IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

GARY RAY BOWLES

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal No.: **SC05-2264**
L.T. Court No.: 94-CF-12188

APPELLANT'S INITIAL BRIEF, PURSUANT TO FLA. R. APP. PRO. RULE 9.210

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County, Florida

Honorable Jack Schemer
Judge of the Circuit Court, Division A

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PRELIMINARY STATEMENT

Appellant, GARY RAY BOWLES, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorney(s) Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel."

References to the Record on Appeal will be designated "ROA." followed by the page number indicated on the Index to the Record on Appeal. Volume Three of the Record on Appeal will be designated "ROA," Vol. III, followed by the page number of Volume III on the Record of Appeal.

STATEMENTS OF THE CASE AND FACTS

Gary Ray Bowles was arrested by Jacksonville Sheriff's Office officials on November 22, 1994 in relation to the murder of Walter Hinton. During the subsequent police interrogation, appellant gave both oral and written confessions to the murder. The grand jury indicted Appellant in December of 1994 on charges of first-degree murder and robbery. Bowles pled guilty to premeditated first-degree murder, and the jury in the subsequent penalty phase recommended death by a 10-2 vote. The trial court sentenced appellant to Death.

On appeal, the Florida Supreme Court (hereinafter FSC) vacated the death sentence and remanded the case for re-sentencing on August 27, 1998. The FSC found that the trial court erred in allowing the state to introduce evidence of Appellant's alleged hatred for homosexual men in the penalty phase as it was not harmless and was a prevalent feature of the penalty phase.[1]

On remand, the re-sentencing jury recommended death, voting 12-0. The trial court again imposed the death penalty on or about September 7, 1999.[2]

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[1] See *Bowles*, 716 So. 2d at 769.

[2] The trial court found the following five aggravating circumstances: (1) Bowles was convicted of two other capital felonies and two other violent felonies; (2) Bowles was on felony probation in 1994 when he committed the murder as a result of a July, 18, 1991 conviction and sentence to four years in prison followed by six years probation for a robbery in Volusia county; (3) the murder was committed during a robbery or an attempted robbery, and the murder was committed for pecuniary gain (merged into one factor); (4) the murder was heinous, atrocious, or

Appellant appealed this sentence to the FSC, raising twelve issues.[3] The FSC denied this appeal, affirming Appellant's sentence on October 11, 2001.

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cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). The trial court assigned tremendous weight to the prior violent capital felony convictions, great weight to the HAC and CCP aggravators, significant weight to the robbery-pecuniary gain aggravator, and some weight to the fact that appellant was on probation for a robbery conviction. The trial court rejected the two statutory mitigators advanced by Bowles: (1) Extreme emotional disturbance at the time of the murder and (2) substantially diminished capacity to appreciate the criminality of his acts at the time of the murder. The trial court found and assigned weight to the following non-statutory mitigating factors: significant weight to evidence that Bowles had an abusive childhood; some weight to Bowles' lack of education; little weight to Bowles' use of intoxicants at the time of the murder; and no weight to the circumstances which caused Bowles to leave home or his circumstances after he left home. The trial court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances. See *Bowles*, 804 So. 2d 1173

[3] (1) the trial court erred in allowing the use of peremptory challenges to remove prospective jurors who were in favor of the death penalty but would only impose it under appropriate circumstances; (2) the trial court erred in allowing the State to introduce in aggravation for the first time at this re-sentencing hearing evidence of two prior similar murders for which the defendant was convicted after the first sentencing hearing; (3) the trial court erred in finding HAC; (4) the trial court erred in rejecting the proposed HAC jury instruction; (5) the trial court's CCP instruction to the jury was unconstitutionally vague; (6) the trial court erred in finding the robbery-pecuniary gain aggravator; (7) the trial court erred by giving little weight or no weight to the non-statutory mitigators; (8) the trial court erred in rejecting the proposed victim impact evidence jury instruction; (9) the trial court erred by rejecting the two statutory mental mitigators of extreme emotional disturbance at the time of the murder and substantially diminished capacity to appreciate the criminality of acts at the time of the murder; (10) the trial court erred in giving the standard jury instruction on mitigation instead of the requested specific non-statutory mitigation instructions; (11) the trial court erred in rejecting the requested jury instructions defining mitigation; and (12) the trial court committed reversible error in allowing impermissible hearsay.

The undersigned was appointed to represent Appellant on February 28, 2002. Following the denial of a Writ of Certiorari by the United States Supreme Court on June 17, 2002, Appellant filed an amended motion pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851 with the trial court on August 29, 2003.[4] The state's response was filed November 18, 2003, and Appellant's reply

[4] Appellant presented nine claims in said pleading, namely: (1) Counsel for Mr. Bowles failed to sufficiently present both statutory and/or non-statutory mental mitigating factors, in clear violation of 8th and 14th Amendment rights; (2) The Court erred in denying defense counsel's requested Jury Instruction defining both Statutory and non-statutory mitigation, in direct violation of Mr. Bowles Eighth and Fourteenth amendment rights; (3) The trial court erred in instructing the jury that they could consider victim impact evidence, in violation of defendant's Eighth and Fourteenth amendment rights; (4) Mr. Bowles was denied the right to a jury trial in violation of the Fifth, Sixth, and Fourteenth amendments to the United States Constitution; (4)(a) Florida's Death Penalty scheme is effectually similar to the Arizona scheme found unconstitutional by the United State Supreme Court in *Ring v. Arizona*; (4)(b) Under Articles three and six, and clause three of the Constitution of the United States, Florida's Judicial Officers must apply the holding of *Ring* to the Florida's Death Penalty Scheme; (4)(c) Even should this Court determine that the decision in *Ring* constitutes a "new rule", the Court must retroactively grant constitutional relief to Mr. Bowles; (4)(d) The right to a Jury trial is a fundamental bedrock procedural element of a trial as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the constitution of the United States; (4)(e) The unconstitutional procedures authorized by Florida's Death penalty statute infect the entire framework of the trial by jury so that the death sentence imposed under the statute must be vacated; (5) Florida's Death Penalty scheme as applied violated Bowles' Constitutionally guaranteed right to a fair and impartial trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States constitution because the statute under which he was sentenced, Fl. Stat. 921.141, did not meet the heightened reliability requirements of a capital sentencing scheme and failed to adequately safeguard his right to a fair trial by permitting unreliable evidence to be used against him. (6) Bowles was unconstitutionally deprived of his Fifth, Sixth, and Fourteenth Amendment rights

was filed on January 21, 2004. A ***Huff*** hearing was conducted on February 17, 2004, and a subsequent evidentiary hearing was conducted on February 8, 2005. Appellant filed closing argument for said hearing on April 12, 2005; the state filed its closing argument on May 12, 2005. The trial court denied Appellant's motion on August 12, 2005.[5] The Notice of Appeal of the trial court's ruling was filed on December 9, 2005. This timely appeal from the trial court's denial of Appellant's 3.850/3.851 Motion follows.

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because under Florida Statute 921.141 he was not given notice of the nature of the charges against him and he was not indicted on every element of the offense for which he was charged. (7) Bowles conviction under Fl. Stat. 921.141 is constitutionally invalid because the Jury's findings of Death eligibility was not unanimous, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 2, 9, 16, and 17 of the State of Florida Constitution. (9) Defendant was unconstitutionally sentenced to death because defendant was denied a fair jury trial in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the Constitution of the United States and Article I sections 2, 9, 16, and 17 of the Florida Constitution; (10) Florida's Death Penalty scheme as applied violated Bowles' constitutionally guaranteed right to a fair and impartial trial under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because the Statute under which he was sentenced, Fl. Stat. 921.141, did not meet the heightened reliability requirements of a Capital sentencing scheme and failed to adequately safeguard his right to a fair trial by permitting unreliable evidence to be used against him.

[5] Specifically, the trial court dismissed claims one through eight as, "procedurally barred either having been raised on direct appeal or because they should have been raised on direct appeal." (See ROA, pg. 156) The trial court, while addressing each claim in the order, only effectively considered claims nine and ten in its decision to deny the motion.

STANDARD OF REVIEW

In regards to when a trial court summarily denies a claim for postconviction relief, Fla. R. Crim. P. 3.850(d) provides that when denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order. *Williams v. State*, 642 So. 2d 67 (Fla. 1st DCA 1994). Moreover, if the trial court, in summarily denying a claim for postconviction relief, does not conclusively rebut said claim by record attachments, the summarily denial must be reversed and remanded for an evidentiary hearing. *See* *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999)*[Holding that, the movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant…upon review of a trial court's summary denial of a postconviction relief without an evidentiary hearing, the court must accept all allegations."]; See also* Moreover, as to those claims which raise ineffective assistance of trial counsel that "are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant," *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990), the appellants are entitled to an evidentiary hearing.

Regarding Appellant's claims where an evidentiary hearing was held, the Florida Supreme Court sets forth the abiding standard of review for an appellate court to apply when reviewing a trial court's ruling on an ineffectiveness of counsel claim. It has summarized that standard as follows. "The standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged. The appellate court must defer to the trial court's findings on factual issues but must review the trial court's ultimate conclusions on the performance and prejudice prongs *de novo*." *State v. Coney*, 845 So. 2d 120 (Fla. 2003).

STATEMENT OF THE ISSUES INVOLVED

1. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BOTH PRONGS IN THE *STRICKLAND V. WASHINGTON* TEST WERE NOT VIOLATED BY APPELLANT'S TRIAL COUNSEL IN NOT CALLING AN EXPERT WITNESS TO TESTIFY AS TO MITIGATION, TO SUBSTANTIATE DEFENDANT'S CLAIMS THAT TWO STATUTORY MITIGATORS EXISTED IN HIS CASE

2. WHETHER THE TRIAL COURT ERRED IN FINDING THAT BOTH PRONGS IN *STRICKLAND V. WASHINGTON* TEST WERE NOT VIOLATED BY APPELLANT'S TRIAL COUNSEL IN FAILING TO REBUT THE EXISTENCE OF THE HAC AGGRAVATING FACTOR WITH EXPERT TESTIMONY

3. WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIM ONE OF APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF, AS THE CLAIM WAS NOT INSUFFICIENTLY PLEAD NOR CONCLUSIVELY REFUTED BY THE RECORD

4. WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS FOUR, FIVE, SIX, AND SEVEN APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF, IN REGARDS TO WHETHER APPELLANT'S CONVICTION(S) AND SENTENCE (AND THE PROCEDURES USED THEREBY TO OBTAIN SAME) WERE IN VIOLATION OF THE U.S. CONSTITUTION AND *RING V. ARIZONA* AND *APPRENDI V. NEW JERSEY*

5. WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S AMENDED CLAIM IN HIS 3.850 MOTION FOR POSTCONVICTION RELIEF, ENTITLED "MOTION TO REOPEN TESTIMONY."

SUMMARY OF THE ARGUMENTS

1. **APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND/OR CALL AN EXPERT TO TESTIFY AT APPELLANT'S SENTENCING PHASE, IN AN EFFORT TO CORROBORATE AND SUBSTANTIATE APPELLANT'S TWO STATUTORY MITIGATING FACTORS, TO WIT: (1) THE APPELLANT SUFFERED FROM EXTREME EMOTIONAL DISTURBANCE AT THE TIME OF THE MURDER, AND (2) THE CAPICITY OF THE APPELLANT TO APPRECIATE THE CRIMINALITY OF HIS ACTS, WAS, AT THE TIME OF THE HOMICIDE, SUBSTANTIALLY DIMINISHED. BECAUSE SAID STATUTORY MITIGATORS WERE NOT BROUGHT TO FRUITION BY DEFENSE COUNSEL, APPELLANT WAS PREJUDICED, AS THE SENTENCING JURY RECOMMENDED DEATH AND THE SENTENCING JUDGE SENTENCED HIM TO DEATH, THEREBY FINDING THAT SAID STATUTORY MITIGATORS WERE NOT ENTITLED TO ANY WEIGHT.**

2. **APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REBUT THE EXISTENCE OF THE STATE'S AGGRAVATING FACTOR, TO-WIT, HAC, WITH EXPERT TESTIMONY SHOWING THAT THE VICTIM WAS UNCONSCIOUS AT THE TIME OF DEATH. BECAUSE THE HAC AGGRAVATING FACTOR (NAMELY THE VICTIM BEING UNCONSCIOUS) WENT UNREBUTTED, APPELLANT WAS PREJUDICED AS HE WAS RECOMMENDED DEATH BY HIS SENTENCING JURY, AND THE TRIAL COURT SENTENCED HIM TO DEATH, GIVING SAID AGGRAVATOR "GREAT WEIGHT."**

3. **THE TRIAL COURT ERRED IN RULING THAT CLAIM ONE OF APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF STATED "CONCLUSORY ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL," AS SAID CLAIM ALLEGED SPECIFIC**

FACTS THAT WERE NOT CONCLUSIVELY REFUTTED BY THE RECORD OR RECORD ATTACHMENTS

4. **THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS FOUR THROUGH SEVEN IN APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF, AS SAID CLAIMS ILLUSTRATE THAT APPELLANT'S CONVICTIONS AND SENTENCE WERE IN VIOLATION OF THE 4TH, 6TH, 14TH AMENDMENTS OF THE U.S. CONSTITUTION, AND VIOLATE THE U.S. SUPREME COURT HOLDINGS IN *RING V. ARIZONA* AND *APPRENDI V. NEW JERSEY.***

5. **THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM ILLUSTRATED IN HIS AMENDED MOTION FOR POSTCONVICTION RELIEF, ENTITLED "MOTION TO REOPEN TESTIMONY." APPELLANT'S *CRAWFORD* RIGHTS WERE VIOLATED AS OFFICER JAN EDENFIELD'S TESTIMONY WAS HEARSAY AND THEREBY PREJUDICED APPELLANT, AS THE EXISTENCE OF A PRIOR AGGRAVATING FACTOR (PRIOR VIOLENT FELONY) WAS ESTABLISHED IN PART USING AS EVIDENCE SAID HEARSAY TESTIMONY**

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
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GARY RAY BOWLES

Appellant,

v.

Appeal No.: SC05-2264

STATE OF FLORIDA, L.T. Court No.: 94-CF-12188

Appellee.

_____/

ARGUMENT ONE:

THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S TRIAL COUNSEL'S CONDUCT WAS NOT IN VIOLATION OF *STRICKLAND V. WASHINGTON* IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE (EXPERT TESTIMONY) IN SUPPORT OF TWO STATUTORY MITIGATING FACTORS, TO-WIT: (1) THE DEFENDANT SUFFERED FROM EXTREME EMOTIONAL DISTURBANCE AT THE TIME OF THE MURDER, AND (2) THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS ACTS, WAS, AT THE TIME OF THE HOMICIDE, SUBSTANTIALLY DIMINISHED. APPELLANT WAS PREJUDICED THEREBY, AS THE TRIAL COURT ASSIGNED NO WEIGHT TO SAID STATUTORY MITIGATORS.

In Claim Nine of Appellant's Motion for Postconviction relief, pursuant to Rule 3.850/3.851, it was argued that Appellant's trial counsel's (See ROA, pg. 74) (Claim Nine) representation was violative of the two prongs in *Strickland v. Washington*, in regards to defense counsel's failure to

investigate and present evidence corroborating Appellant's statutory mitigation, pursuant to the Sixth and Fourteenth amendments of the United States Constitution and Article I, sections 2, 9, 16, and 22 of the Florida State Constitution.

In particular, Appellant's counsel did not substantiate the statutory mitigators with evidence obtained from its expert, Dr. McMahon (Nor did counsel present argument that mental statutory mitigation was prominent in Appellant's case), to wit: (1) the defendant suffered from extreme emotional disturbance at the time of the murder, and (2) the capacity of the defendant to appreciate the criminality of his acts, was at the time of the homicide substantially diminished. (See ROA pgs. 78-88)

In lieu of this failure to present said evidence, the sentencing court gave no weight to said statutory mitigators in its sentencing order. (See Exhibit A, pgs. 11-15) Said failure to present evidence in the form of expert testimony in support of the two statutory mitigators prejudiced Appellant, as the trial court with no evidence in support of said mitigators, was at liberty to give them little or no weight, and rightfully did so. (See Exhibit A, pgs. 11-15) (*See also* Bowles v. State, 804 So. 2d 1173; Ragsdale v. State, 798 So. 2d 713 (Fla. 2000) *[stating, "counsel did not present an expert at the proceeding to testify regarding how defendant's child abuse, drug and*

alcohol abuse, and the history of head trauma may have contributed to defendant's psychological status at the time of the murder…this was never introduced in the penalty phase].

Moreover, Appellant's counsel, despite having substantial mitigation by way of Dr. McMahon, did not attempt to introduce said evidence outside of the jury's presence, namely in the *Spencer* hearing (Supp. ROA., pg. 1083). As such, said conduct by Appellant's trial counsel was in violation of *Strickland v. Washington*, as well as being in violation of Appellant's rights pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, and Article 1, sections 2, 9, 16, and 22 of the Florida Constitution.

During Appellant's evidentiary hearing on his 3.850 Motion for Postconviction relief, Appellant's trial counsel admitted that he did not put on any expert witness testimony to explain Appellant's mental and psychological status in general or at the time of the instant crime. (See ROA, volume III, pgs. 169-172). Trial counsel did however put on several witnesses (two of which knew Appellant personally), to explain Appellant's alcohol and drug dependency, abuse at the hands of his stepfather, witnessing severe abuse of his mother, and lack of a true parental father during childhood. (See ROA, volume III, pg. 176)

Without having an expert link any of Appellant's traumatic experiences, substance abuse, and brain damage (See ROA, pgs. 193-295), counsel attempted to prove that the statutory mitigating factors existed. To wit: (1) extreme emotional disturbance at the time of the murder, and (2) the capacity of the defendant to appreciate the criminality of his acts was at the time of the homicide substantially diminished. This clearly failed, as shown by the 12-0 jury recommendation of death, and the subsequent imposition of death by the sentencing judge. As a result of the failure to substantiate and validate the two statutory mitigators through expert testimony, the trial court, in sentencing Appellant to death, rejected these two statutory mitigators advanced by Appellant. *See* *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001)[6] (See Exhibit A, pgs. 11-15)

The failure to link Appellant's psychological, physical, and sociological history to the said two statutory mitigators was ineffective and prejudicial to Appellant's case. The testimony from both Dr. McMahon and Dr. Krop show that such a link was possible (and recommended pursuant to

[6] The trial court gave the remainder of presented non-statutory mitigation the following weight: (1) significant weight to evidence that Bowles had an abusive childhood; some weight to Bowles' history of alcoholism and absence of a father figure; little weight to Bowles' lack of education; little weight to Bowles' guilty plea and cooperation with police in this and other cases; little weight to Bowles' use of intoxicants at the time of the murder; and no weight to the circumstances which caused Bowles to leave hoe or is circumstances after he left home. *Id.*

Dr. Krop's testimony). (See ROA, volume II, pgs. 194-295) In particular, both experts found Appellant to have mild cognitive disorder and impairment (See ROA, volume II, pgs. 221, 260)[7]; both experts found Appellant to have a borderline IQ, falling in the low average range (See ROA, volume II, pgs. 199, 260); both experts found (independent of each other) that Appellant had extensive difficulties in performing tasks involving reasoning, and judgment. Essentially, both experts found that Appellant had difficulty in evaluating consequences of choices, learning from mistakes, memory retention, and other tasks associated with frontal lobe brain impairment. (See ROA, volume II, pgs. 275-277)[8]

Had an expert witness been called (Dr. McMahon) at Appellant's second (after remand by the FSC) penalty phase, this expert(s) could have easily correlated the said non-statutory mitigators with the statutory mitigators, thereby bolstering both the impact and credibility (and eventual

[7] As evidenced by the testimony by both experts (ROA, volume II, pgs. 194-295), Drs. McMahon and Krop disagreed as to whether a full neuropsychological evaluation should have been conducted based on the initial tests given by Dr. McMahon during the pre-trial proceedings of Appellant's case. It is clear based on Dr. McMahon's testimony that there was evidence of a Neuropsychological/Cognitive impairment that could have been explored further. (See ROA, volume II, pg. 221, 277)

[8] Additionally, Appellant's trial counsel admitted to Dr. Krop that he didn't know why a Neuro-psychological evaluation was not conducted, and relied completely on the advice of Dr. McMahon in formulating his approach. (See ROA, volume II, pg. 281-283)

weight given by the jury and judge) of these mitigators with the jury and the trial judge, thereby giving same an explanation as to why the non-statutory mitigators support a finding of statutory mitigation. A number of factors, both sociological and psychologically based, from Appellant's life could have been correlated to the two statutory mitigators (and thereby substantiating said statutory mitigators) discussed herein. Without presenting an expert testimony or evidence of same, the jury and judge were not given a scientific and objective view of Appellant's life and the events of his childhood and adolescence and how these factors contribute to the finding and substantiating of said mitigators.[9]

[9] To note a few important events/facts that were not substantiated into statutory mitigation by experts: Appellant was never given a full neuropsychological evaluation; no expert was called in penalty phase to establish a link between the evidenced substance abuse and the statutory mental mitigators; Appellant had a low IQ (one point from borderline); evidence of cognitive and neuropsychological impairment; the effects of alcoholism and substance abuse from age 10-13 on; the effects of Appellant being exposed to and experiencing severe physical and psychological abuse and neglect as a child; the effects of witnessing the physical and psychological abuse of his mother from his stepfather; the near abandonment of he and his siblings by his mother at an early age; the absence of a true father figure in his home during his childhood, etc. (See ROA, volume II, pgs. 194-295 for a complete analysis of these events by Drs. McMahon and Krop)

In addition to the potential impact that said testimony could have had on the outcome of Appellant's sentencing proceedings, Florida case law definitively gives counsel the duty to present mental mitigation on the client's behalf. *See* Phillips v. State, 608 So. 2d 778 (1992) [*Holding that although defense counsel presented some mitigation at the initial sentencing, such as defendant's mother, he did not present a large amount of evidence concerning defendant' childhood abuse nor did he present expert testimony regarding defendant's mental or emotional deficiencies].* (Moreover, the *Phillips* Court stated that although the childhood evidence would essentially have had no effect on the outcome of the sentencing proceedings, the expert's testimony would have amounted to "strong mental mitigation." In *Phillips*, counsel did not call an expert witness to testify as to how this abuse contributed to the defendant's psychological state in general or at the time of the offense.) *See also* State v. Michael, 530 So. 2d 979 (1988). [*Holding that defense counsel was on notice of defendant's disturbed mental and emotional state that could have effectively been presented as mitigating evidence]; State v. Sireci*, 502 So. 2d 1221 (Fla. 1987) *["a new sentencing hearing is mandated in cases that entail psychiatric examinations so grossly insufficient that they ignore clear indications or organic brain damage]; Larkins v. State*, 739 So. 2d 90 (Fla. 1999). [*Holding that a defendant's*

sentence of death was found disproportionate upon the finding that the defendant suffered from organic brain damage]; Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) *[Finding trial counsel ineffective according to Strickland for failure to present evidence of psychological deficiencies, expert testimony, and relevant mitigation.]*

In the instant case counsel did not present any expert testimony validating any of the findings of the experts as discussed at length above. The jury and the trial judge essentially had no choice but to deny said statutory mitigating factors as having any weight against the aggravators as a result of counsel's performance.

The action of not presenting expert testimony to substantiate and validate these two statutory mitigators cannot be considered strategy. It appears through the testimony of Bill White in Appellant's evidentiary hearing that linking Appellant's mental and physical defects (resulting from neuropsychological and/or sociological trauma and/or physical) to these two statutory mitigators was not considered. To wit, Mr. White states that he was looking to establish "extreme emotional disturbance" and "we presented that through the family members." (See ROA, Volume III, pg. 167) By not investigating whether (or disregarding same) Appellant's mental and/or physical deficiencies and his history of physical and substance abuse could

be correlated in demonstrating (and thereby proving) said two statutory mitigating factors, Appellant's trial counsel's actions in this regard cannot be considered strategy. *Horton v. Zant*, 941 F. 2d 1449 (11th Cir. 1991), [*Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them*].

Continuing, the introduction of Dr. McMahon's testimony and like-evidence at Appellant's sentencing hearing, contrary to the testimony of Appellant's trial counsel, would not have had a negative affect on the jury. In Appellant's evidentiary hearing, Appellant's trial counsel reasoned that the main reason he did not call Dr. McMahon at Appellant's sentencing phase was the implication of the negative characteristics of Appellant that would come out through cross-examination. (See ROA, volume III, pg. 170)[10]

In particular, one of the main reasons of not calling Doctor McMahon (in both the original sentencing proceeding and the resentencing after remand by the FSC) was the fact that Appellant's convictions for two

[10] Mr. White discusses the negative aspects of the potential testimony in cross examination that could have been brought out in the ROA, volume III, pgs. 170-194. Notably, these were his anti-social personality disorder and "lack of conscious" (*Id* at 177) (which is not elaborated on further by counsel).

unrelated murders would be heard by the jury. (See ROA, volume III, pg. 170) However, this information would have been heard by the jury regardless of this decision to call Dr. McMahon, as Appellant plead guilty to two murders during the interim of his original sentencing proceeding and his resentencing hearing. (See ROA, volume III, pg. 174) Counsel's decision therefore is irrelevant in determining the potential impact of Dr. McMahon's testimony and again supports Appellant's contention that not calling the Doctor was not a strategic decision.

Additionally, the American Bar Association's guidelines, specifically in guidelines 10.7(A) and 10.11(A)(F), give explicit instructions to death counsel regarding investigating and presenting mitigation in the penalty phase of the trial.[11] *See also Rompilla v. Beard*, 125 S. Ct. 2456 (2005)

[11] To note, guideline 10.7(A) states: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to both guilt and penalty." Continuing, 10.11(A) states: "As set out in guideline 10.7(A), counsel at every stage of the case has a continuing duty to investigate issues bearing on penalty and to seek information that supports mitigation or rebuts the prosecutions case in aggravation." Most importantly, 10.11(F) states: "In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: (1) Witnesses familiar with and evidence relating to the clients life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death; (2) Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical,

[Holding that: the ABA guidelines in place at the time of trial should be used as a guide to determine whether counsel's actions can be considered strategic.] Here, it is clear that counsel did not take every reasonable measure possible to ensure that the Appellant's mitigation information was prepared and presented adequately when viewed in light of the ABA guidelines. Given the Supreme Court's ruling in *Rompilla*, strategy cannot be used to explain the inadequate presentation that resulted at sentencing.

ARGUMENT TWO:

THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S COUNSEL WAS NOT IN VIOLATION OF *STRICKLAND V. WASHINGTON* (AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION) BY FAILING TO COMPETENTLY REBUT AND/OR REDUCE THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, OR CRUEL STATUTORY AGGRAVATOR (HAC)

In Claim Ten of Appellant's Motion for Postconviction relief, he argues that his defense counsel was ineffective in failing to rebut the statutory aggravating factor of Heinous, Atrocious, and Cruel (hereafter HAC) by not retaining an expert to contrast the Medical Examiner's finding that the victim was conscious and/or struggling before he was killed. (See

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psychological, sociological, cultural, or other insights into the client's emotional and/or mental state and life history that may explain or lesson the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaption to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor.

Exhibit A, pg. 6) By failing to do same, Appellant was prejudiced as the trial court found said HAC aggravator, as enumerated in Fla. Stat. 921.141(5)(h), and gave it great weight in its' sentencing order. (See Exhibit A, pg. 5-8)

In Appellant's initial case, and in the following resentencing hearing, evidence was introduced through Medical Examiner Dr. Azurra that the victim in the instant case suffered by testifying that the victim probably would not have been rendered unconscious by a blow to the head from a 40 pound stone block that fractured his skull and facial bones (ROA, pgs. 93-94, T. 908-909). Moreover, Dr. Aruzza, stated that the scrapes on the victim's arm and knee, coupled with broken ribs, were consistent with a struggle taking place. (ROA, pg. 94-95, T. pg. 912)[12]

The defense did not retain an independent medical examiner or like-qualified expert to review the findings (and conclusions) of Dr. Aruzza,

[12] The state, in support of its argument that the victim was conscious during the attack, introduced statement made by Appellant shortly after his arrest for the instant case. In particular, Appellant stated to police officers that "something snapped inside me. I went outside and pickup up one concrete block and brought it inside. I put it down on a table and thought for a few minutes. I then picked up the block and went into Jay's room where he was sleeping. I raised the block over my head and dropped it on his head. Jay fell off the bed, foot of the bed, and I choked him with my arm (Jay was struggling a little). (ROA, pg. 75, T. 1018). Moreover, Appellant also made a statement to the F.B.I. (in response to F.B.I. questioning), acknowledged that the victim did not come to (after the dropping of the brick), and further stated, "Well, you get hit in the head with a forty pound block I guess, probably ain't gonna wake up right away." (ROA, pgs. 95)

regarding the nature and circumstances of the crime, as well as the time of unconscious of the victim.

In Appellant's evidentiary hearing on February 8, 2005 expert testimony by Dr. Wright, an experienced Medical Examiner, forensic pathologist (among other titles), testified opined that the Appellant first attacked the victim by dropping the brick and missing him, then hitting the victim on the head. (ROA, volume III, pgs. 20-51) Moreover, Dr. Wright did not agree with Dr. Aruzza's testimony that the victim was not rendered unconscious by the blow to the head by the forty pound block to his head. (ROA, volume III, pg.35)

After said evidentiary hearing, the trial court, in its order denying said claim, stating that the "victim was fully awake, trying to defend himself, and struck by Bowles with a the stone before the blow to the head occurred...According to *either* expert's opinion of the order of events, this would have been a heinous, atrocious, and cruel murder." (ROA, pgs. 159-160)

However, the Florida Supreme Court has previously held that a trial court errs in finding HAC where a medical examiner testifies that the attack took place in a very short period of time, the victim was unconscious at the end of this period, and there was no prolonged suffering or anticipation of

death. *See* Elam v. State, 636 So. 2d 1312 (Fla. 1994)[*Stating that, Although the defendant was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the defendant was unconscious at the end of this period, and never regained consciousness*.].

In Appellant's case, there was no prolonged suffering or anticipation of death. Neither Dr. Aruzza nor Dr. Wright testified that the victim's death was a slow one, unlike the victim in the *Douglas v. State*, 878 So. 2d 1246 (Fla. 2004) (used by the trial court as a case supporting its conclusion that Defendant Bowles' crime was heinous, atrocious, and cruel), whom was struck 24 to 27 times.[13]

Moreover, the testimony by Dr. Wright is in contrary to the trial court ruling. As discussed in the preceding paragraph, Dr. Wright's testimony was that the victim would have been rendered immediately unconscious (Glasgow level 3) and therefore unable to feel pain or have any awareness of his surroundings. (ROA, volume III, pg. 41)

[13] While Dr. Wright does discuss that bruising on the victim's leg could indicate defensive wounds, (ROA, volume III, pg. 41) he goes on to state that the victim would have been rendered unconscious immediately after the blow to the face. (Id, pg. 48)

In order to find that HAC exists in a case the killing must be a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim…The finding of the HAC aggravator is proper only in torturous murders, those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Cheshire v. State*, 568 So. 2d 908 (Fla. 1990) Moreover, "the HAC aggravator considers the circumstances of the capital felony from the unique perspective of the victim." *Banks v. State*, 700 So. 2d 363 (Fla. 1997) *See also* Fla. Stat. 941.141 (5) (h)

To support a finding of HAC, the victim must have been conscious and thereby be able to feel pain. *Herzog v. State*, 439 So. 2nd 1372 (Fla. 1983) [*Holding that, when victim was unconscious, acts of a defendant prior to the victim's death could not support a finding of heinousness."]; See also Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1988)[*Holding that, the Court (Florida Supreme Court) has generally held that awareness to be a component of the heinous, atrocious, and cruel manner (HAC) aggravator."]; Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989); *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994) [*Holding that HAC is repeatedly upheld when the victims are "acutely aware of their impending deaths,"]; Jackson v. State*, 451 So. 2d 458 (Fla. 1984) [*Holding that circumstances that*

contribute to a victim's death after the victim after the victim becomes unconscious cannot be considered in determining HAC."]

The Appellant's case, facts regarding the victim's death is analogous to the case of *Elam v. State*, 636 So. 2d 1312 (Fla. 1994) No expert testified in either the sentencing hearing or evidentiary hearing that the victim in the instant case died a slow death. Moreover, Dr. Wright's testimony supports the logical conclusion that shortly after the victim was attacked by Appellant, he was rendered unconscious and remained unconscious until his death. Therefore, following *Elam v. State*, if Appellant's trial counsel had been effective in rebutting Dr. Aruzza's testimony regarding the HAC aggravating factor, said aggravator would not have been found by the judge and jury in the instant case. Moreover, because of said ineffectiveness, this aggravator was indeed found by the trial court and given great weight. (See Exhibit A, pgs. 5-8) Based on the testimony of Dr. Wright, and in accordance with the holding in *Elam v. State* and *Jackson*, Appellant's trial counsel was ineffective in not rebutting said HAC aggravator, thereby prejudicing Appellant, as said aggravator was given great weight by the trial court.

Given this, the finding of the trial court of the HAC aggravator cannot be considered harmless error, given the weight assessed to this aggravator by

the trial court in its ruling. Therefore, the Appellant requests this court remand this case for resentencing.

ARGUMENT THREE:

THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIM ONE IN APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF, AS THE CLAIM DEALT WITH INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PRESENT MITIGATION AT APPELLANAT'S PENALTY PHASE

In the trial court's "Order Denying Defendant's Second Amended Motion for Postconviction Relief," it stated, "Many of the claims are procedurally barred either having been raised on direct appeal or because they should have been raised on direct appeal. (ROA, pg. 156)

In particular, in regards to Claim One, the trial court held although Appellant "alleges that trial counsel were deficient in presenting mental health mitigation, because Defendant also alleged in said claim that the trial court erred in not finding the existence of the two mental mitigators, "initially, the Court notes that allegations of trial court error could and should have been raised on direct appeal…and in fact was raised and rejected by the FSC." (ROA, pg. 164-165) Continuing, in regards to the ineffectiveness claim, the trial court stated that "Bowles may not attempt to circumvent this procedural bar by inserting conclusory allegations of ineffective assistance of counsel." (ROA, pg.165) As such, the court only

allowed Appellant's Claims Nine and Ten to be given an evidentiary hearing.

However, in regards to Claim One of Appellant's 3.850 Motion, the court erred in summarily denying the claim. Appellant's Claim One was entitled, "Counsel for Mr. Bowles failed to sufficiently present both statutory and/or non-statutory mental mitigating factors, in clear violation of 8th and 14th Amendments." (ROA, pg. 25) Moreover, Claim One stated that, (ROA, pg. 27), "Counsel for Mr. Bowles erred in failing to produce sufficient available testimony and evidence regarding these three mitigators."[14] Appellant further stated that the court refused to find these mitigators because a "reasonable quantum of relevant and uncontroverted evidence supporting theses mitigators was not presented to the court."[15] Appellant also stated that "Defendant's counsel's failure to present adequate testimony in this regard." (e.g. counsel's failure to present evidence in support of said three mitigating factors). (ROA, pg. 31)

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[14] The mitigators included the following (1) Defendant suffered from extreme mental or emotional disturbance at the time of the murder (2) the capacity of the Defendant to appreciate the criminality of his acts at the time of ht homicide, was substantially diminished (3) Mr. Bolwes' mental and emotional condition were both exacerbated by his level of intoxication which precluded Mr. Bolwes from being able to conform his conduct to the requirements of the law." (Transcript, Sentencing Proceeding 1999 at p. 240).

[15] Appellant does concede that a portion of this claim dealt with the Court's error in not finding said mitigators.

As the aforementioned paragraph illustrates, Appellant's Claim One was not "mere conclusory allegations of ineffective assistance of counsel," but rather a claim that discussed how trial counsel was ineffective in failing to substantiate their contention that two statutory mitigators should be included and given weight against the aggravating factors and imposition of death. (ROA, pg. 25-31) *See* *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999)*[Holding that, the movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant…upon review of a trial court's summary denial of a postconviction relief without an evidentiary hearing, the court must accept all allegations in the motion as true to the extent they are not conclusively refuted by the record."].*

Fla. R. Crim. P. 3.850(d) provides that when denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order. *Williams v. State*, 642 So. 2d 67 (Fla. 1st DCA 1994). Moreover, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing. *Id.* Continuing, "While defense

counsel is entitled to broad discretion regarding trial strategy, where the trial court is confronted with a claim of ineffective assistance of counsel, a finding that come action or inaction by defense counsel was tactical is generally inappropriate without the benefit of an evidentiary hearing. The determination that tactical decisions are best made after an evidentiary hearing unless the record conclusively refutes the allegations. *Anthony v. State*, 660 So. 2d 374 (Fla. 4th DCA 1995). Lastly, where there has been no evidentiary hearing, the allegations in support of the motion for postconviction relief must be taken as true unless they are conclusively rebutted by the record. *Harich v. State*, 484 So. 2d 1239 (Fla. 1986)

In Appellant's case, Claim One of his 3.850 Motion was not conclusively refuted by the record. In fact, the court held an evidentiary hearing on Claims Nine and Ten of Appellant's 3.850 Motion, regarding ineffective assistance of counsel by failing to substantiate and/or investigate and bring mitigating factors to the jury and sentencing judge, as well as failing to rebut the existence of the HAC aggravating factor. Claims Nine and Ten dealt specifically with ineffective assistance of counsel, which was granted an evidentiary hearing, yet an ineffective assistance of counsel claim alleged in Claim One was summarily denied. Therefore, because the trial court granted an evidentiary hearing on similar ineffective assistance claims

in Appellant's 3.850 motion, and allowed evidence regarding same, it cannot now claim that a similar ineffective claim with specific allegations should be summarily denied. Moreover, by summarily denying Appellant's Claim One, the trial court essentially ruled on the issue of whether Appellant's trial counsel's decision not to present corroborating evidence with the statutory mitigation was a tactical and/or strategic decision. *See* *Davis v. State*, 608 So. 2d 540 (Fla. 2nd DCA 1992) [*Holding that "summary determination that defense counsel's failure to present testimony of expert witness was a tactical matter is conclusion best made by trial court following evidentiary hearing."].* Moreover, as to those claims which raise ineffective assistance of trial counsel that "are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant," *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990), the Appellant are entitled to an evidentiary hearing.

In conclusion, because Appellant specifically alleged in Claim One a claim that his counsel was ineffective in failing to support with evidence said three (two statutory) mitigating factors, Appellant requests this Honorable Court to remand his case for an evidentiary hearing and/or resentencing regarding Appellant's counsel's ineffectiveness pertaining to

his failure to support said three mitigating factors (two mitigators being statutory mitigation) with record evidence.

ARGUMENT FOUR:

THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS FOUR, FIVE, SIX, SEVEN IN APPELLANT'S 3.850 MOTION FOR POSTCONVICTION RELIEF

Defendant realleges and reincorporates Claims Four through Seven as stated in his trial court 3.850 Motion for Postconviction Relief as reasons for why the trial court erred in denying said claims[16]. (ROA, pgs.39-74).

ARGUMENT FIVE

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S "MOTION TO REOPEN TESTIMONY" CLAIM IN HIS AMENDED 3.850 MOTION

Subsequent to the trial court holding a *Huff* hearing (January 22, 2004) on Appellant's claims contained in his 3.850 Motion for Postconviction relief, the U.S. Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). In light of this U.S. Supreme Court case, Appellant filed a pleading entitled, "Motion to Reopen Testimony," alleging

[16] Claims Four and Five primarily dealt with Florida's capital sentencing scheme and how it is unconstitutional and violates *Ring v. Arizona*, 536 U.S. 584 (2002). (ROA, pgs. 39-70). Claim Six encompassed an issue whereby the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) require elements of the offense necessary (aggravating factors) to establish capital murder must be charged in the indictment. (ROA, pgs. 70-72) Claim Seven alleges that *Apprendi* and *Ring* require a unanimous jury finding of death. (ROA, pgs. 72-74)

that a *Crawford* violation occurred as the result of Officer Jan Edenfield's testimony regarding a hearsay description of the injuries of a victim dealing with Appellant's 1982 conviction for sexual and aggravated battery. (See Exhibit B, pgs. 1-6)

The trial court, in its Order denying Appellant's 3.850 Motion, stated that *Crawford* does not apply retroactively. (ROA, pg. 169) Also, the trial court stated that even if the Florida Supreme Court found *Crawford* to be applicable retroactively, "Officer Jan Edenfield's testimony was not necessary to establish the existence of Bowles' 1982 conviction in Hillborough County for sexual battery and aggravated battery. (ROA, pgs. 169-170) Moreover, the trial court held that if *Crawford* were to apply to Bowles' and resulted in the exclusion of his 1982 conviction in its entirety, *Crawford* would not have affected the testimony and evidence "which established the following aggravating factors[17]." (ROA, pg. 170)

[17] The aggravating factors mentioned by the court in said statement were the following: (1) prior violent/capital felony which was supported by proof of (a) 1991 Volusia County robbery conviction, (b) a 1994 Volusia County conviction for first degree murder; (c) a 1994 Nassau County conviction for first degree murder; (2) the murder was committed during the commission of or attempt to commit robbery; (3) the murder was committed for financial gain; (4) the murder was heinous, atrocious, and cruel; (5) the murder was cold, calculated and premeditated; and (6) the murder was committed while Defendant was on felony probation. (ROA, pg. 170)

As such, the trial court held that, "any error regarding Bowles' confrontation right as to the Officer Edenfield's testimony would be harmless because of the strong aggravators in this case." (ROA, pg. 170)

Appellant concedes that this issue (in regards to harmless error analysis), in part, has been previously decided by this Honorable Court. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001) [*Holding that, "Bowles had the opportunity to rebut hearsay presented by the state. That Bowles did not or could not rebut this testimony does not make it inadmissible…Even if we were to find error, any error in Edenfield's testimony about this prior violent felony is harmless because (1) the certified copy of the conviction itself conclusively establishes the aggravator; and (2) the strong aggravators in this case overwhelmingly outweigh the mitigation.]*

Appellant also notes that the Florida Supreme Court has recently ruled that the holding in *Crawford v. Washington* is not retroactive to cases that have become final. *See Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005)

However, in light of the aforementioned arguments made in Appellant's 3.850 Motion for Postconviction relief and the instant Initial Brief, Appellant respectfully requests this Court to reconsider its previously entered decision in light of said aforementioned arguments (and arguments contained in Appellant's trial court "Motion to Reopen Testimony")

concerning ineffective assistance of counsel concerning mitigation and failure to rebut the HAC aggravating factor.

CONCLUSION:

Wherefore, Appellant respectfully requests this Honorable Court to reverse and remand the trial court's denial of Appellant's 3.850 Motion for Postconviction relief, entitling Appellant to either a new resentencing hearing and/or a new evidentiary hearing concerning the claims that were summarily denied in said 3.850 Motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to all counsel of record, on this ___ day of August, 2006.

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

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