. 4648-49). He denied responsibility for Jessica's disappearance and denied knowledge of her whereabouts. (T. 4726-27, 4740-41). He also denied having burglarized the Goodine residence. (T. 4725). Asked why he had bought a car so similar to Ms. Goodine's, he could not really give a response. (T. 4725). Connor said that he had not gone to work on November 19. (T. 4723). He claimed that he had gone to visit an attorney but could not give the attorney's name or address or the time he had gone to see him. He said that, after meeting with the attorney, he had gone to a tile company but could not give a specific time or location or even say whether he had actually purchased any tile. (T. 4723). He said he had then gone to a supermarket, and had returned home by about six o'clock. (T. 4723). When asked again to explain how the blood came to be on his clothes, Connor could not respond. (T. 4650). At that point he was informed that he was under arrest for first-degree murder. (T. 4650). It was about 12:30 p.m. (T. 4651).

After a search warrant had been obtained, at 11 a.m., the Cadillac was towed away for further processing. (T. 332). A blood stain was found on the pouch behind the driver's seat, and another on the rear seat. (T. 4173-74). DNA analysis showed that the blood was that of Lawrence Goodine. (T.

4359-60). At around 11:00 a.m. the police conducted a second search of the cottage. (T.20 3901). Detective Butchko used the key he had obtained from Mrs. Connor. (T. 3850, 4416). In the bedroom, wedged between the bed and the wall, Sergeant Jimenez found the body of Jessica Goodine. (T. 339, 3854). It was wrapped in a green comforter (T. 339, 3854, Exhibit 76). This green comforter did not come from the Goodine home. (T. 4618).

Jessica probably died "sometime late on Friday" (i.e., November 20, 1992). (T. 5320). The cause of death was asphyxia by manual strangulation. (T. 4714). Her eyes were puffy, indicating she had been crying. (T. 5321). There was residue of duct tape on the face. (T. 4706-7). A hand had been pressed down over her mouth with sufficient force to cause hemorrhaging along the gum margin. (T. 4706, 5329). She had not been sexually molested. (T. 3372-73, 4325). There were no ligature marks on the body. (R. 2204).

Several articles taken from the Goodine home were also found in the cottage, including jewelry, sheets, pillowcases, and shoes. (T. 4609-19).

At trial, Mr. Connor testified concerning his background, his relationship with the Goodine family, and his activities between Thursday, November 19, 1992, and Saturday, November 20, 1992. That testimony essentially reiterated his statement to the police. (T. 4775-87, 4796-4804).

During the penalty phase, Connor vehemently denied that he was

incompetent.

SUMMARY OF ARGUMENTS

ARGUMENT-I

During jury selection, the prosecutor informed the jury that Appellant had a criminal record that would not be revealed to the jury. Mr. Connor's trial attorney was ineffective in that he failed to object to this highly prejudicial statement. Not only was this statement highly prejudicial, it was also false because Appellant did not have a criminal record. Mr. Connor's appellate lawyer was also ineffective because he did not present this issue on appeal.

ARGUMENT-II

The trial Court violated Mr. Connor's Constitutional Right to confront witnesses by allowing the State to introduce prejudicial testimonial hearsay statements. These hearsay statements were introduced over Appellant's attorney's objections. Although this issue was properly preserved for appeal, Mr. Connor's appellate lawyer failed to present this very important issue on appeal.

ARGUMENT-III

Mr. Connor was severely prejudice as a result of his trial lawyer's failure to move to strike the entire jury panel, after prospective jurors told the Court

that they could not give Mr. Connor a fair trial because they had overheard him make positive remarks about Cuban dictator Fidel Castro. There was at least one prospective un-known juror that heard said statements and possibly more. In addition, Appellant also received ineffective assistance from his appellate lawyer because this crucial issue was not presented on appeal.

ARGUMENT-IV

Several times during jury selection, the Court described to prospective jurors a hypothetical situation where an elderly man kills his ill wife to keep her from suffering and described it as an example of a case where life imprisonment would be an appropriate sentence. This illustration was highly suggestive and misleading in that the Court was in essence telling the jury that the only cases worthy of life sentences were cases involving " mercy killings". Being that this case does not involve a "mercy killing" the Court could only conclude that the only appropriate sentence for Mr. Connor was death. Since his attorneys failed to object or to appeal this issue, Mr. Connor received ineffective assistance of counsel from both his trial and appellate attorneys.

ARGUMENT-V

From the record, it appears that Appellant was not present numerous times during trial. This is a clear violation of Appellant's Constitutional Right to

be present during all stages of trial. The Court also violated Mr. Connor's Right to be present during trial, when it conducted an *ex-parte* hearing where the Court excused a juror from the panel. It should be noted that Mr. Connor did not waive his presence.

ARGUMENT-VI

The trial Court violated Appellant's Constitutional Right to remain silent by allowing a police officer to comment on situations where Appellant exercised such a right.

ARGUMENT-VII

Mr. Connor's Sixth Amendment Right to effective assistance of counsel was compromised because a conflict of interest existed between Mr. Connor and his trial attorney. This conflict of interest resulted from the business relationship that his trial lawyers had with Appellant's former attorney who was discharged by the Court because of a conflict of interest.

ARGUMENT-VIII

Mr. Connor's trial attorney was ineffective in that he failed to properly investigate and prepare for trial. He also failed to present crucial witnesses and evidence and to conduct proper direct and cross-examinations of witnesses.

ARGUMENT-IX

Mr. Connor received ineffective assistance of counsel during the penalty phase, as a result of his attorney's failure to properly investigate mitigating issues such as Appellant's childhood. He also failed to properly prepare for the penalty phase and to present mitigating evidence and witnesses.

ARGUMENT-X

The death penalty imposed on Appellant must be revered because of the United States Supreme Court decisions of Ring v. Arizona and Apprendi v. New Jersey. In Ring, the Supreme Court struck the Arizona death penalty scheme, which is similar to the Florida scheme, as unconstitutional. In Apprendi, the United States Supreme Court announced the requirement that any sentence above the maximum authorized by law, must be pled and proved to the jury beyond a reasonable doubt.

ARGUMENT-XI

The death penalty imposed on Mr. Connors violated the Eight and Fourteenth Amendments of the United States Constitution.

ARGUMENT-XII

The death penalty imposed on Mr. Connors violates the Florida Constitution prohibition against cruel and unusual punishment.

ARGUMENT-XIII

The Trial Court erred in denying Mr. Connor an evidentiary hearing as to most issues presented in his post-conviction relief motion because there were specific prejudicial facts presented in Appellant's motion outlining trial counsel's deficient performance. These facts were not conclusively rebutted by the record.

ARGUMENT-XIV

All of the errors mentioned in this brief, when viewed together, deprived Mr. Connor of a fundamentally fair trial as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMEN-I

MR.CONNOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FROM BOTH HIS TRIAL AND APPELLATE LAWYERS WHEN THEY FAILED TO OBJECT AND TO APPEAL A FALSE AND IMPROPER COMMENT MADE BY THE PROSECUTOR DURING JURY SELECTION THAT SUGGESTED THAT MR. CONNOR HAD A CRIMINAL RECORD AND THAT THE JURY WOULD NOT BE TOLD ABOUT IT.

During jury selection the prosecuting attorney made the following statement to the jury panel:

> "…if I was Mr. Zenobi, my concern would be if she doesn't hear about **the prior record of the defendant** in this case because you won't…" [T-2628] [Emphasis added]

This comment was totally uncalled for and it was highly prejudicial. It basically told the jury that Mr. Connor had a criminal record and that they would not be told about it. Most importantly, said statement was false in that Mr. Connor had not been convicted of a crime. At the very least the trial attorney should have objected to such a comment and should have requested the Court to instruct the jury panel that Mr. Connor had never been convicted of a crime.

In the case at bar, we are presented with a situation where the prosecutor unequivocally told the jury panel that Mr. Connor was a convicted criminal

but that they would not be told about it. This statement was not an ambiguous remark but rather direct and to the point. There was no instruction given by the Court to the jury after this remark was made. Thus this statement was so prejudicial that it amounted to a denial of the Appellant's Due Process Rights. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed.2d 690 (1967); Brady v. Maryland, 373 U.S. 1, 87 S. Ct. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, (1963) distinguished Page 642-648.

In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984); Wike v. State, 813 So. 2d 12, 17 (Fla. 2002); Rutherford v. State, 727 So. 2d 216, 219-20 (Fla. 1998); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996).

To establish defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

In the case at bar, the Appellant has met both prongs of the Strickland, test. Clearly, trial counsel's failure to object to the prosecutor's improper remarks about Appellant's criminal record was a very serious mistake that violated Appellant's Sixth Amendment Right to competent counsel. There was no legal or tactical reason for not objecting to such remarks. Especially since the remarks were false. Mr. Connor has also shown that Mr. Zenobi's deficient performance prejudiced his defense. After all there is nothing more prejudicial than calling someone a "convicted criminal.

Mr. Connor's appellate counsel was also ineffective in that he failed to present this issue on appeal.

There are rare exceptions where appellate counsel may successfully raise

the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue. Stewart v. State, 420 So.2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S. Ct.1802, 76 L.Ed.2d 366 (1983); Foster v. State, 387 So. 2d 344 (1980). In the case at bar, the Court must decide whether the Prosecutor's comments prejudiced Mr. Connor's case. In Strickland, the Supreme Court stated that to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for the error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. To determine whether the failure to raise a claim on appeal resulted in prejudice, the court must review the merits of the omitted claim. Cross v. United States, 893 F. 2d 1287, 1290 (11th Cir. 1990). If the court finds that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial.

In the case at bar, Appellant had a reasonable probability of being successful on appeal. After all, the case law is clear that comments and even suggestion about a defendant's criminal conviction have been deemed prejudicial. A case that is worth noting is that of Knight v. State, 316 So. 2d 576 (1st DCA, 1975). In Knight, (*Supra*) the prosecutor initially asked the

defendant if he had ever been convicted of a crime, to which the defendant responded in the negative. The jury was then excused and a sidebar conference was held, after which the jury returned and the prosecutor asked the appellant if he had ever been convicted of assault with a deadly weapon, found guilty, and placed on five years probation. Again, appellant answered in the negative to compound the error, the prosecutor asked the question, in varying forms, six more times, each time receiving a negative reply. In reversing the defendant's conviction the court held that:

> What is the average juror to think when the representative of the State is allowed to repeatedly ask an accused whether he had been convicted of a particular crime? **The unfortunate tendency of the human mind to conclude that 'where there is smoke, there is fire' operates to prejudice the right of an accused to a fair trial**. Moreover, this Court cannot allow such a flagrant violation of the statute to go unnoticed. Therefore reversal for a new trial on this point alone would be required. [Emphasis added]

In the case at bar the situation is even more egregious than in Knight, (*Supra*) because the prosecutor did not just merely suggest to the jury that the Appellant had a criminal record. In the case at bar, the prosecutor told the jurors that the Appellant had a criminal conviction that they would not be told about. Accordingly, the prosecutor's comments prejudiced Mr. Connor's right to a fair trial.

Given the prejudicial nature of the improper comments made by the prosecutor about Mr. Connor having been convicted of a crime, it is clear that both his trial and appellate lawyers were ineffective for failing to preserve and present this issue during trial and on appeal. Accordingly, the Court should reverse the conviction and grant Mr. Connor a new trial.

ARGUMENT-II

THE TRIAL COURT VIOLATED MR. CONNOR'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AS GUARANTEED BY THE FLORIDA AND UNTITED STATES CONSTITUTIONS BY ALLOWING THE INTRODUCTION OF HEARASY STATEMENTS. FURTHER, ON APPEAL MR. CONNOR'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN THAT HE FAILED TO APPEAL THIS HIGHLY PREJUDICIAL ISSUE.

The Court violated Mr. Connor's Constitutional Right to confront witnesses, by allowing the State of Florida to introduce several hearsay statements. These statements were not only inadmissible under the hearsay rule, they were also highly prejudicial.

It should be noted that although Mr. Zenobi objected to the introduction of the hearsay statement, Mr. Connor's appellate counsel did not present this issue on appeal.

Some of the hearsay statements were presented through the testimony of Margarate Goodine's next door neighbor Alice McLaughlin. [T-4581-4608]

The particular hearsay statements allowed were as follows:

MS. McLAUGHLIN: Well, she came over to me and told me that her clothes—

MR. ZENOBI: Objection. This is hearsay response, Your Honor.

MS. HENGHOLD: Judge, I will rephrase the question.

THE COURT: Ladies and gentlemen, what you are about to hear is not coming in for the truth of the matter asserted. That is, what you are going to hear is coming in in order to explain why the witness did a certain thing and the truth of the words is not what it's coming in for but rather to explain why the witness acted, why this witness acted in a certain fashion. Let's proceed.

MS. HENGHOLD: The question was how you knew about the burglaries and you began saying Margaret came over?

MS. McLAUGHLIN: She didn't had no clothes to wear. She didn't no clothes to wear to go to work and she came over and told me <u>that Seburt took all of her clothes</u>. [Emphasis added]

MR. ZENOBI: Objection.

THE COURT: Overruled. [T-4586, Lines 16-25 & 4587, Lines1-15]

MS. McLAUGHLIN: ….. an she begs Seburt---

MR. ZENOBI: Objection. That is hearsay. [T-4589, lines3-5]

MS. McLAUGHLIN: She [Margaret Goodine] was crying and she begged him to leave her alone. [T-4593, Lines 20-21]

MS. HENGHOLD: Were you aware that Margaret Goodine obtained an injunction for protection against Seburt Connor?

MS. McLAUGHLIN: Yes, she told me.

MR. ZENOBI: Objection.

THE COURT: Sustained. You don't need to talk about what she said. [T-4594-95]

Aside from the aforementioned hearsay states, Alice McLaughlin was also allowed to testified to a telephone call that she received from an unknown individual. Despite Mr. Zenobi's objections and a request for a mistrial, the Court allowed the highly inflammatory hearsay testimony from this unknown individual into evidence. Accordingly, Alice McLaughlin testified as follows:

MS. HENGHOLD: What did the caller say to you?

MS. McLAUGHLIN: He said Ms. Alice, I want you to give Margarte a message for me. Tell her I am going to hill her and Karen [Margarert Goodine's other daughter].

MS. HENGHOLD: Did he say that each and every time he called?

MS. McLAUGHLIN: Yes. [T-460, Lines7-13]

With regards to these statements Ms. McLaughlin admitted during cross examination that " [She] did not recognize the voice, no". [T-4604, Line 15]. It should be noted that although Margaret Goodine testified during trial she did not provide any testimony about the conversations that she supposedly had with Ms. McLaughlin because she did not remember. [T-3771, Line22] Accordingly, Mr. Connor did not have an opportunity to confront Margaret Goodine or the un-known caller about said statements at anytime.

The leading case with regards to the issue of hearsay is Crawford v. Washington, 541 U.S. 36 (2004). It should be noted that this case was decided on March 8, 2004, well after the filing of Appellant's post conviction relief motion. There is now pending in the Florida Supreme Court two cases that will decide whether or not Crawford v. Washington, (*supra*) shall be applied retroactively. These cases are Breedlove v. Crosby, No. SC04-686 and Chandler v. Crosby, No. SC04-518. The Appellant hereby

adopts all arguments made by the petitioners in both of these cases in support of Crawford's retroactive application.

In Crawford, (*supra*), the petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife had made during police interrogation, as evidence that the stabbing was not in self-defense. The wife did not testify at trial because of Washington's marital privilege.

Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under Ohio v. Roberts, 448 U. S. 56 (1980) that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears adequate indicia of reliability. The trial court found that the statements had adequate indicia of reliability and admitted the wife's statements.

The state Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

In reversing petitioner's conviction, the United States Supreme Court in Crawford, (*supra*) held that:

> In this case, the State admitted the wife's testimonial

> statement against petitioner, **despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.** Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. **Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.** [Emphasis added]

In the case at bar, all of the aforementioned statements were testimonial in nature and Mr. Connor had no opportunity to cross-examine the person that made them. Accordingly, all of the aforementioned statements were admitted in violation of Appellant's Sixth Amendment Right to confront witnesses. Thus the Court should vacate Mr. Connor's conviction and grant him a new trial.

In order not to be repetitious, the Appellant will rely on the same ineffective assistance of counsel arguments and case law mentioned in Argument-I in support of his claim of ineffective assistance on the part of his appellate attorney on this issue.

ARGUMENT-III

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FROM BOTH HIS TRIAL AND APPELLATE LAWYERS AS A RESULT OF HIS TRIAL LAWYER'S FAILURE TO MOVE TO STRIKE THE ENTIRE JURY PANEL AFTER PROPECTIVE JURORS TOLD THE COURT THAT THEY COULD NOT GIVE MR. CONNOR A FAIR TRIAL BECAUSE THEY HAD OVERHEARD APPELLANT MAKE POSITIVE REMARKS ABOUT CUBAN DICTATOR FIDEL CASTRO.

During the course of jury selection the Judge asked several Hispanic jurors that expressed reservation about being able to vote for death during the penalty phase, whether or not they could conceivably give the death penalty to an individual like Fidel Castro. [T- 2319] Ironically, during the first attempted jury selection in June of 1997, the Judge asked the same question to the prospective juror. During both jury selection Mr. Connor, in a loud tone of voice, replied "Why Castro, he is a good man!" [T-2513].

Despite being aware of the Petitioner's intellectual capacity and his prior reply to the Fidel Castro hypothetical in June of 1997, the Judge nevertheless used the same hypothetical question.

Although Mr. Connor's comment was not noted by the court reporter, the following day several jurors came forth and told the Court about Mr. Connor's comments. The first juror to bring this matter to the attention of

the Judge was Mr. Soto. Mr. Soto told the Court:

> Mr. Soto: I am troubled by something that the Defendant said yesterday.

The Court: Okay.

> Mr. Soto: When you asked the lady, one of the jurors in the back concerning the death penalty, you used Castro as an example. At that time the defendant turned around and said, I don't know what, I am sorry, the juror said she was for Castro being executed, I believe her answer was yes, and the defendant turned around and said, "Why, Castro, he is a good man," and I by that I am very troubled. [T-2537]

Ms. Bendinel also expressed her concerns to the Judge about Appellant's comments. Ms. Bendinel told the Judge as follows:

> …there was a comment made a couple days ago about something you said about Castro and I did notice that it was laughed about over here by the defendant, and I don't know if it was a joke or not, but I know if I heard it over there I am sure a **half dozen people heard it behind him.** And if we don't know him he could have been joking or been very dead serious, and if he is very dead serious, **that is going to affect me and it definitely affected me.** **[**Emphasis added][T-2545, 2359, 2360, 2721, 2723, 2756, 2760, 2761, 2763, 2673, 3294, 3883]

The trial attorney did not object or moved to strike the entire panel after he was made aware of the highly prejudicial comments made by Mr. Connor. Not only was Mr. Zenobi aware of the effect that said comments had on the minds of Mr. Soto and Ms. Bendinel, he was also told by Ms. Bendinel that at least 6 other jurors had heard the comments.

During voir dire, the prosecutor also asked the prospective jurors if they had heard the comment made by the Appellant about "…a political leader from another country…" [T-2743]. In response to this question several jurors raised their hands. These jurors were Ms. Koblenzer, Ms. Tookes, Mr. Fernandez, Mr. Grimes, Ms. Rodriguez, Mr. Charles and Ms. Brown. [T-2743-2774]. Thereafter, these jurors were questioned individually. It should be noted that some of the jurors claimed to have heard the Appellant make the statement about Castro and some heard it from other jurors. For the most part all the jurors that supposedly knew about the statements made by Appellant about Castro were accounted for with the exception of one. This information was provided by Ms. Rodriguez who told the court that " Yes, I didn't hear it, I was told", [T-2768-lines 24-25] "I heard two jurors saying it". [T-2772]. However Ms. Rodriguez was not able to identified all the jurors that made the comments. When asked by Mr. Zenobi who made the comments? Mr. Rodriguez gave the following reply:

> MS RODRIGUEZ: One was Robyn, the attractive brunette.
>
> THE COURT: Bandinel, who has been excused.
>
> MS. RODRIGUEZ: Right. And the other one, I can't recall who, but it was a two-way conversation and I was standing by them. [T-2772-Lines 9-16].

Because the Court was not able to account for all persons that knew

about the statement about Fidel Castro the entire panel should have been dismissed.

It should be noted that the following exchanged took place between Mr. Zenobi and the Court on this topic:

> MR. ZENOBI: This comment was inflammatory enough to basically eliminate a juror for cause. I think if we go ahead and talk to everyone at the same time what we are doing is tainting one or another juror and I think we are going to have to do this on an individual basis.
>
> THE COURT: okay. You are right. [T-2746-2747]

These comments show that both the Court and Mr. Zenobi were aware of the inflammatory nature of this comments and the negative impact that they could have on the jury. In fact these comments were so egregious that the Court *sue sponte* should have dismissed the entire panel. The panel should have also been dismissed because by discussing the comments made by Mr. Connor about Castro, they were not following the Court's instruction of not to discuss the case.

The topic of Fidel Castro is a highly emotional issue in Miami-Dade County, Florida. After all, most of the people who reside in Miami-Dade County, Florida had been adversely impacted by the actions of the ruthless dictator Fidel Castro, the undersigned included. For this reason it is very unlikely that any individual who makes such positive remarks about Fidel

Castro could get a fair trial in Miami especially since it appears that there were a number of Cuban-American jurors that were selected in this case.

It is important to note the recent decision of the Eleventh Circuit Court of Appeal in the case of United States v. Campa, No. 03-11087 (August 9, 2005). In Campa, (supra) the Eleventh Circuit Court of Appeals reversed the conviction of the so called "Cuban Spies" based on the trial court's denial of defendants' motion for change of venue. In so doing the Eleventh Circuit Court of Appeals found that:

> Despite the district court's numerous efforts to ensure an impartial jury in this case, we find that empaneling such a jury in this community was an unreasonable probability because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami.

In Campa, (supra) the Eleventh Circuit Court of Appeals based its decision partly on a telephone poll conducted by Florida International University Psychology Professor Gary Patrick Moran. This survey concluded that:

> Cuban-related matters were "'hot-button issues'" as there were over 700,000 Cuban-Americans living in Miami. Of those Cuban-Americans, 500,000 remembered leaving their homeland, 10,000 had a relative murdered in Cuba, 50,000 had a relative tortured in Cuba, and thousands were former political prisoners. Professor Moran's survey results showed that 69 percent of all respondents and 74 percent of Hispanic

> respondents were prejudiced against persons charged with engaging in the [pro-Castro] activities named in the indictment.

The Court should note that there were no Hispanics in the juror panel in Campa.

In order not to be repetitious, the Appellant will rely on the same ineffective assistance of counsel arguments and case law mentioned in Argument-I in support of this claim of ineffective assistance on the part of both s his trial and appellate attorneys.

Given the prejudicial nature of Mr. Connor's complimentary statement about Fidel Castro, it is clear that both his trial and appellate lawyers were ineffective for failing to preserve and present this issue during trial an on appeal. Accordingly, the Court should reserve conviction and grant him a new trial.

ARGUMENT-IV

MR.CONNOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FROM BOTH HIS TRIAL AND APPELLATE LAWYERS WHEN THEY FAILED TO OBJECT AND TO APPEAL NUMEROUS IMPROPER COMMENTS MADE BY THE COURT TO THE JURY PANEL THAT SUGGESTED TO THE JURY SPECIFIC SITUATIONS THAT WARRANTED THE PENALTY OF LIFE IN PRISON.

During jury selection the Judge repeatedly used the same example of a

case not deserving the death penalty. The example used by the Court of a case not deserving the death penalty was as follows:

> Do you remember a case, probably right around the time you moved here, an older gentleman who was about 70 years old, his wife was extremely ill. He was convicted of killing his wife. Some people mercy killing.
> Would you think that case, even if he was convicted of first degree murder, was that case appropriate for the death penalty? [TT page 2322, 2360 & 2470]

By using this example the Court in essence told the jury that the death penalty was not appropriate in such cases. The problems with the Court using said example was that the facts of this case did not involve a mercy killing. Accordingly, by using the mercy killing example the Court in essence told the jury that the only recommendation they could make under the fact of this case was that of death. Ironically, the court sustained an objection made by the defense attorney about not allowing the prosecutor to ask questions of particular situations where the death penalty was warranted. [TT page 2942].

A case that is worth noting is that of

In order not to be repetitious, the Appellant will rely on the same ineffective assistance of counsel arguments and case law mentioned in Argument-I in support of this claim of ineffective assistance on the part of

both s his trial and appellate attorneys. However, given the prejudicial nature of the Court's repeated inaccurate comments about a specific situation that warrants a sentence of life in prison for a conviction of first-degree murder, it is clear that both his trial and appellate lawyers were ineffective for failing to preserve and present this issue during trial an on appeal.

In order not to be repetitious, the Appellant will rely on the same ineffective assistance of counsel arguments and case law mentioned in Argument-I in support of this claim.

Accordingly, the Court should reserve Appellant's conviction and grant him a new trial either a new trial or a new penalty hearing.

ARGUMENT-V

THE TRIAL COURT VIOLATED MR. CONNOR'S CONSTINUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF TRIAL, WHEN IT CONDUCTED AN EX-PARTE MEETING WITH MEMBERS OF THE JURY PANEL AND ALSO BY CONDUCTING A TRIAL WITHOUT THE PRESENCE OF THE APPELLANT.

It appears from the record that Mr. Connor was not present on several occasions during trial. This is a clear violation of Appellant's Constitutional Right to be present during trial. According to the trial transcript the Appellant was not present for trial:

a. On January 26, 1998, Mr. Connor was not present when the Court and

the lawyers were discussing important aspects of jury questions. [T-2884-2885].

b. On the January 23, 1998, 11:30 a.m. session, there is no notation that Appellant was present. [T-2456].

c. On the January 23, 1998, 2:00 p.m. session, there is no notation that Appellant was present. [T-2526].

d. On the January 27, 1998, 8:30 a.m. session, there is no notation that Appellant was present. [T-3069].

e. On the January 30, 1998 session, there is no notation that Appellant was present. [T-3824]

f. On the January 30, 1998 session, it appears that Mr. Connor arrived after the trial began. [T-3897, Defendant arrived at T-3900].

g. On the February 3, 1998 1:30 P.M. session, there is no notation that Appellant was present. [T-4249].

h. On the February 4, 1998 session, there is no notation that Appellant was present. [T-4399].

i. On the February 5, 1998 session, there is no notation that Appellant was present. [T -4623]

j. On the February 11, 1998 session, there is no notation that Appellant was present. [T-5066].

k. On the February 20, 1998 session, there is no notation that Appellant was present. [T-5260].

l. On the February 24, 1998 session, there is no notation that Appellant was present. [T-5407].

m. On the March 18, 1998 session, there is no notation that Appellant was present. [T-5913].

n. On the April 24, 1998 session, there is no notation that Appellant was present. (T-5926).

Even during a crucial hearing that took place on March 18, 1998, where the Court discussed mitigating and aggravating evidence, the Court did not bring Mr. Connor out. [T-5013-5923]

The constitutional right to be present is rooted to a large extent in the Confrontation Clause of the Sixth Amendment. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). However, the right of presence is protected to some extent by the Due Process Clause where the defendant is not actually confronting witnesses or the evidence against him. A defendant has a due process right to be present at any stage of the proceeding that is critical to its outcome, if his presence would contribute to the fairness of the proceedings. Kentucky v. Stinger, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987); Francis v. State, 413 So.2d 1175,

1177 (1982). When a defendant is excluded from a portion of the trial proceeding without objection, the inquiry centers on whether, in light of the whole record, the fairness of the proceeding was frustrated by the defendant's absence. Gudinas v. State, 693 So.2d 953, 962 (Fla. 1997) cert. denied, 118 S. Ct. 345(1997); Rose v. State, 617 So.2d 291, 296(Fla. 1993).

There is no indication on the record that Mr. Connor was present during the aforementioned proceedings. In addition, the record does not show that there was a waiver of Appellant's presence. Accordingly, it is clear from the record that the "fairness of the proceeding was frustrated" by Mr. Connor's absence.

It should also be noted that during trial, the Court held an *ex-parte* conference with one or more jurors.[T-4458-4460] This incident occurred on February 4, 1998. This portion of the proceeding is reflected on the record as follows:

> {Thereupon, the jury existed the courtroom, and the following proceeding were had:}
>
> THE COURT: One of our jurors doesn't feel well, Ms. Thrower. Let me go see.
>
> {Recess}
>
> THE COURT: Let me see the lawyers sidebar.
>
> {Discussion held sidebar off the record.}

THE COURT: On the record, Seburt Nelson Connor.

Okay. Let the record reflect that we took a recess because my bailiff informed me that Ms. Thrower was not feeling well and, well, he informed me first she need to use the restroom. Then he came back and told me she wasn't feeling well.

I went back there. All the jurors were there with her. I have asked the fire rescue be called because I am not going to let her go home on her own and I am concerned about her.

What I have determined—she said—I asked her did she eat. Apparently, so did a couple of other jurors. She did eat.

MR. GILBERT: Did you talk to her again?

THE COURT: Yes. She said she had breakfast, lunch. She was feeling okay until they walked into the courtroom the second time which was after we came back from recess. Then she suddenly felt ill.

Now, I have called fire rescue. Once I do that, my feeling is that we need to go on with the trial. It's 3:30, and I am going to substitute Ms. Mckinney.

I am going to make sure Ms. Thrower is taken care of and substitute Ms. McKinney and keep going on because regardless of what my feeling may be, her supposition—I have a juror telling me she is not well. I don't feel comfortable, you know, and I don't have a sense of what is wrong with her and she is not diabetic. We determined that….

> It's only 3:30 and I want to proceed with the trial. That is why we have three alternates, four alternates… I am going to continue with the trial, and I am going to ask Rene, my JA, to bring the rest of the jury in and we are going to continue.
>
> I will excuse Ms. Thrower from further service.

MR. GILBERT: The State has no objection.

MR. ZENOBI: We object. [T-4458-4460]

The problem with this situation is that the Court, *sue sponte*, decided to talked to the jury. She took no court reporter into the jury room to make a record of the conversation. There is no record of what was discussed or how many jurors the Judge talked to. Most importantly, the record does not reflect that the Appellant was present during this proceeding. There was a recess and there is no record that Mr. Connor was brought back for any portion of this hearing. In addition, its also clear from the record that the Court's Judicial Assistant and not the bailiff had conversations with the jury.

Criminal defendants have a due process right to be physically present during all critical stages of trial, including the examination of prospective jurors. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), overruled in part on other grounds by Malloy v. Hogan, 378 U.S. 1 (1964). In Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982), the court recognized that the process of

exercising challenges to members of the jury constitutes a critical stage of the proceedings where a defendant has a right to be present. Furthermore, a criminal defendant has the due process right to be present at proceedings "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by this absence, and to that extent only." United States v. Gagnon, 470 U.S. 522, 526 (1985).

A case that is worth noting is that of Francis v. State, 413 So.2d 1175 (Fla. 1982). In Francis, (*supra*), the Florida's Supreme Court reversed the conviction of first-degree murder based on the fact that the defendant was absent during a portion of jury selection and his absence was not voluntary. In reversing the defendant's conviction the Court found that the defendant had been excused by the court momentarily to go to the restroom. After he had returned to the courtroom, his counsel, the prosecutor, the judge, and the court reporter retired to the jury room to exercise the defendant's' and the State's peremptory challenges. His counsel had told him he could not go with them into the jury room. His counsel had not obtained his express consent to challenge peremptorily the jury in his absence. In the case at bar, the record reflects that there was a recess. Most of the time there is a recess,

a defendant that is in custody is taken to the holding cell so that he or she can go to the bathroom. In this case the record does not show that Mr. Connor was present in couer during the *ex-parte* hearing between the Court and the jurors or even when the Court made the decision to release Ms. Thrower from the jury panel. This was a critical stage of the proceedings, in which Appellant had no knowledge of. Perhaps Ms. Thrower would have voted for life and thus the split would have been 7-5. One thing is for sure, Appellant never agreed to waive his presence. Accordingly, the Court violated Mr. Connor's Constitutional Rights to be present at all stages of trial.

Since his appellate lawyers also failed to present these issues for appeal, the Appellant is also claiming ineffective assistance by his appellate lawyer. On this issue. Thus, the Appellant will rely on his ineffective assistance of counsel arguments and cases presented on Argument-I above.

ARGUMENT-VI

THE TRIAL COURT VIOLATED MR. CONNOR'S CONSTITUIONAL RIGHT TO REMAIN SILENT, WHEN IT ALLOWED LAW ENFORECEMENT OFFICERS TO TESTIFY DURING TRIAL AS TO INSTANCES WHERE APPELLANT REFUSED TO ANSWER QUESTIONS.

During direct examinations both Detective Times and Detective Bayas

made improper comments concerning the Petitioner having exercised his right to remain silent during his interview of November 21, 1992. In particular they stated as follows:

Detective Times: A. I asked him did he know how Larry was killed **and again he had no respond**. [Emphasis added TT 4643]

A. I continued to ask Mr. Connor questions about Larry's death. **He could not respond.** [Emphasis added TT 4643 line19]

A. …and I advised him what if I told you I had physical evidence linking you to Larry's death, and again, **he did not respond.** [Emphasis added TT 4643 line 22]

A. **He did not respond again.** [Emphasis added TT 4644 line 13]

Detective Bayas: A. **He didn't really give a response to that.** [Emphasis added TT 4725 line 25]

An accused always has the right to remain silent. This is a fundamental right which is guaranteed by both the State and Federal Constitutions. The aforementioned comment were made in direct violation of Mr. Connor's constitutional right to remain silent. The defense attorney did not object to such comments. Any remark which is "fairly susceptible" of being interpreted as a comment on the defendant's failure to testify is an impermissible violation of the constitutional right to remain silent. State v Kinchen, 490 So. 2d 21, 22 (Fla. 1985).

In order not to be repetitious, the Appellant will rely in the same legal arguments and authorities cited in Argument-I above with regards to the issue of ineffective assistance of counsel..

ARGUMENT-VII

MR. CONNOR'S SIXTH AMENDEDMENT RIGHT TO EFFECTIVE ASSITANCE OF COUNSEL WAS VIOLATED BECAUSE MR. CONNOR'S TRIAL ATTORNEY LABORED UNDER AN ACTUAL CONFLICT OF INTEREST.

Originally, the Court appointed Louis Jepeway to represent the Mr. Connor. [PC-R-1 & 415] Mr. Jepeway named attorney Eugene Zenobi as his second chair.[PC-R415] After Mr. Jepeway was appointed, Mr. Connor filed a *pro se* motion seeking to remove Mr. Jepeway and Mr. Zenobi as his attorneys based on a conflict of interest. [R-419-421] Mr. Connor also filed a Bar complaint against his, Louis Jepeway, alleging that Mr. Jepeway was involved in taken from his house a brief case which contained valuable jewelry that included Rolex watches. It should be noted that there was no evidence implicating Mr. Jepeway and the Bar complaint was dismissed. However, after the conclusion of the competency hearing, the Court *su sponte*, removed Mr. Jepeway from the case. The Court's reasoned that there was a conflict of interest between Appellant and Mr. Jepeway. [T-941] On June 10, 1996, the Court discharged Mr. Jepeway after finding that Mr.

Connor was competent to stand trial. [T- 930] After the competency hearing, Assistant State Attorney David Gilbert told the Court as follows:

> …we have an additional problem that is created by the defendant filing a Bar complaint against his attorney during the period of time that this competence hearing was in question. Now that it has been determined that he was competent when he filed that—I checked with my Legal Division—**I believe we have a per se conflict of interest between him and Mr. Jepeway.** [Emphasis added][T- 931]

Thereafter the Court ruled as follows:

> The Court: --or whether **I'm going discharge him with the thanks of the Court based on the conflict**. And at that time we will go into the matter of who, if Mr. Jepeway is no longer be on the case, I would appoint. [Emphasis added] [T-941]

Thereafter the Court discharged Mr. Jepeway and appointed Eugene Zenobi as first chair. [PC-R-1] The discharge of Mr. Jepeway was in large part due to the conflict of interest that resulted from the Bar complaint. However, the conflict of interest occurred the moment that the Bar complaint was filed which was prior or during the competency hearing. Accordingly, Mr. Jepeway should have been discharged from the case the moment that the Bar complaint was filed. Therefore, Mr. Jepeway should not have been allowed to conduct the competency hearing. There was a conflict of interest *per se* and it was reversible error to allow Mr. Jepeway to

conduct said hearing.

In the case at bar, there was also a conflict of interest between Mr. Zenobi and Mr. Connor because at the time that Mr. Zenobi was appointed he had a business arrangement with Mr. Jepeway. Accordingly, the *per se* conflict of interest between Mr. Jepeway and Mr. Connor also carried over to Mr. Zenobi because of their on going business relationship. It is undisputed that Mr. Zenobi and Mr. Jepeway shared office space, as well as office expenses and shared a secretary. [PC-R-421-422] This matter was also briefly discussed by the Court during the June 10, 1996 hearing when the Court stated as follows:

> The Court: How do you feel about Mr. Zenobi [Being your attorney], Mr. Connor?
>
> The Defendant: Well, would you pardon me if I state they are fooling? He works together.
>
> The Court: Well, they don't always work together. They're not all partners. Can you try and Separate them in your mind and tell me how you feel about Mr. Zenobi?[T-948]

The Sixth Amendment guarantees a criminal defendant "the right . . . to have the assistance of counsel for his defense." The right to counsel includes the right to an effective attorney who can represent his client competently and without conflicting interests. Garcia v. Bunnell, 33 F.3d

1193, 1195 (9th Cir. 1994). In Glasser v. United States, 315 U.S. 60, 70 (1942), the Supreme Court held that:

> [T]he `Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

Competent, conflict-free defense counsel is vital to preserving a criminal defendant's right to a fair trial. United States v. DeFalco, 644 F.2d 132, 136 (3d Cir. 1980). The essence of the system is that there be professional antagonists in the legal forum. Therefore, if any circumstance impedes the unqualified participation by an attorney, the adjudicatory function is inhibited and thus ultimately threatening the object of that function. If defense counsel is prevented by a conflict of interest from "asserting his client's contentions without fear or favor, the integrity of adversary system is cast into doubt because counsel cannot" play the role necessary to ensure that the trial is fair. Strickland v. Washington, 466 U.S. 668, 685 (1984).

A conflict of interest can arise in one of two ways: the attorney is representing multiple defendants whose interests are hostile to one another, Holloway v. Arkansas, 435 U.S. 475, 481-84 (1978), or the attorney is representing a defendant with interests hostile to the attorney's own interests,

Mannhalt v. Reed, 847 F.2d 576, 579-80 (9th Cir. 1988). In either conflict situation, determining whether a constitutional violation occurred and whether reversal of the defendant's conviction is required involves a two-factor analysis. The first question that must be answer is, did the trial court have reason to know of the conflict? Second, if the trial court was on notice that a potential conflict of interest existed, did the trial court conduct an appropriate inquiry into the conflict?

Where counsel suffers from a potential conflict of interest but defense counsel did not disclose the conflict and the court had no independent reason to know of it, the court is not on notice and has no duty to inquire. Cuyler v. Sullivan, 446 U.S. 335, 346-48 (1980). A defendant seeking to prove that he was deprived of the effective assistance of counsel under these circumstances must show that an actual conflict of interest existed and that it had an "adverse effect" on his lawyer's performance. Although "adverse effect" is a less onerous showing than “prejudice,” as required under Strickland, (supra), the defendant is still required to show that the conflict "likely" had some impact on counsel’s performance at trial. United States v. Mett, 65 F.3d 1531, 1535 (9th Cir. 1995).

By contrast, when counsel’s potential conflict of interest is brought to the court’s attention, the trial judge is on notice and must "take adequate steps"

to protect the defendant's rights. Holloway, (*supra*). To properly perform this duty, the trial judge must make an inquiry into the potential conflict. Glasser, (*supra*). Another case worth reviewing is that of Smith v. Anderson, 689 F.2d 59, 63 (6th Cir. 1982), where the court held that "In the realm of the Sixth Amendment, when an objection to [a conflict of interest] is properly raised and dismissed without a searching review . . . a constitutional violation occurs." If the court determines that an actual conflict of interest exists, it must obtain the defendant's knowing and intelligent waiver to the conflict or provide the defendant with the opportunity to seek new counsel. United States v. Allen, 831 F.2d 1487, 1495-96 (9th Cir. 1987); Ciak v. United States, 59 F.3d 296, 305 & n.5 (2d Cir. 1995).

Where the trial court is on notice that a potential conflict of interest exists and instructs the parties to proceed to trial without making an inquiry, the court has failed to protect the defendant's essential rights to counsel and to a fair trial. As a result, the legal process is "contaminated, " and the defendant's conviction is reversed automatically. Satterwhite v. Texas, 486 U.S. 249, 256-257 (1988).

The Supreme Court announced the "automatic reversal" rule in Holloway, (*supra*), which involved a conflict of interest that arose when one attorney represented three co-defendants in a rape and robbery trial. There,

defense counsel repeatedly asked the trial judge to appoint a separate attorney for each co-defendant, explaining that, because all of the defendants wanted to testify, he could not examine or cross-examine any one of them without implicating the others. Despite these representations, the court declined to appoint separate counsel. In reversing the decision, the Supreme Court held that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." Id. at 488, 98 S. Ct. 1173. Explaining the basis for the automatic reversal rule, the Court stated:

> [I]n a case of joint representation of conflicting interests the evil -it bears repeating -is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. [Id. at 490, 98 s. Ct. 1173]

The Supreme Court has also affirmed the Holloway automatic reversal rule in other cases. One such case is that of Satterwhite (*supra*) which cited Holloway for the proposition that Sixth Amendment violations that pervade

the entire proceeding are never harmless. In addition Cuyler, (*supra)*also holds that where a trial court knows of a conflict and fails to conduct an inquiry, the reviewing court can assume that the conflict resulted in ineffective assistance of counsel. Wood v. Georgia, 450 U.S. 261, 273 n.18 (1981) (stating that Supreme Court case law "mandates a reversal when the trial court has failed to make an inquiry even though it `knows or reasonably should know that a particular conflict exists' ") (citation omitted).
or the attorney is representing a defendant with interests hostile to the attorney's own interests.

A case that is worth noting is that of Campbell v. Rice, 265 F.3d 878 (9th Cir. 2001). In Campbell, (*supra*) The Santa Clara County District Attorney's Office charged Campbell with multiple counts of first-degree Burglary and several counts of attempted burglary. Campbell retained Maureen McCann ("McCann") as defense counsel. McCann represented Campbell at his preliminary hearing on December 4, 1995, after which Campbell was held over for trial. The trial was scheduled to begin on February 8, 1996.

On January 9, 1996, one month before Campbell's trial date, McCann herself was arrested for attempting to transport methamphetamine through a metal detector in the San Martin Criminal Court Justice Facility in Santa

Clara County. The Santa Clara County District Attorney's Office charged McCann with one count of felony possession of methamphetamine.

On February 8, 1996, the first day of Campbell's trial, the court met in chambers with McCann and Santa Clara County Deputy District Attorney Ralph Dixon, who was prosecuting Campbell. Campbell was neither present at the conference nor informed of it. The trial judge explained that the conference was taking place because "Mr. Dixon has something he wishes to put on the record with respect to Ms. McCann."

Dixon then informed the trial judge that the Santa Clara County District Attorney's Office was prosecuting McCann on unspecified charges. Dixon noted that Campbell had a constitutional right to a conflict-free attorney. He stated that his office had made McCann an offer regarding her own criminal prosecution that was "neither more lenient nor more severe than that any other defendant would be offered if they were eligible" and that "she has not nor will she receive favorable treatment from our office for any reason."

The following conversation then took place:

THE COURT: Do you wish to make any statement at this time, Ms. McCann?

MS. McCANN: No, that's fine.

THE COURT: Very well.

MR. DIXON: And the Court has determined that this is sufficient.

THE COURT: The Court has determined there is no conflict of interest with respect to Ms. McCann as against her relationship with the district attorney in this case of People v. Campbell.

MR. DIXON: Thank you, Your Honor.

THE COURT: Thank you.

The conference ended at this point, and the tria1 went forward.

On February 23, 1996, the jury found Campbell guilty of eighteen counts of first-degree burglary and one count of attempted burglary. Approximately one month later, the trial judge sentenced Campbell to an aggregate term of fourteen years in prison. On January 7, 1997, Campbell filed his direct appeal with the California Court of Appeal for the Sixth Appellate District. On August 9, 1997, Campbell filed a state habeas petition in the same court. The California Court of Appeal denied Campbell's direct appeal and his state habeas petition in an unpublished decision on December 15, 1997. Campbell appealed to the California Supreme Court, which denied review of both matters on April 1, 1998.

Campbell filed a §§ 2254 habeas petition in the United States District Court for the Northern District of California on August 25, 1998. The

petition was denied on September 24, 1999. Campbell timely appealed.

In reversing Campbell's conviction, the Court of Appeals found that:

> McCann was caught between the rock of her legal obligation to zealously defend Campbell and the hard place of her instinctive desire to "save[her]self." [United States v.]McClain, 823 F.2d [1457] at 1464 [11th Cir. 1987]. **The trial court's knowledge of McCann's predicament triggered a duty "to inquire further.**" Wood, [v. Georgia]450 U.S.[261] at 272. [1981] [Emphasis added]

The Court of Appeals in Campbell, held that the trial court's failure to inquire into defense counsel's potential conflict of interest deprived Campbell of his constitutional right to the effective assistance of counsel. Under Holloway, the absence of a meaningful inquiry by the trial court resulted in structural error, which fell within a class of constitutional violations that by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."

In the case at bar, the facts are even stronger for reversal than in Campbell, (*supra*). Unlike in Campbell, in the case at bar there was no hearing held despite the fact that Judge Cohen Lando knew that Mr. Zenobi and Mr. Jepeway had a business relation and worked together on cases.

As detailed above, in this case there was a actual conflict of interest between the Appellant and his attorneys, Mr. Jepeway and Mr. Zenobi. So the key question then becomes, did Judge Cohen Lando know or should he have known that Mr. Zenobi and Mr. Jepeway had a business relationship? If the answer to this question is "yes", then the Appellant is entitled to "automatic reversal" pursuant to the aforementioned case law, because no evidentiary hearing was held with regards to Mr. Zenobi's "conflict-of-interest". The answer to this question can be found in the aforementioned statements made by Mr. Connor and the Court as well as also from the record that showed that Mr. Zenobi and Mr. Jepeway had the same business address and telephone numbers.

Accordingly, given that Judge Cohen Lando knew that Mr. Zenobi and Mr. Jepeway had a business relationship she had the duty to conduct an evidentiary hearing as to the "conflict-of-interest" and to inform Mr. Connor of said conflict. Since Judge Cohen Lando failed to conduct the required hearing, Appellant's criminal conviction should be vacated and this case should be remanded to the Circuit Court for a new trial.

Assuming that the Court was not aware of the relationship between Mr. Zenobi and Mr. Jepeway, then in order to prevail on a claim of conflict of interest Appellant must prove two things: (1) that an actual conflict of

interest existed; and (2) that the conflict adversely affected the lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Obviously**, t**his standard is less stringent than the one in Strickland, (supra). In the case at bar, it is clear that that the conflict of interest had an impact on Mr. Zenobi's performances as set forth on all arguments set forth in this appeal. In order not to be repetitive, Appellant will rely in all the deficiency argument and legal authorities that appear in this brief.

Mr. Connor, further urges that he has met all requirements set forth in Strickland, (*supra*). The Appellant will rely on the same ineffective assistance of counsel arguments and case law mentioned in Argument-I and throughout this brief in support of his claim of ineffective assistance on this issue of "conflict of interest".

At the very least, this matter should be remanded to the trial Court so that a full evidentiary hearing can be conducted as to this issue.

ARGUMENT-VIII

MR. CONNOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF THE PROCEEDINGS.

The Appellant received ineffective assistance of counsel during the guilt phase of the trial. In particular, the Appellant asserts that his trial lawyer

failed to properly investigate his case and prepare for trial. In addition, the Mr. Connor further alleges that his trial attorney was ineffective in his trial strategy, direct and cross examination and also in failing to present crucial witnesses and evidence.

Mr. Connor has always maintained that he was framed with the murders. In particular, he has always maintained that someone planted the body of Jessica Goodine in the cottage behind the house and the blood in his car and clothing. In his limited wisdom, Mr. Connor has always believed that it was the police who framed him. However, Mr. Connor believe that the police framed him is just a hunch. The truth of the matter is that he simply does not know, who actually framed him.

Fasha Thomas Original Statement to Police

In the case at bar, a multitude of evidence existed that should have been presented in support this theory. One key pieces of evidence that should have been presented, came from Fasha Thomas, the little girl that lived across the street from Margaret Goodine's house. In her original statement, which is noted on page 3 of Detective Murias' report of November 20, 1993, Faisha told the police as follows:

> …she saw Jessica get into what she described as a Black Cadillac, similar to the car that Mrs. Goodine drives, **at 5:30 or 6:00** in the afternoon

> …**she thought that the car was driven out of the garage by Jessica's father**…[she] also advised this writer that that **she saw Mr. Goodine driving the Cadillac**, **and saw Jessica getting into the front seat while the vehicle was still parked in front of the garage**. **Fasha stated that she saw only Jessica and Mr. Goodine in the vehicle**….**Fasha didn't think Jessica was in any way strange**, but Mrs. Merritt though Jessica was acting strangely since She got into car and drove away without saying anything to them. [Emphasis added]

This testimony, if properly presented by Mr. Connor's attorney could have changed the out come of the trial. The Court should note according to the police report, Fasha saw Mr. Goodine and Jessica in the car at 5:30 p.m. to 6:00 p.m. The police report does not express any uncertainty about seeing Mr. Goodine getting into the car. This means that Mr. Goodine was not killed inside the house. Thus, the bloody scene inside Margaret Goodine's house had to be planted by someone before the Broward Sheriff's Office Detectives went to Margaret Goodine's house the following day. This also explains why Margaret Goodine, her daughter Karen and the Miami-Dade Police officers that went to Margaret Goodine's house on the day of the disappearance, did not notice the broken chair, the bloody rug and the bloody towels discovered by the Broward Detectives the following day. It is undisputed that Miami-Dade police officers, including Detective Murias went to Mrs. Goodine's house on the night of the disappearance and did not

see or were not told of a broken chair or of any blood in the house. [T-3952-3982]

Items Not Found by Police Initially

At 4:20 p.m., on November 20, 1992, Broward Detective Ilarroza traveled to Dania, Florida to a canal adjacent to the Hollywood/Fort Lauderdale International Airport to examine the body that was later identified as that of Lawrence Goodine. [T-3640] After fingerprints from the body were run through the crime computer, they were able to determine that it was Lawrence Goodine and obtained an address for him. Mr. Goodine had a criminal history. The Broward Sheriff Detectives went to an address for Mr. Goodine and met a lady by the name of Pamela White. Ms. White gave the Detectives the address of Margaret Goodine. When they arrived at Mrs. Goodine's house, they discovered a blood smear in a closet door. [T-3664-3665] Mrs. Goodine was asked about the blood smears in the closet and she said didn't know. {T-3664] There was also a towel found in the bed with blood in it and blood in the living room rug. [T-3665] There were blood splatters on the living room wall and a chair that had been broken in the corner of the dining room adjacent to the living room. [T-3665-3666] Ironically, none of these items were found by Miami-Dade Detectives the day before.

Strangely enough, the police did not discover Jessica's body in their initial search of the cottage behind Mr. Connor's house. It was discovered hours later after Mr. Connor had been taken to the police station.

Mysterious Telephone Calls

Another key piece of evidence that was totally overlooked by Mr. Connor's attorney were mysterious telephone calls. During trial the State argued that these telephone calls were made by Mr. Connor. One such call is mentioned in Argument-II above. In said telephone call Mrs. McLaughlin could not identify the caller, who told her to tell Margaret Goodine that he was going to kill her and her daughter Karen. This evidence could have been easily contradicted by Mr. Connor's attorney. All that he needed to do was to present as witnesses Wendell McLaughlin, Alice McLaughlin's husband, and Miami-Dade Police Officer Taylor. It should be noted that Wendell McLaughlin had been deposed prior to trial and stated that he received telephone calls at his house from someone whose voice he did not recognized threatening to kill Margaret Goodine, Karen Goodine and Seburt Connors [Page 18 line 24 of Mr. McLaughlin's deposition] [Appendix-3] It should also be noted that Mr. Wendell is also from Honduras and has known the Appellant for many years. [See Page 5 line 16 of Mr. McLaughlin's deposition] Even as important, is the police

report filed by Miami-Dade Police Officer Taylor, dated May 14, 1992, Case No. 239446-M. This police report was made at the requests of Margaret Goodine. In this police report Mrs. Goodine reported the following:

> "Victim Goodine advised that her neighbor Mrs. McLaughlin has been receiving numerous phone calls in the past week from an **unknown male** advising that he was going to kill the victim's daughter [Karen]. On today's date and time, victim Goodine advised she received a phone call from an **unknown male** who stated that "**Is this Margaret and did you get the message?"** Mrs. Goodine did not answer. The caller then stated. " **if Mr. Seburt is not at the Rolex at 10:00 o'clock, your daughter Karen will be killed."…[emphasis added]**

It should be noted that "the Rolex" mentioned in Officer Taylor's report is probably the infamous Club Rolexx that is located near Mrs. Goodine's house. This Club is known to be a hangout for gangs and numerous shootings have taken place there. Most importantly, not only was the story described in the police report about the telephone calls different than what Mrs. McLaughlin and Mrs. Goodine testified to during trial. It should also be noted that according the trial testimony presented by the State and also Detective Murias' police report of November 20, 1992, Mrs. Goodine claimed that she had broken up with Mr. Connor only **"two months ago".** This means that Mrs. Goodine and Mr. Connor were still together on May 14, 1992 when the alleged threatening telephone calls were

made.

These telephone calls would not only have contradicted the trial testimony of Alice McLaughlin, they would have also established that there was an unknown person who not only wanted to kill Margaret Goodine and her daughter Karen, but also Mr. Seburt Connor. This would have been a crucial piece of the puzzle in establishing that someone framed Mr. Connor. Mr. Connor attorney could have easily proven this, if he had read his file and presented Wendell McLaughlin and Officer Taylor as witnesses.

Unidentified Fingerprints

Another crucial piece of evidence that appears to have been overlooked by Mr. Zenobi, were the unidentified latent fingerprints found at Margaret Goodine's House, and in Seburt Connor's Black Cadillac.

During direct examination, Metro Dade Latent Examiner Charles Pardee testified that of the four latent fingerprints of value that were found at Margaret Goodine's house, three were matched to Margaret Goodine and one was not identified. [T-4538] Mr. Pardee also testified that there were six prints lifted from Mr. Connor's Cadillac and that one was identified as Mr. Connor's and five were not identified. [T-4539] He testified that he did not attempt to run the finger print through the FBI or Metro Dade files. [T-4544] Given that the Mr. Connor has maintained that someone else

committed the murders a prudent defense attorney would have requested a court order to compare said fingerprint. In addition, the unidentified finger prints should have been made a focal point of Mr. Connor's defense.

Failure to Investigate and Ineffective Cross-Examination of Margaret Goodine

Mr. Zenobi conducted a very ineffective investigation and cross-examination of Mrs. Goodine. One key piece of evidence overlooked not only by Mr. Zenobi but also by detective Times was the whereabouts of Margaret Goodine during the time of 6:00 p.m. to 9:30 p.m. on the day that her husband and daughter Jessica disappeared. According to the trial testimony given by Mrs. Goodine, she left the house at 9:30 a.m. in her Cadillac to go to work at Quayside.[T-3773] It should be noted that from her house to Quayside is probably a 15 to 20 minute drive. She then received a telephone call from her daughter Karen. [T-3774] According to Detective Murias, Mrs. Goodine told him that Karen called her at around 6:00 p.m. and told her that she found all doors open and that Mr. Goodine and Jessica were missing. [T-3955] Strangely enough, it took Margaret Goodine almost three hours to get home after learning that her house had been burglarized and that her daughter and husband were missing. The testimony presented at trial, established that Mrs. Goodine got home at approximately 9:30 p.m.[T-3954]

Where was she that it took her over two and a half hours to get home? This was an important fact that should have been presented by Mr. Zenobi. Especially in light Fasha's original statement to the police in which she claimed that it was Mrs. Goodine car's in which Jessica and Mr, Goodine left.

It should also be noted that according to Mrs. Goodine, she always parked her Cadillac in the garage of her home. [T-3774] Coincidentally. Fasha originally told the police that the car was parked in the garage when she saw Jessica getting in the car.

What is more disturbing about this, is that Mr. Zenobi and the police failed to investigate the time that Mrs. Goodine normally got home after work. If they would have investigated this issue, they would have found out that Mrs. Goodine normally got home at 3:30 p.m. This would have put her Cadillac at the house at the time that Fasha claimed to have seemed it.

The issue of the Margaret Goodine's "whereabouts" become of greater importance when examined alongside of other strange events.

Jessica Goodine's Guardianship and Probate

The trial attorney failed to investigate, discover and confront Margaret Goodine's with evidence that Jessica Goodine had a substantial sum of money at the time of her death. The truth is that a Guardianship had been

opened for Jessica in the Circuit Court of Miami-Dade County, Case Number 1992-3354-GD-02 on July 20, 1992. On February 3, 1993, Margaret Goodine filed a Petition for Probate with the Circuit Court of Miami-Dade County. It appears that Margaret Goodine was the sole beneficiary of Jessica Goodine's Estate. This case was also filed in the Circuit Court of Miami-Dade County, Case Number is 1993-542-CP-02.

This is a very important piece of evidence, because pecuniary gain is always a possible motive in murder cases. It should also be noted that Mr. Goodine also settled a lawsuit in which he received a substantial sum of money at the time that Mrs. Goodine took him back in the house. He also owned a house that apparently Mrs. Goodine kept given she filed an eviction action against the tenant.

Missing 357 Magnum

On November 19, 1992, Margaret Goodine told Detective Murias that a 357 magnum was missing from Mrs. Goodine's bedroom. This was a crucial piece of evidence that was not mentioned during trial by the trial attorney. The importance of this weapon was that it was not found. Why was Mrs. Goodine not asked to provide information about the gun? Who did the gun belong to, who bought it and what was the serial number of the gun? Were there any efforts to trace the gun to a pawnshop? [See page 3 of

Detective Murias Report of 11/20/92] It is also very estrange that Mrs. Goodine discovered the missing gun from her closet but not broken chair and two blood stained towels.

Likewise Mrs. Goodine was able to describe to Detective Murias the items taken by the alleged perpetrator but she was not able to tell the Detective about the broken chair and the blood in her house.

Ineffective Cross Examination of Detective Times

During trial, Detective Times testified that after she was informed that Jessica's body was found, she brought Mr. Connor back to her office to continue to interrogate him. During this interrogation, Detective Times testified that:

> A. I continued to accuse him of killing Jessica and Lawrence Goodine and he asked me, well, **why didn't they take her up to the airport, also**? [Emphasis added] [R-4657]

Such statements were very damaging, because supposedly Mr. Connor had not been told that Mr. Goodine's body was found by the Fort Lauderdale Airport, which is located to the north of Ms. Goodine's house. Accordingly, such statement was in essence a confession to knowing where Lawrence Goodine's body was located. Thus, the only conclusion that the jury could have reached was that since Mr. Connor knew where Mr. Goodine's body was discarded that he must have been the killer.

Ironically, the defense attorney could have easily impeached Detective Times with the statements that she made during her deposition. It should be noted that in her deposition in 1994 she testified that Mr. Connor made no incriminating statements. In fact, she stated that:

> She told Connor about Jessica's body.
> **He [Connor] said that someone playing games with him and was trying to mess him up.**
> **No other question of Connors and Connor made no remarks.**
> **No admission of either murder.** [Emphasis added]
> [52-lines 6-21].

The fact that the trial attorney did not confront Detective Times with her inconsistent statements is a clear indication that the trial attorney did not review the depositions in preparation for trial. There is no excuse for a trial attorney failing to impeach a crucial witness about such a crucial issue. A prudent attorney would have confronted Detective Times with her prior inconsistent statement. If Detective Times would have been properly cross-examined, the testimony about Mr. Connors having mentioned that Mr. Goodine's body was found in "up by the airport" would have been negated and the Detective's credibility would have been shattered.

The fact that Mr. Zenobi failed to impeach Detective Times with her prior statement, is also an indication that he failed to read and prepare for trial.

Mr. Zenobi's performance was not only deficient in failing to confront Detective Times with her prior inconsistent statement, it was also deficient because he failed to move to strike the statement and request a mistrial.

The State has an on going obligation, under the rules of discovery, to provide defendants with all statements made by a defendant to the police. The state failed to provide Mr. Connor notice of said statements prior to trial.

Ineffective Direct Examination of Appellant

The Petitioner testified during trial. The way that the defense attorney asked the Petitioner the questions seemed to suggest to the jury that the Petitioner was incompetent. The Petitioner requested that the Court review the entire transcript of Petitioner's direct examination. Rather than ask questions regarding Petitioner's lack of knowledge as to who may have framed him, the Trial Attorney simply asked the Petitioner questions that were in direct conflict with the testimony of the police officers. The problem with the questions asked by the Trial Attorneys were that they were inconsistent with the defense. If the Petitioner's defense would have been insanity, then the questions asked by the Trial Attorney would have been proper. However, insanity was not the defense. The defense was that the Petitioner did not commit the crime.

In order not to be repetitious, the Appellant will rely on the same ineffective assistance of counsel arguments and case law mentioned in Argument-I in support of this claim.

ARGUMENT-IX

MR. CONNOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE, AS A RESULT OF HIS TRIAL ATTORNEY'S FAILURE TO PROPERLY PREPARE FOR THIS PHASE OF TRIAL AND ALSO BECAUSE HIS ATTORNEY FAILED TO PROPERLY INVESTIGATE AND PRESENT MITIGATING WITNESSES AND EVIDENCE DURING TRIAL.

The defense attorney was totally unprepared to conduct the penalty phase. It should be noted that rather than getting a second chair to conduct the penalty phase he chose to have a private investigator sit at the defense table during trial.

A review of the record of the penalty phase clearly illustrates how the defense attorney was caught off guard when the prosecution began to cross-examine Dr. Eisenstein about Mr. Connor's prior criminal behavior at work. [T-5555] From the beginning, Mr. Zenobi did not want to raise that fact that the Mr. Connor had no criminal convictions as a mitigating factor. The reason behind this decision, was to keep the prosecutor from bringing out specifics about Mr. Connor's criminal behavior. However, Mr. Zenobi

should have know that by presenting the testimony of the Doctors Eisenstein and Mosman the prosecutor would be able to cross examine the Doctors as to all information they relied upon to form the basis for their opinions. In the case at bar, Doctor Eisenstein had reviewed and relied on a police report of the incident where Mr. Connor appeared to have made a bomb threat. [T-5555] At this time Mr. Zenobi objected to the line of questioning and moved for a mistrial. [T-5555]. Following Mr. Zenobi's objection, the following dialog took place:

> THE COURT: Are these matters that were supplied by the Defendant to the doctor?
>
> MR. GILBERT: Yes.
>
> THE COURT: I am not asking you.
>
> MR. ZENOBI: These are matters which have nothing to do with the diagnoses.
>
> THE COURT: Are these matters that were supplied by the Defendant to the doctor? [T-5556]
>
> MR. ZENOBI: **I have no idea. I was not the attorney at the time. [T-5556][Emphasis added]**
>
> MR. GILBERT: Yes they were supplied. He already testified that he rendered some of his opinion based on the Defendant's past history of conduct.
>
> THE COURT: Take the jury out.
>
> THE COURT: …Doctor, the information that you have as to

Mr. Connor's work history, did that include the bomb threat?

DOCTOR EISENSTEIN: Yes.

THE COURT: Who gave you that information?

DOCTOR EISENSTEIN: There was some packets of information that were provided by Roy Matthewman and Assiciates.

MR. GILBERT: The mitigating expert of Mr. Jepeway.

THE COURT: It was provided by Mr. Jepeway or someone associated to him. [T-5557]

MR. ZENOBI: Who?

DOCTOR EISENSTEIN: Mr. Jepeway had hired Larry Blakeman and Roy Matthewman who were mitigating experts.

THE COURT: Is this bomb threat that occurred, is this something that you took into consideration and used as part of the basis for forming your opinion that the Defendant suffers from paranoia or whatever proportions?

DOCTOR EISENSTEIN: Going through his work history, it was many incidents.

THE COURT: Is this one of them that you considered?

DOCTOR EISENSTEIN: I wrote it in the report.

THE COURT: Motion denied. Let's proceed. Bring in the jury.

As indicated by his answer of " I have no idea. I was not the attorney at

the time", Mr. Zenobi was ill prepare for the penalty phase. If Mr. Zenobi had been prepared he could have asked Doctor Eisenstein about Mr. Connor's incidents of criminal behavior to show that Mr. Connor was not functioning normal is society. For instance, the bomb threat over a parking space is not a normal type of behavior. Normal people do not react this way to this particular situation. The machete incidents at his work is also a good indication that Mr. Connor had severe cognitive behavior problems. He simply was not able to adjust and functioned in a normal fashion. This way Mr. Zenobi could have provided specific instances to show that Mr. Connor was not functioning rationally and also he could have argued as a mitigator that Mr. Connor did not have a significant criminal history.

Mr. Zenobi could have also presented Doctor Jacobson as a witness. Although Doctor Jacobson found Mr. Connor's competent, he would have been able to provide the following testimony:

> … but I think [Petitioner] has always been paranoid. When I say always, a good part of his adult life, and that it's probably become worse as he has gotten older. I say probably on the basis of his hypertension, which has been fairly severe at the time, and vascular disease, which has kind of probably **made his paranoid thinking get a little worse……. He is kind of just sort of crept along slowly being less adaptive and less functional.** [Page 700 lines10-25]

Q. First of all, was there any evidence of organic brain damage based

on the materials that you saw?

> **A. I saw Doctor Eisenstein's material, and in terms of data, I think there is evidence of some cognitive dysfunction, some memory dysfunction. He is not as sharp, precise, perhaps as he was. He is very circumstantial, and this is something you often see in individuals who are <u>organic.</u> It is a sign more of a---to some degree it is almost normal but probably he I a little bit too young for it to be normal. In terms of his chronological age, you might---if he was 75 years of age and talking the way he did, you would kind of well, older people tend to go into a lot……,but, <u>yes I thought that was evidence of organic stuff</u>. Page 714 lines 7-19]**

Most importantly, there were witnesses that the defense attorney could have called to shed more light about Appellant's abusive childhood. This witness was Kricenze Connors, a childhood friend and distant relative of Mr. Connor from Hunduras. Kricenze is perhaps the only childhood friend of Mr. Connor who residing in South Florida.. [PC-R-651] It should be noted that Kricenze testified during the evidentiary hearing as to Mr. Connor's childhood. Kricenze is a minister at a local church. Kricenze would have been able to tell the jury about the Mr. Connor's abusive childhood. In particular, Kricenze would have testified that Mr. Connor did not have much schooling. [PC-R-651] He also knew that during his childhood, Mr. Connor lived between his mother and grandmother.[PC-R-652] He also witnesses Mr. Connor working to support himself when he was a child shining shoes.[PC-R-651] He remembers that when Mr. Connor's grandmother died

he was taken in by a man named Tyson Connor. [PC-R 653] Kricenze also knew that Mr. Connor had no relationship with his father when he was a child. [PC-R-654] Most importantly, Kricenze knows about the severe punishment inflicted upon Mr. Connor during his childhood. Part of the punishment endured by Mr. Connor resulted from having to kneel on top of a coconut grating board for long periods of time. [PC-R-655] There was also an incident, where, Mr. Connor was force to eat a pie made of pig manure as a punishment.

Kricenze Connors is also a good friend of both Margaret Goodine and Mr. Connor. Because of his unique position, he knew about the extramarital relationship between Margaret Goodine and Seburt Connor. Kricenze Connors is able to provide substantial information to the jury as to the overwhelming emotional and financial stress that Mr. Connor's had as a result of his extramarital relationship with Margaret Goodine. This also should have been used by Mr. Zenobi as a mitigating factor during the penalty phase.

The Court should note that during the evidentiary hearing on this issue, the Appellant presented testimony from Appellant's family member. For the most part, these witnesses testified that they had very little contact with Mr. Zenobi in preparing for their testimony during the penalty phase. They also

testified, that Mr. Connor severe punished his children often causing scars. This is important testimony for the simple fact that violent behavior is learned behavior. Thus as Doctor Eisentien concluded during the evidentiary hearing, this is strong evidence that Mr. Connor was brutally abused during his childhood. It should be noted that there are police reports of Mr. Connor having physical abused his children that were also overlooked by Mr. Zenobi. This issue should have been for fully investigated. It should be noted that Mr. Zenobi did not send his investigator to the Island of Rotan to try to learn more about Mr. Connor's childhood.

The Court should devote a full hearing to the numerous issues that the defense attorney failed to present in the penalty phase. It should be noted that since the vote for death was 8 to 4 there is great likelihood that the vote would have been different if the trial attorney would have presented the aforementioned evidence during the penalty phase.

In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel, a defendant must show both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating

circumstances would have been different.

In determining whether the penalty phase proceedings were reliable, "[t]he failure [of counsel] to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." Rose v State, 675 So. 2d 567, 571 (Fla. 1996). When evaluating claims that counsel was ineffective for failing to present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." Rutherford v. State, 727 So.2d at 223. This Court has found counsel's performance was deficient where counsel "never attempted to meaningfully investigate mitigation" although substantial mitigation could have been presented. Rose v. State, 675 So. 2d 567, 571 (Fla. 1996), Hildwin V. Dugger, 654 So.2d 107, 109 (Fla. 1995). ("woefully inadequate" investigation failed to reveal a large amount of mitigating evidence, such as prior psychiatric hospitalizations and statutory mental health mitigators); State V. Lara 581 So.2d 1288, 1289 (Fla. 1991). (finding counsel "virtually ignored" preparation for penalty phase). The mitigation presented at the evidentiary hearing is of a qualitatively lesser caliber than in other cases where this Court found that counsel rendered ineffective assistance for failing to present mental health mitigation. Compare to Rose, (supra) where defendant had previously been characterized as schizoid and suffered from

organic brain damage and a longstanding personality disorder. Heiney v, State, 620 So. 2d 171, 173 (Fla., 1993). (defendant diagnosed with borderline personality disorder); Phillip v. State, 608 So. 2d 778, 783 (Fla. 1992) (defendant had a schizoid personality and was passive-aggressive); Lara, (*supra*)(the defendant's bizarre behavior signaled serious mental disorientation).

In determining the prejudicial effect, if any, of counsel's performance the courts have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, Santos v. State, 629 So.2d 838, 840(1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness. In addition the courts have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence. Stephen v. Kemp, 846 F.2d 642, 653 (11th Cir. 1987) ("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital), Blanco v. Singletary, 943 F.2d 1477 at 1503 (11th Cir.1991)); Middleton v. Dugger, 849 F.2d 491, at 495 (11th Cir. 1988). Armstrong v. Dugger, 833 F.2d 1430, 1432-34 (11th Cir. 1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was "mentally retarded and had organic brain damage"). Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was

"essentialn-rebutted"), cert. denied, 509 U.S. 908, 113 S. Ct. 3005, 125 L.Ed.2d 697 (1993); Mitchell v. State, 595 So.2d 938, 942 (Fla. 1992). (prejudice established by expert testimony identifying statutory and non-statutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So.2d 1288, 1289 (Fla. 1991)(prejudice established by evidence of statutory mitigating factors and abusive childhood).

ARGUMENT-X

APPELLANT'S DEATH PENALTY MUST BE VACATED BECAUSE IT WAS ISSUED IN VIOLATION OF THE SUPREME COURT DECISIONS OF RING V. ARIZONA AND APPRENDI V. NEW JERSEY.

In Ring v. Arizona, 536 U.S. 584 (2002), the U.S. Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. In the instant case the trial judge found aggravating circumstances that allowed the imposition of the death penalty. However, Ring v. Arizona clearly forbids a judge from taking such an action. Rather, the Sixth Amendment right to a jury trial only permits that a jury find aggravating circumstance that enhances a defendant's maximum punishment. The question presented was whether an aggravating factor may be found by the

judge, as Arizona law specified, or whether the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury. The Court concluded that the Walton decision and the Apprendi rule were irreconcilable because there was no specific reason for excepting capital defendants from the constitutional protections extended to defendants generally. Because Arizona's enumerated aggravating factors operated as the functional equivalent of an element of a greater offense, the Sixth Amendment required that they be pled in the indictment and decided by a jury.

The judgment of the Arizona Supreme Court was reversed and the case was remanded for further proceedings.

Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13-703." Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001). The cross-referenced section, § 13-703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of

determining the sentence to be imposed." § 13-703(C) (West Supp. 2001). The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." Ibid.

At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated "aggravating circumstances" and any " mitigating circumstances." The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and "there are no mitigating circumstances sufficiently substantial to call for leniency." § 13-703(F).

The Florida sentencing scheme is very similar to the procedure used in Arizona. About the only difference is that in Florida the jury renders an advisory opinion as to whether the Court should impose the death penalty or sentence a defendant to life in prison. However, the jury's recommendation is just that, a recommendation. Even more troubling is the fact that the recommendation does not have to be unanimous. In the case at bar the jury recommended death, as to Count II of the Indictment, by an 8 to 4 vote. However, the actual decision to sentence the Petitioner to death was made by the Judge. It should also be noted that the aggravating circumstances were not pled in the indictment and thus Appellant can not be

sentence for matter not pled and proved to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000).

ARGUMENT-XI

MR. CONNOR'S SENTENCE OF DEATH STANDS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. The United States Supreme Court has addressed the Eighth Amendment and explained its dynamic character:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly human institutions can approach it."
>
> The [cruel and unusual punishment clause], in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice. Weems v. United States, 217 U.S. 149, 373-378(1910).

When the Supreme Court addressed whether the Eighth Amendment precluded the execution of those who were 17 years of age at the time they committed a capital offense, the plurality explained:

> When this Court cast loose from the historical moorings

> consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S., at 101 (plurality opinion)(emphasis added). Stanford v. Kentucky 492 U.S. at 378-79 (plurality opinion as to part V).

On March 1, 2005, the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when their crimes were committed. Roper v. Simmons, 03-633, 543 U.S. _____ (2005). In so holding, the Supreme Court relied on its earlier decision of Atkins v. Virginia, 536 U.S. 304 (2002), which made it unconstitutional to execute the mentally retarded. It should be noted that the Supreme Court in Roper, (*supra*) Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the mentally retarded.

Mr. Connor has been evaluated by several psychologists and Psychiatrics since his arrest. Most of the mental health professionals that evaluated Mr. Connor, have diagnosed that Mr. Connor suffers from a host of mental and psychological disorders. These disorders include:

a. Organic brain damage more precisely, an executive brain disorder. (T. 5458-59); (T. 5492) (T. 582-83, 595-96, 5662-64); (T. 5753-54, 5769-79, 5786); (T. 715).

b. Paranoid schizophrenia. (T. 808, 814); (T. 582-83, 595-96, 5662-64); (T. 700, 709, 729).

c. Damage to the frontal lobe, with profound impairment of cognitive functioning. (T. 774, 5441-45, 5456-58, 5499); (T. 5615, 5624, 5633, 5635-37

d. Stuttering, (T. 595-96, 5664)

d. Micrographia, (small letter writing), resulting from temporal lobe epilepsy. [PC-R-575].

In addition to his disorders, doctors have predicted that Mr. Connor's mental and psychological state will continue to deteriorate because of his hypertension and vascular diseases. [T. 700, 709,729]; [PC-R-576].

In fact, in his most recent evaluation of Mr. Connor, Doctor Hyman Eisenstein discovered that Mr. Connor's I.Q. score dropped 10 points, from 84 to 74 in roughly 8 years.[PC-R-567-570] According to doctor Eisenstein this score places the Appellant at the borderline range of intellectual functioning.[PC-R 569] Doctor Eisenstein also testified that Mr. Connor's receptive language score was 74, which placed him in the borderline range and that Mr. Connor had a 40-point drop in the memory test. [PC-R 579 and 583] In his latest examination Doctor Eisenstein also discovered rapid deterioration from other examinations that he conducted. These examinations included the Trails A and B tests. According, to Doctor Eisenstein, this requires an individual to alternate between numbers and

letters and can normally be done in 90 seconds. However, it took Mr. Connors four minutes and 39 seconds to complete this test. [PC-R-578] Mr. Eisenstein described this result as "…he is **far beyond the end point In terms of cognitive abilities and gains**, because of the fact that he had stronger abilities to begin with, and he is unfortunately, demonstrating decline in all these areas". [Emphasis added] [PC-R-578-579]

It should also be noted that both Dr. Eisenstein and Doctor Mosman have previously found that the crimes were committed while under the influence of extreme mental or emotional disturbance, and Mr. Connor lacked the capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law. [T- 5469-70], [T- 5669], [T- 5670-71].

In the alternative, The Appellant requests that this matter be remanded to the Circuit Court with the specific instructions to conduct a full hearing to determine whether or not Mr. Connor suffers from severe psychological and mental conditions that render him mentally retarded. Arguably, the Court could rule that Mr. Connor is protected, because at the conclusion of his post-conviction relief process he can petition the Circuit Court for a hearing pursuant to Florida Rule of Criminal Procedure 3.203. However, if the Court proceeds in this fashion, Mr. Connor will be force to proceed to

the United States Supreme Court with an insufficient record on this issue, if the Court denies his appeal.

ARGUMENT-XII

MR. CONNOR'S DEATH SENTENCE VIOLATES FLORIDA'S CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Florida Statute § 921.137, was signed into law by Governor Bush on June 12, 2001. This Statute provides that the "[i]mposition of [a] death sentence upon a mentally retarded defendant [is] prohibited." This provision extends to mentally retarded individuals a substantive right not to be executed[1]. The legislature directed that "[t]his act shall take effect upon becoming a law." However, the legislature further directed that "[t]his section does not apply to a defendant who was sentenced to death prior to the effective date of this act."[2]

The Senate Staff -Analysis explained that the legislation did not set forth

[1] In Ford v. Wainwright 477 U.S. 399,427 (1986), Justice O'Connor in considering a Florida statute precluding the execution of the incompetent stated, "the conclusion is inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent."

[2] Thus, this provision would indicate that the substantive right to not be executed is arbitrarily denied to those mentally retarded individuals with a valid death sentence in place. The substantive right to not be executed would only be restored to a mentally retarded individual under sentence of death if the death sentence were declared invalid and vacated. Such an inmate would have his right to not be executed restored if a re-sentencing was ordered to be conducted after the effective date of the new statute.

a specific IQ as necessary to establish mental retardation:

The bill does not contain a set IQ level, but rather it provides that low intellectual functioning "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." Although the department does not currently have a rule specifying the intelligence test, it is anticipated that the department will adopt the nationally recognized test. Two standard deviations from these tests is approximately a 70 IQ, although it can be extended.

The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty.

It should be noted that the un-contradicted testimony of Doctor Eisenstein during the post-conviction relief hearing was that he conducted an IQ test on Mr. Connor on May 13, 2003 and that he obtained a full scale IQ score of 74. [PC-R-567] In addition to his testimony, Doctor Eisenstein report was also introduced into evidence as Defendant's exhibit A-1. According to Doctor Eisenstein, this score placed Mr. Connor at a borderline range of intellectual functioning and at the fourth percentile of the general population. [PC-R-569]. Thus placing Appellant's intellectual functioning at about the

70’s range.

In the past, members of the Florida Supreme Court have indicated that even without legislative action prohibiting the execution of the mentally retarded, the Florida Constitution’s prohibition against “cruel or unusual" punishment should be construed to ban the execution of a mentally retarded individual. Woods v. State, 531 So. 2d 79, 83 (Fla. 1988)(Barkett J. dissenting, joined by Shaw and Kogan, JJ.); Hall v. State, 742 So. 2d 225, 231 (Fla. 1999)(Anstead, J. dissenting, joined by Pariente, J.). Certainly, the Florida legislature's adoption of Sect. 921.137, and the Governor's decision to sign it, speaks volumes regarding the development of a consensus within the State of Florida that mentally retarded individuals should not be executed.[3] While addressing the constitutionality of the electric chair, Justice Quince recently stated, "Courts should instead give effect to the legislative enactment as a reflection of the will and the moral values of the people." Provenzano v. Moore, 744 So. 2d 413, 421 (Fla. 1999). The legislature and the Governor have now spoken. This Court should address the issue of whether the Florida Constitution precludes the execution of the

[3] 6 Sect. 92 1.137 was unanimously passed by the Senate and by a vote of 110-1 in the House.

mentally retarded in light of the consensus within the State of Florida that such individuals should not be executed.

Additionally, Mr. Connor would note that under Florida's new provision, the date of the sentencing determines whether a mentally retarded person may be executed. For example, assuming Mr. Connor's death sentence is vacated on other grounds and a re-sentencing is ordered, a death sentence will be precluded under the new provision if it is determined that Mr. Connor is mentally retarded. The date of the crime does not control, rather it is the date of the sentencing that is controlling. The distinction is surely arbitrary. Those mentally retarded individuals already sentenced to death who are lucky enough to get a re-sentencing ordered on other grounds may not be re-sentenced to death. However, mentally retarded individuals who do not obtain a re-sentencing on other grounds would not get the benefit of the new provision. The difference in treatment of those mentally retarded individuals sentenced to death turns on a factor entirely unrelated to either the circumstances of the crime or the character of the defendant. Gregg v. Georgia 428 U.S. 153, 199 (1976)("Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized

circumstances of the crime and the defendant"), Thus, such an arbitrary distinction calls into question Florida's capital sentencing process.

Moreover, the Florida Supreme Court has held that "the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime." Allen v. State, 636 So. 2d 494, 497 (Fla. 1994). This is because the Florida Supreme Court could not "countenance a rule that would result in some young juveniles being executed while the vast majority of others were not, even where the crimes were similar." Id. See Brennan v. State, 754 So. 2d 1(Fla. 1999). In light of the new legislative enactment there can be no real dispute that it would be unusual for a mentally retarded individual to be executed. Thus, the Florida Constitution will not “countenance a rule" that would permit a mentally retarded person to be executed while other mentally retarded persons have a substantive right to not be executed.

For practical reasons, given Mr. Connor’s rapid mental decline, this Court should to remand this matter to the Circuit Court in order to conduct additional psychological, evaluations and examinations. It should be noted that even Doctor Jacobson, a witness called to testify by the State of Florida, predicted Mr. Connor’s psychological decline, as a result of his hypertension and vascular diseases. (T. 700, 709, 729). Dr. Jacobson also predicted in

time Mr. Connor would be less adaptive and less functional. (T. 700).

Since this claim is premised upon legislation effective on June 12, 2001, it is properly presented in a 3.850 motion. Accordingly, Rule 3.850 relief must issue.

In the alternative, The Appellant requests that this matter be remanded to the Circuit Court with the specific instruction to conduct a full hearing to determine whether or not Mr. Connor suffers from severe psychological and mental conditions that renders him mentally retarded. Arguably, the Court could rule that Mr. Connor is protected, because at the conclusion of the of his post-conviction relief process, he can petition the Circuit Court for a hearing pursuant to Florida Rule of Criminal Procedure 3.203. However, if the Court proceeds in this fashion, Mr. Connor will be force to proceed to the United States Supreme Court with an insufficient record on this issue, if the Court denies his appeal.

ARGUMENT-XIII

THE CIRCUIT COURT ERRED WHEN IT DENIED MOST OF THE ISSUES RAISED IN APPELLANT'S POST-CONVICTION RELIEF MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING.

The Circuit Court denied most of the issues presented in Mr. Connor's post-conviction relief motion without holding an evidentiary hearing. [PC-R-

354-373] Since these issues have been discussed above, they will not be repeated at this time.

A motion for post-conviction relief can be denied without a hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. Robert v. State, 568 So.2d 1255, 1256 (Fla.1990).

A claim of ineffective assistance of counsel will warrant an evidentiary hearing only where the defendant alleges specific facts, which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992), Hoffman v. State, 613 So.2d 405, 406 (Fla. 1992), Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999).

In the case at bar, an evidentiary hearing should have been granted by the Circuit Court as to the aforementioned issues, because as noted above, the post-conviction relief motion alleged "specific facts that were not rebutted by the record". In fact, the opposite was true, the facts presented in Mr. Connor's post-conviction relief motion were supported by the record. These specific facts have already been discussed in above and will not be repeated herein. Likewise, the Appellant has also established in his post-conviction relief motion and above that Mr. Zenobi's performance was deficient and that the deficiency resulted in prejudice to the Appellant.

For these reasons this Honorable Court should remand this case to the Circuit Court with instructions to conduct a full evidentiary hearing as to all of the aforementioned issued.

ARGUMENT-XIV

MR. CONNOR'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Connor did not receive the fundamentally fair proceeding to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. The cumulative error that occurred resulted in Mr. Connor being the victim of a fundamentally unfair proceeding in violation of the Sixth, Eighth, and Fourteenth Amendments. Derden v. McNeel, 978 F.2d 1453, 1456-61 (5th Cir.1992) (en banc), cert. denied, 508 U.S. 960, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993), Walker v. Engle, 703 F.2d 959, 963-69 (6th Cir.), cert. denied, 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 and 464 U.S. 962, 104 S.Ct. 396, 78 L.Ed.2d 338 (1983); Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed2d 368 (1973).

CONCLUSION

The issues presented above individually and collectively establish that Mr. Connor received ineffective assistance of counsel at trial and at the appellate level. Accordingly, based upon the foregoing and on the record, Mr. Connor urges this Honorable Court to reverse his conviction and sentence and grant him a new trial or a new penalty phase hearing. In the alternative, the Appellant requests that this case be remanded to the trial court so that it can conduct an evidentiary hearing as to the issues presented in Appellant's post conviction relief motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this day 9TH of September, 2005 to: Seburt Nelson Connor # 124517, c/o Union Correctional Institute 7819 N.W. 228th Street, Raiford, FL 32026-4440; A.S.A., David Gilbert, 1350 NW 12 Avenue, Miami, FL 33125; Assistant Attorney General, Sandra S. Jaggard, 444 Brickell Avenue, Suite 650, Miami, FL 33131-2407; The Florida Commission on Capital Cases, c/o Roger Maas, 402 S. Monroe Street, Tallahassee, FL 32399-1300, and the Clerk of Florida Supreme Court, Capital Case Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is submitted in Times New Roman 14-point font, as required by Florida Rule of Appellant Procedure 9.210 (a)(2).

Respectfully submitted,

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