IN THE SUPREME COURT OF FLORIDA

NO.

ERIC SCOTT BRANCH,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Branch's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Branch was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original jury trial proceedings shall be referred to as "R." for the record and “TT.” For the trial transcript, followed by the appropriate page number(s). The postconviction record on appeal will be referred to as "PC-R." for the record and “PC-T” for the transcript, followed by the appropriate page number(s).

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Branch's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Further, trial counsel preserved numerous issues by objection

and motion for mistrial, which were not raised on appeal. In addition, appellate counsel failed to challenge numerous constitutionally flawed and vague penalty phase issues, despite objections by trial counsel.

The issues which appellate counsel neglected demonstrate a deficient performance was deficient and these deficiencies prejudiced Mr. Branch. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]" Fitzpatrick, 490 So.2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome" Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined" Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled upon during direct appeal, but should now be revisited in light of subsequent case law, as well as correcting error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Branch is entitled to habeas relief.

PROCEDURAL HISTORY

Mr. Branch was tried in Escambia County, Florida, and convicted of first-degree murder, sexual battery, and grand theft[1]. The jury trial commenced on March 7, 1994 [R. 1]. On March 10, 1994, the jury found Mr. Branch guilty as charged [R. 935]. On March 11, 1994, the jury recommended death by a vote of 10-2 [R. 1032]. On May 3, 1994, the Court imposed the death sentence. The Florida Supreme Court affirmed Mr. Branch's convictions and death sentence on direct appeal. Branch v. State, 685 So.2d 1250 (Fla. 1996), *rehearing denied* (January 8, 1997)[2]. Petition for Writ of Certiorari to the United States Supreme Court was denied on May 12, 1997. Branch v. Florida, 520 U.S. 1218 (1997).

On May 7, 1998, Mr. Branch timely filed an initial but incomplete "shell" postconviction motion in order to toll the time limit in which to file his petition for writ of habeas corpus in federal court [PC-R, p137-200].

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[1] The court presented a general verdict to the jurors offering premeditated first-degree murder and felony murder. Despite this, the record indicates that the State argued felony murder premised upon the underlying sexual battery charge.

[2] The following issues were raised on appeal: (1) failure to grant continuance; (2) failure to conduct hearings concerning counsel's competence; (3) failure to give a requested instruction on circumstantial evidence; (4) insufficient evidence; (5) comment on right to silence; (6) photo of victim; (7) failure to give a requested instruction defining mitigating evidence; (8) evidence of another crime, and (9) victim impact evidence.

On June 30, 2003, the office of Capital Collateral Regional Counsel - North ceased to exist. Undersigned Counsel was appointed to represent the Petitioner as of July 14, 2003 [PC-R. Vol. I, p877-878]. Petitioner filed his Seconded Amended 3.850 Motion October 10, 2003. An order granting an evidentiary hearing was entered on December 15, 2003 [PC-R. Vol. I, p1044-1047]. An evidentiary hearing was conducted April 26-28, 2004 [RC-T. Vol. I-III]. The Trial Court entered an order denying Petitioner's Motion to Vacate on February 24, 2005 [PC-R. p1591-1616]. Petitioner filed his Notice of Appeal on March 4, 2005 [PC-R. p1617-1618].

The instant petition seeking habeas corpus relief is being filed simultaneously with Petitioner's appeal from the denial of his Rule 3.850 Motion. The two pleadings are interrelated and should be considered cumulatively.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues that directly concern the judgment of this Court during the appellate process, and the legality of Mr. Branch's convictions and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental

errors challenged herein arise in the context of a capital case in which this Court heard and denied Petitioner's direct appeal. See Wilson, 474 So.2d at 1163; Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Branch to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. This petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as these pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Branch's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Branch asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United

States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO SUFFICIENTLY ARGUE THAT THE STATE HAD FAILED TO PROVE THE AGGRAVATOR OF PRIOR VIOLENT FELONY THROUGH THE INTRODUCTION OF THE INDIANA STATUTE IN SUPPORT OF SECTION 921.141(5), FLORIDA STATUTES[3].

In issue VIII of the Petitioner's Direct Appeal from the original trial, Appellate Counsel questioned whether the Indiana offense constituted a violent felony that satisfied Section 921.141(5), Florida Statutes. This Court's opinion in Branch, Supra, found this issue, as argued, without merit.

In Petitioner's initial brief, Appellate Counsel did not argue the inadmissibility of the Abstract of Judgment, other than to say, "It allowed the state to introduce, without any further proof, the Indiana judgment (T975). That was error." [Appellant's Initial Brief p55]. Appellate Counsel also did

[3] A similar issue was raised as ineffective assistance of counsel in claims IV and V of the Petitioner's initial brief from the denial of the 3.850 Motion. The issue is being raised here because the State claimed that Petitioner was procedurally barred from raising the issue in the 3.850 Motion, since it should have been raised on direct appeal. Inasmuch as the State may be found to be correct, Petitioner has raised the issue herein.

not raise the issue of whether the Indiana statute would be considered a felony in Florida.

The standard of review for claims of ineffective assistance of appellate counsel is the same standard for trial counsel, as set out in Strickland v. Washington, 466 U.S. 668 (1984). Further, in order to support an ineffective assistance of counsel claim, it must be shown that the issue was preserved for appeal or fundamental error. Skipper v. State, 420 So.2d 877 (Fla. 1982). Petitioner contends whether the Abstract of Judgment was admissible and whether the Indiana offense met the criteria set out in Section 921.141(5) was preserved for appeal. However, if not preserved, Petitioner contends that the issue constituted fundamental error.

During the penalty phase, the State introduced a certified copy of an Abstract of Judgment [TT. Vol. VI, p972] purporting to be a prior offense of sexual battery in Indiana. While trial counsel vehemently argued that the Indiana offense did not amount to a violent felony, he did not make a specific objection to the admission of the abstract [TT. Vol. VI, p973]. The trial court's order denying Petitioner's 3.850 Motion found that trial counsel did not object to the admission of the abstract [PC-R. Vol. IX, p1611]. At the evidentiary hearing, the trial court and trial counsel were confused if trial counsel objected.

Further, the State argued to the trial court in its memorandum that this issue was barred from a 3.850 Motion because it could have been raised on direct appeal [PC-R. Vol. VIII, p1488]. Therefore, the State must believe the issued was preserved.

The abstract was presented to the jury in an attempt to establish that the Petitioner had been convicted of a prior violent felony. However, the document contained no identifying information to establish that the Petitioner was, in fact, the individual referenced in the out-of-state abstract, nor described in any detail the nature of the alleged offense (State's trial exhibit H-1). Further, in the penalty phase no evidence was presented to the jury explaining the circumstances surrounding the alleged offense.

After the penalty phase concluded the Court gave the following jury instructions that referenced a prior violent felony:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: First, that the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. The crime of sexual battery is a felony involving the use or threat of violence to another person… [TT. Vol. VI, p1027].

At the Evidentiary Hearing, trial counsel acknowledged that no identifying factors were present in the abstract [PC-R. Vol.

VII, p1165]. The abstract was inadmissible hearsay. Williams v. State, 515 So.2d 1042 (Fla. 3rd DCA 1987).

In Sinkfield v. State, 592 So.2d at 323, the Court found:

> However, after the issuance of the original mandate herein, this court issued its opinion in *Killingsworth v. State, 584 So.2d 647, 1991 Fla. App. LEXIS 8080, 16 Fla. Law W. D 2189 (Fla. 1st DCA 1991).* Like Sinkfield, the Killingsworth defendant did not object on any ground to the admission of a certified copy of a judgment and sentence introduced by the state to prove prior conviction (although this fact is not explicitly stated in the opinion). The Killingsworth court nevertheless relied on Miller to hold that the mere identity between the name appearing on the prior judgment and the name of the defendant on trial does not satisfy the state's obligation to present affirmative evidence that they are the same person. The court therefore held that a motion for judgment of acquittal should have been granted, and ordered the appellant discharged.

As in Sinkfield, Petitioner's trial counsel did not specifically object to the admission of the Abstract of Judgment. However, the issue for which it was offered, proof of prior violent felony, was objected to. There was no question by the Court that trial counsel was objecting to the introduction of the Indiana offense into evidence. Moreover, the mere identity between the name appearing on the Abstract of Judgment and the name of the defendant on trial did not satisfy the State's obligation to present affirmative evidence that they are the same person. Had Appellate Counsel raised this issue before this Court, this Court would have found that the jury's

receiving the Abstract of Judgment as the only evidence of a prior violent felony was harmful. Appellate Counsel was, therefore, ineffective by not arguing this issue.

Trial counsel objected that the Indiana offense was not a violent felony, but did not make a specific objection that the Indiana offense was not a felony in Florida. However, the two arguments go hand-in-hand, because if the offense, whether violent or not, was not in fact a felony in Florida, the admission of the offense was in error.

In Hess v. State, 794 So.2d 1249 (Fla. 2001), a case of first impression regarding lewd and lascivious behavior, this Court found that the State was required to establish the offense was violent.

> Whether the trial court was correct in concluding that sexual activity with a child and lewd and lascivious assault are per se crimes of violence is an issue of first impression. Section 921.141(5)(b) reads: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." We have held that this aggravator attaches only to "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." *Johnson v. State, 720 So.2d 232, 237 (Fla. 1998)* (quoting *Lewis, 398 So.2d at 438);* see *Mahn v. State, 714 So.2d 391, 399 (Fla. 1998).*

Id. At 1264.

> The Legislature finds that the least serious battery offense . . . was intended, and remains intended, to serve as the basic charge of sexual battery . . . and that it was never intended that sexual battery offense . . . require any force or violence beyond the force

> and violence that is inherent in the accomplishment of "penetration" or "union."
>
> We conclude that both the language of section 794.011(8)(b) and section 794.005 indicate the Legislature's intent to treat a violation of section 794.011 as implicitly involving violence or the threat of violence. Accordingly, we find no error with the trial court's instruction to the jury as to this offense.
>
> However, the trial court also found that lewd assault on a child was a prior violent felony per se. *Section 800.04(1), Florida Statutes* (1993), states that it is a crime for a person to handle, fondle, or assault any child under the age of sixteen years in a lewd, lascivious, or indecent manner. However, because this crime does not include sexual battery within its definition and because, unlike sexual battery, the language does not indicate any inherent violence or threat of violence, we conclude this is not per se a crime of violence. Thus, the State had the burden of proving that this crime involved violence or the threat of violence under the actual circumstances in which it was committed.

Id. At 1265.

This Court in Hess held that Sexual Battery, as **defined by the statute** (emphasis added) amounts to a per se violent felony. However, as explained below, the Indiana statute did not meet Florida's definition of Sexual Battery and, therefore, required additional evidence by the State. The State failed to prove that the Indiana statute constituted a prior violent felony under Florida Law. Appellate Counsel was ineffective for failing to fully argue the issue.

In determining whether an out-of-state offense is a felony in Florida, the Court in Carpenter v. State, 785 So.2d 1182, 1205 (Fla. 2001), stated:

> In the present situation, however, the Legislature has not provided for any type of comparison and has specifically provided that only a "felony involving the use or threat of violence to the person" may establish an aggravating factor under section 921.141(5)(b). Sec. 921.141(5)(b), Fla. Stat. **Further, based on the elements and definitions in the Nevada Statutes, it is not clear that the offense would be a felony in Florida. Resolution of the issue would require a separate trial concerning the Nevada events within the trial of this case. Strictly construing this statutory language in favor of the defendant.** See. E.g., *Donaldson v. State*, *722 So.2d 177, 184 (Fla. 1998*) ("It is axiomatic that penal statutes must be strictly construed."), we determine that an out-of-state conviction related to an offense that has only similar but different elements and does not constitute a "felony" in that state does not amount to a felony in Florida as a matter of law for the purposes of establishing the prior violent felony aggravating circumstance under the present statute.

[emphasis added]. The language in Carpenter, Id., is clear regarding an alleged out-of-state prior violent felony pursuant to Section 921.141(5)(b). In the situation where an out-of-state statute has similar, but different elements and is not a felony in that state, the conviction cannot be used as an aggravator. It is also clear that when the elements and definitions of the out-of-state statute are not apparent that the offense would be a felony in Florida, "resolution of the issue would require a separate trial concerning the [out-of-

state] events within the trial of th[e] case. Strictly construing this statutory language in favor of the defendant." Id. At 1205.

While the comparison of the Indiana statute to Florida's statutes in Branch v. State, 671 So.2d 224 (Fla. 1st DCA 1996), may not be the same comparison for Section 921.141(5)(b), it is instructive that the Court found the elements to be different.

> Our review of the statutes in question leads us to the conclusion that the crime of sexual battery in Florida is not analogous to the crime of sexual battery in Indiana for purposes of the habitual violent felony sentencing. Each crime requires elements that the other does not. [fn1 Indiana has a separate crime of "Rape." *Ind.Code Sec. 35-42-4-1.] See, e.g., Dautel v. State, 658 So.2d 88 (Fla. 1995); Forehand v. State, 537 SO.2d 103 (Fla. 1989)*.

"Sexual battery" in Indiana does not constitute a "sexual battery" as contemplated by the Florida statute, and is, in fact, more comparable to a simple battery. See Florida Statutes Sec. 794.011(h) (1991)(sexual battery defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object"); see also Florida Statutes Sec. 784.03 (1991)(a person commits battery if he actually and intentionally touches or strikes another against their will or intentionally causes bodily harm to an individual); Elledge v. State, 346 So. 2d 998 (Fla. 1977) (remanded for re-sentencing because a non-statutory

aggravating circumstance was considered.) The prior Indiana conviction involved an offense alleged as Count Five of the information, to-wit:

> [O]n or about October 15, 1991, Eric S. Branch, did with the intent to arouse and satisfy his own sexual desires, ***touch another person***, to-wit: Tiffany Pierce, the said Tiffany Pierce being compelled to submit to the touching by force, to-wit: ***covering the mouth of Tiffany Pierce and forcing her to the ground and telling Tiffany Pierce not to scream***, contrary to the form of the statutes in such cases made and provided by I.C. 35-42-4-8 . . .

The offense is denominated "sexual battery" under Indiana Statute is 35-42-4-8, which provides in pertinent part:

> **Sexual battery** - Any person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:
>
> (1) Compelled to submit to the touching by force or imminent threat of force; . . . commits sexual battery, a Class D felony . . .

The crime of "sexual battery," as defined by this statute, is not a lesser included offense of rape in Indiana. Scrougham v. State, 654 N.E. 2d 542 (Ind. App. 1990).

"Sexual battery" as it is defined in Florida, is "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object," Section 794.011(1)(h), Fla. Stat. The Indiana offense simply does not contain any of the essential elements of Florida's sexual battery offense.

The Indiana offense contains elements of touching similar to Florida's definition of battery[4], but the crime also requires specific intent: to arouse or satisfy the person's own sexual desires or the sexual desires of another person. Thus, the Indiana offense appears to require more elements than Florida's offense of battery because it contains the added element of specific intent. However, at the time of Petitioner's trial, it was analogous to no other statutory offense in Florida other than simple battery -- a misdemeanor in the first degree. Fla. Stat. 784.03(2) is not a qualifying offense for the purpose of the prior violent felony aggravating circumstance; it is an impermissible factor to consider in the capital sentencing calculus in Florida.

The Indiana information and statute clearly demonstrate that this offense does not contain elements essential to, and which necessarily define, Florida's crime of "sexual battery." The Indiana offense lacks the essential elements of the penetration or union with the victim's vagina, anus or mouth with the sexual organ of the perpetrator[5]. Alternatively, there

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[4] In Florida, "A person commits battery if he:
(A) Actually and intentionally touches or strikes another person against the will of the other; or
(B) Intentionally causes bodily harm to an individual." Section 784.03, Fla. Stat.

[5] In fact, such elements are found only in other Indiana

is also no required element of the penetration of the victim's vagina or anus by an object. Thus, the Indiana conviction was not an offense analogous to or the same as Florida's sexual battery. Further, given this Indiana offense has been held not to be a lesser-included offense to rape (defined in Indiana as forced vaginal sexual intercourse), they are also mutually exclusive offenses.-

The Indiana offense is also not aggravated battery in Florida. First, the offense lacks the essential elements of the aggravated battery relating to the infliction of great bodily harm, permanent disability, permanent disfigurement, or the use of a deadly weapon during its commission. Thus, the offense is not analogous to, and is not, an aggravated battery under Florida law.

The Indiana offense is not an aggravated assault under Florida law. Neither the Indiana statute nor the information requires or alleges the essential element of creating a well-

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statutes defining other criminal offenses. Essentially, rape as defined by Indiana Statute 35-42-4-1, requires knowing or intentional sexual intercourse with a member of the opposite sex by force or imminent threat of force. Penetration of the vagina, even the slightest, is required for this offense. *Holder v. State, 272 Ind. 52, 396 N.E. 2d 112 (Ind. 1979).* This statute covers only one aspect of Florida's sexual battery statute, vaginal penetration. Indiana Statute 35-42-4-2, Criminal Deviate Conduct, prohibits sodomy. *Estes v. State, 195 N.E. 2d 471 (Ind. 1964)*. It also prohibits insertion of an object into the anus. *Stewart v. State, 555 N.E. 2d 121 (Ind. 1990)*.

founded fear in the victim that violence is imminent. The Indiana statute does not require, nor did the information allege, a deadly weapon or intent to commit a felony. Thus, the Indiana offense is not an aggravated assault in Florida. None of the offenses contemplated by the prior violent felony aggravating circumstance in Fla. Stat. 921.141 (5)(b) are the same as or analogous to the elements of the Indiana offense as it is defined by Indiana statute and as alleged in the Indiana information. At the very most, the Indiana conviction is analogous to only a simple misdemeanor battery in Florida.

Thus, Appellate Counsel was ineffective for failing to fully argue on direct appeal the admissibility of the Indiana offense before the jury, as well as the court's instruction to the jury that the offense was a violent felony, and the trial court's finding that the Indiana offense was a violent felony.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE ISSUE OF THE TRIAL COURT'S ERROR BY ADMITTING DNA PROBABILITY STATISTICS WITHOUT A PROPER FRYE HEARING.

During the trial of the Petitioner, the State called James M. Pollock, Jr., (FDLE serologist) to testify [TT. Vol. III, p494]. Prior to Mr. Pollock taking the stand, trial counsel moved to exclude his testimony on the grounds that it was

unreliable because Mr. Pollock had no basis to determine its reliability.

> MR. ALLBRITTON: Your Honor, at this time as it relates to testimony from Dr. Pollock involving the probability of random matches - conclusions that he made with his DNA profile matches, I am going to move in limine that he not be allowed to testify -- or I'm filing a motion in limine asking that his testimony be limited to simply that a match was made and not to the probability.
>
> It's my understanding from talking with Dr. Pollock that this probability of -- in this case he said conservatively one in a million as it relates to Caucasians, was based upon a data set that was prepared by someone other than himself. He has indicated to me earlier today that he is not an expert and cannot vouch for the reliability of that data set upon which that conclusion is reached. That being the case, we would ask that his testimony be -- that portion of his testimony be limited, that it not be allowed to come in.
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> If it is not reliable, then of course it's not admissible, and he cannot testify as to the reliability of the data set upon which he reached his conclusion. And based upon that, we would ask that his testimony as relates to the probability not be included.

It is extremely clear that trial counsel was objecting to the admission of the probability application to DNA results as being unreliable. Neither trial counsel nor the Court mentioned the magic words: Frye hearing. However, the trial court did require some testimony by Mr. Pollock on the subject, after the State argued that the FBI tables were recognized in the scientific community [TT. Vol. III, p493].

DIRECT EXAMINATION

BY MR. PATTERSON:

Q. Dr. Pollock, the tables that you have discussed, the probability tables, can you tell us - describe them to us a little bit.

A. The population data base tables that I use are ones which are used by other crime laboratories throughout the country, like ours, for the purposes of developing approximate population frequencies for a given DNA profile. The population data set was -- all of the data that we use came from compilation of information that was developed, compiled by the FBI from samples that were taken from various populations around the United States. For instance, the Caucasian population data set consisted primarily, at least initially, of national academy students that were going through the FBI research and training center in Quantico, random samples taken in that nature. Now, they took extreme measures so that those samples were not duplicated, so there was only one sample from one individual in that database. Now, that started in 1988.

Trial counsel objected on the grounds that Mr. Pollock had not laid the proper foundation to establish how the data sets were prepared or its reliability [TT. Vol. III, p497]. On cross-examination trial counsel asked Mr. Pollock the following:

Q. Dr. Pollock, are there other data sets used by other laboratories?

A. By other laboratories in the united States, yes. Some of the private laboratories have their own compiled data sets that they use.

Q. Okay. Is there a disagreement in the scientific community as it relates to the reliability of data sets between different companies and different laboratories?

A. Well, I would say no. And in fact, when the world population data study was published, which is primarily brought forward by the FBI again this is about six volumes or approximately a foot thick on all that data. When that data is compared, data sets from not only around the United States, from various states, such as Florida -- we've done our own portion of that study in Jacksonville and also in Orlando, but when you compare other states and, in fact, when you compare other nations, such as Canada and even European nations, the difference between the distributions among Caucasians in the United States, for instance, and Caucasians in Canada and Caucasians in Europe vary only by a small amount. So in other words, they're very close to one another. Now of course, in any scientific study the data is not exact-- exactly the same, because any time you do an experiment, it's going to vary slightly.

Q. Well, isn't it true, Dr. Pollock, that there are different data sets used within the FDLE laboratories?

A. Well, in fact, we have different data sets available in different regional laboratories. Now, whether those data sets -- those local data base sets are used or not, I can't comment on that. I can only comment on the sets that are used in the Jacksonville lab and the ones that are in this matter, and that's the FBI set.

[TT. Vol. III, p499].

At the conclusion of the proffer of Mr. Pollock, the trial court denied, without explanation, the defense Motion in Limine, and allowed Mr. Pollock to testify in error.

While the words "Frye[6] hearing" were not used, trial counsel made sufficient objection to the trial court so that the Court and the State knew that he required a

[6] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (F.C. Cir. 1923).

hearing to determine the validity of the science of population statistics, as it related to DNA analysis. In Spurlock v. State, 420 So.2d 875 (Fla. 1982), counsel requested a specific instruction, which was denied. Although counsel did not object at the close of the instructions, this Court found that the issue was preserved without the specific words "I object."

> The primary thrust of the rule is to insure that the trial judge is made aware that an objection is being made and that the grounds therefore are enunciated. We do not believe that the rule was intended to approve or disapprove a special word formula; we will not exalt form over substance by requiring that counsel use the magic words, "I object," so long as it is clear that the trial judge was fully aware that an objection had been made, that the specific grounds for the objection were presented to the judge, and that the judge was given a clear opportunity to rule upon the objection.

Id. at 876. Trial counsel informed the court that Mr. Pollock was not qualified to testify about the population statistics and objected to the admission of his testimony because the data sets were unreliable. Therefore, whether trial counsel utilized the words "Frye hearing" or not, the State and the Court must have understood trial counsel's request, because the Court proffered Mr. Pollock's testimony.

However, Mr. Pollock's testimony failed to establish that he was sufficiently qualified to testify on the subject of population genetic statistics or to testify sufficiently how the

data base was derived or developed. The trial court made no determination as to the qualifications of Mr. Pollock or mentioned specifically that the data base satisfied the Frye test. In Roberts v. State, 841 So.2d 558 (Fla. 4th DCA 2003), the facts are similar to the instant case as follows:

> On the first day of trial, before jury selection, appellant moved to exclude DNA evidence and expert opinions. Specifically, appellant objected to testimony from the state's witness, Tara Hockenberry, that appellant's DNA profile matched the profile of one of the DNA samples taken from the fisherman's hat. Appellant challenged Hockenberry's qualifications to give an expert opinion evaluating the population statistical data used for the DNA match. When the trial court asked defense counsel whether he wanted a *Frye* hearing, he responded that he did. The court, however, determined that a *Frye* hearing was not necessary to determine the admissibility of the statistical formula used for the DNA match; it thus limited the hearing to determining whether Hockenberry was qualified to testify as an expert in the area of population genetics and statistics.

Further, the Court in Arnold v. State, 807 So.2d 136 (Fla. 4th DCA 2002), found error in the court's denial of a Frye hearing on the matter of genetic population statistics and the qualifications of the expert.

The most recent cases of Brim v. State, 779 So.2d 427 (Fla. 2nd DCA 2000), and Darling v. State, 808 So.2d 145 (Fla. 2002), have found that the genetic population statistics are generally acceptable in the scientific community to satisfy the Frye test. However, in both those cases, the experts who testified were

qualified by the trial court and had sufficient training and skills. Specifically, in Darling, the expert testified to the following:

> Baer stated that, although he did not "claim to be a statistician," he was "familiar with how statistics are used in this instance." He indicated that he relied on the expertise of other statisticians in reaching his expert opinion. However, he also indicated that he had been qualified to render an expert opinion in the area of statistical interpretation of DNA tests "just about any time I testify on DNA," having never been denied expert qualification in that area. He stated that he had been qualified as an expert in the performance and interpretation of DNA allowances in Florida courts "fifty to sixty times." His training in the area of DNA statistical analysis included completion of a 160-hour course which included "about sixteen hours in statistics"; in addition, he had been educated in statistics in several "other short courses," including a statistics workshop in 1995.
>
> Baer testified that he used the modified ceiling principal formula, which is a variation of the product rule recommended by the National Research Council in its 1992 Report. He acknowledged that there are "issues about the genetic variation between different populations," and to compensate for that, he did three calculations in Darling's case. Each calculation utilized a different database: one was based on African-American data, one was based on Caucasian data, and one was based on Southeastern Hispanics from the Miami area, where there are racial differences in DNA types. In Baer's opinion, use of the ceiling principal compensated for any differences within the major ethnic groups, which he stated are regarded as "very insignificant," in any event.

Id. at 150. No such expertise, training, knowledge, or testing was expressed by Mr. Pollock in the case at bar.

In this cause the trial court had insufficient information

to make a proper determination that the population sets or the statistical methods used by Mr. Pollock satisfied the Frye test. The burden was upon the proponent to prove by the preponderance of the evidence that the expert's qualifications and statistical methods satisfied the Frye test. The State failed to meet that burden and the trial court erred in admitting Mr. Pollock's testimony.

> Today, we rule that the trial court must conduct an additional hearing because it did not make a sufficient record of the "exact methods used by the State in calculating its population frequency statistics" as required by the supreme court. See *Brim*, 695 So. 2d at 275. Indeed, the record currently provides little to assist this appellate court with the unusual de novo review of this issue as mandated by the Supreme Court. This is not intended as criticism of the trial court, which clearly has attempted in good faith to accomplish an unusual and difficult task.

Brim v. State, 779 at 431.

> We start by emphasizing again that the Frye test is utilized in Florida to guarantee the reliability of new or novel scientific evidence. E.g., *Stokes v. State*, 548 So. 2d 188 (Fla. 1989). Despite the federal adoption of a more lenient standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), we have maintained the higher standard of reliability as dictated by *Frye*. E.g., *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995). This standard requires a determination, by the judge, that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community. To that end, we have expressly held that the trial judge must treat new or novel scientific evidence as a matter of admissibility (for

the judge) rather than a matter of weight (for the jury). In Ramirez, we wrote:

> In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a preponderance of the evidence.

Brim v. State, 779 at 433.

The denial or admission of the testimony is subject to a harmless error analysis. Roberts, Supra at 561. Other than Petitioner's testimony[7], the only evidence establishing contact between Ms. Morris and Petitioner was the blood evidence found on Petitioner's socks and boots. It cannot be shown that the DNA evidence and the probability relating thereto did not contribute to the verdict beyond a reasonable doubt.

Appellate Counsel was ineffective for failing to raise this issue on direct appeal.

[7] Had the trial court not erred in admitting Mr. Pollock's testimony, Petitioner may have decided not to testify.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AND ARUGE THE ISSUE THAT THE TRIAL COURT ERRED IN DENYING APPELLANT ACCESS TO HIS ATTORNEY BY RESCINDING THE APPROVAL FOR A RECESS IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO COUNSEL

The Petitioner testified in his own defense at the trial. After cross-examination by the State, Petitioner's counsel requested a recess. The trial court granted Petitioner's request for a recess on two occasions. However, after the State's legal argument, the Court rescinded granting of the recess for the specific purpose of denying Petitioner access to his Counsel. The colloquy of that exchanged is expressed below:

> THE COURT: Any redirect, Mr. Allbritton?
>
> MR. ALLBRITTON: May I have just a minute, Your Honor?
>
> THE COURT: You May.
>
> MR. ALLBRITTON: Your Honor, may I have a three-minute recess, two-minute recess?
>
> THE COURT: You may.
>
> MR. ALLBRITTON: Thank you.
>
> THE COURT: Counsel approach, please.
>
> (Bench conference off the record)
> (At the bench:

MR. ALLBRITTON: Your Honor, my client is an intricate part of his defense. I mean, he has helped plan it and so forth. Whether or not there are other questions I need to ask, other points that I should cover at this point, there is one, frankly, that I have a question of whether or not I should proceed with it, and I want to do that in conjunction with him. I would like him to participate in that decision.

THE COURT: I'm going to do this, Mr. Allbritton. I'll give you your three-minute recess. I'll allow you to confer with your client. I will allow recross-examination, if the State wishes to do that, on the fact that you conferred with him.

MR. ALLBRITTON: Ask him about what he spoke to me about?

THE COURT: No. Simply the fact that you – I'm not going to allow any questions what would be privileged communications, but as to the fact of the communication, if the State wishes to ask about that, I'm going to allow them to do it.

MR. ALLBRITTON: Judge, I don't think that that's fair. The rules say that the jury should not consider whether or not a witness has spoke with an attorney. You know, he has a right to confer with an attorney.

THE COURT: And they'll be given that instruction.

MR. ALLBRITTON: Well, what's the – if they're not to consider it, why is Mr. Patterson going to go into it?

MR. PATTERSON: I think it's improper for him in the middle of redirect examination to confer with his client about the testimony he's in the middle of giving.

THE COURT: I think that's correct. On the other hand, there are some cases that indicate it may be reversible error to –

MR. PATTERSON: pardon me?

THE COURT: There are some cases that indicate it might be reversible error to deny the opportunity to confer.

MR. PATTERSON: And if we take a recess, I agree. You can absolutely refuse to take a recess between cross-examination and redirect and that's not reversible at all. If we take a recess, you cannot prohibit him from talking with his client. That's what the cases say. There's absolutely no obligation for the Court to take a recess in the middle of a witness's testimony.

THE COURT: I think that's right. If you need some time, I'll give you some time. I'm not going to take a recess so you can confer with your client, not in the middle of his testimony.

MR. ALLBRITTON: Okay.

(Bench conference concluded.)

MR. ALLBRITTON: I have no further questions, Your Honor.

[TT. Vol. V, p852-955]

In Amos v. State, 618 So.2d 157 (Fla. 1993), this Court held:

Amos raises ten points on appeal. We find that three have merit and require discussion. While each of these points individually might be found to be harmless under the harmless error rule, we are unable to hold that they constitute harmless error when taken collectively. The first claim that we find to have merit is Amos's claim that the trial court improperly precluded him from consulting with his counsel during the luncheon recess. This issue arose during Amos's testimony in his own defense. After defense counsel concluded his direct examination of Amos, the prosecution requested a luncheon recess. Defense counsel objected. The trial court granted the request for a recess and the prosecution asked that "Vernon be reminded he cannot talk to his attorney, because he is on the stand, because I am concerned that Vernon will

approach Craig [defense counsel] on his own." Defense counsel objected to the prohibition and the court noted that he had "never understood the rules" and asked whether there was case law on this issue. The prosecution advised that "there is case law on it right on point." The trial judge then granted the prosecution's request to prohibit Amos from speaking to his counsel. The prosecutor was correct that there is case law on point, but it is contrary to her position. In *Bova v. State, 410 So. 2d 1343, 1344-45 (Fla. 1982),* decided almost eight years before this case was tried, we held that

> no matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney. The right of a criminal defendant to have reasonably effective attorney representation is absolute and is required at every essential step of the proceedings. Although we understand the desirability of the imposed restriction on a witness or party who is on the witness stand, we find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel. Numerous courts have reached a similar conclusion.
>
> We stress that a defendant in a criminal proceeding is in a different posture than a party in a civil proceeding or a witness in a civil or criminal proceeding. Right-to-counsel protections do not extend to civil parties or witnesses and the trial judge's actions in the instant case would have been proper if a civil party or witness had been involved.

(Citations omitted; footnote omitted.) We reaffirmed that holding in Thompson v. State*, 507 So.2d 1074 (Fla. 1987).* In *Thompson*, the court denied Thompson consultation with his attorney during a thirty-minute recess requested by the prosecution. While we held in *Bova* that the error was harmless because of the overwhelming evidence of guilt, in *Thompson*, we held: "Had the attorney-client consultation been allowed,

> defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against coaching witnesses." *Thompson, 507 So.2d at 1075.* We found that we could not say that there was no reasonable possibility that the error did not affect the jury verdict. In this case, it was clear error for the court to prohibit Amos from speaking to his counsel during the recess period, and the prosecution precipitated the error by incorrectly advising the court on what the law is on this issue.

The only relevant factual difference between the cases cited above by this Court and the case at bar is the Petitioner in this case was arguably denied a recess. However, in reality, trial counsel was granted "some time," but not to talk to Petitioner. The present case is more egregious than the cases cited above.

In the present case, the trial court granted Petitioner's request for a recess on two separate occasions. The grant of a recess was only rescinded because the State informed the Court it was not obligated to provide a recess, and the Court's specific intent for rescinding the grant of a recess was to purposely deny Petitioner access to his attorney. Moreover, at the end of the colloquy, the Court apparently was going to provide trial counsel "some time," but not to speak with his client: "If you need some time, I'll give you some time. I'm not going to take a recess so you can confer with your client, not in the middle of his testimony." This occurred only after the Court had granted the recess twice.

The action by the trial court in this case caused more harm than that expressed by this Court in the cases cited above, because Petitioner's counsel informed the Court that he needed to speak with Petitioner to discuss questions regarding his defense. The cases cited above by this Court merely speculate as to what counsel would say to his client. In Thompson this Court found that it could not be found to be harmless error because: "Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against coaching witnesses."

The trial court and the State should not be permitted to collude to prohibit a client access to his attorney by denying a recess after the Court had in fact granted the recess, or posture a recess under the guise of "some time." This action by the trial court fails to pass the smell test, and Appellate Counsel was ineffective for failing to raise this issue on appeal.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT FLORIDA'S NELSON[8] INQUIRY IS UNCONSTITUTIONAL AS APPLIED, BECAUSE IT VIOLATES A DEFENDANT'S RIGHT TO COMPETENT PRIVATE COUNSEL UNDER THE SIXTH AMENDMENT AND EQUAL PROTECTION, AND FOR FAILING TO POINT OUT IN A MOTION FOR REHEARING THIS COURT'S MISAPPREHENSION OF THE FACTS REGARDING THE ISSUE OF COUNSEL'S INCOMPETENCE.

Appellate Counsel raised the issue at page 17 of the Petitioner's initial brief on direct appeal that the trial court erred in failing to conduct a hearing on trial counsel's competence. However, Appellate Counsel failed to argue that a Nelson inquiry is unconstitutional as applied, because it only requires an inquiry of court-appointed counsel and fails to protect a defendant's Sixth Amendment right to competent private counsel.

In Nelson, the Court stated: "The right of an indigent to appointed counsel includes the right to effective representation by such counsel." The finding by the Nelson Court seems to indicate that the inquiry only applies to appointed counsel, which was approved by this Court in Branch on direct appeal as expressed by the following:

> A Nelson inquiry is appropriate when an indigent defendant attempts to discharge current, and obtain

[8] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

> new, court-appointed counsel prior to trial due to ineffectiveness. *Hardwick v. State, 521 So. 2d 1071* (Fla.), cert. denied, *488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988). Nelson* is inapplicable here for several basic reasons: 1) Branch's lawyer was privately hired, not court-appointed; 2) Branch was not seeking to discharge counsel; and 3) Branch's comments seemed to be a general complaint, not a formal allegation of incompetence. The record contains competent substantial evidence to support the trial court's ruling. We find no error.

Appellate Counsel pointed out in his brief at page 23, that the United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980) held: "We see no basis for drawing a distinction between retained and appointed counsel…" Id. at 344. However, Appellate Counsel did not argue that failure to apply a Nelson inquiry to private counsel amounted to a violation of a defendant's Sixth Amendment right to competent counsel or that a defendant who retained private counsel deserved the same protection as a defendant who has appointed counsel.

This Court also expressed in Branch the fact that Branch was not seeking discharge and only made general complaints. In a Motion for Rehearing[9], Appellate Counsel

[9] The docket of this Court in Case No. SC60-83805 indicates that a Motion for Rehearing was filed on December 5, 1996. However, the undersigned counsel has reviewed countless records in over forty boxes, the record on appeal, and this Court's Internet site and was unable to find a copy of the Motion for Rehearing. Therefore, the undersigned will assume that this issue was not raised in the Motion for Rehearing.

should have pointed out to this Court its misapprehension of the facts, which established that Petitioner's grandfather requested counsel to withdraw and the allegations in Petitioner's letter to the trial court was of the same nature as those expressed in Nelson, and more.

In a Motion to Declare Section 921.141, Florida Statutes, Unconstitutional [R. Vol. I, p80], the trial court was put on notice that "Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida in capital cases from the 1970's through to the present." In denying this Motion, the trial court stated that he had read the motion [R. Vol. II, p281].

Appellate Counsel included in his brief at page 18 the exchange between the court and Petitioner's grandfather. During that exchange, it was expressed by Petitioner's grandfather that he had "asked him (counsel) to withdraw from the case…" [R. Vol. I, p154-156]. Further, Petitioner's grandfather pointed out to the trial court in his affidavit [R. Vol. I, p339] that he had paid Mr. Allbritton in full. Inasmuch as Mr. Allbritton was paid in full, there was no incentive for him to withdraw. When private counsel has been paid, is requested to withdraw and fails to do so, what is a defendant's remedy other than to

express these facts to the court? On a Motion for Rehearing, Appellate Counsel should have pointed out to this Court, that Petitioner (through his grandfather) did in fact move for discharge of counsel.

As to this Court's finding of only general complaints, Petitioner's grandfather pointed out to the trial court that Mr. Allbritton had not: obtained an investigator, obtained a second lawyer, obtained a mitigation specialist, or obtained a psychiatrist [R. Vol. II, p339]. Further, Petitioner, in his letter, informed the trial court that Mr. Allbritton had only visited him once, did not investigate, and did not consult with Petitioner regarding his defense [R. Vol. II, p355]. Appellate Counsel raised these facts in his brief at page 20. However, Appellate Counsel failed to reiterate these facts in a Motion for Rehearing in order to establish to the Court that it was mistaken about a "general complaint."

Appellate Counsel pointed out in his brief that Petitioner requested a hearing on the issue, but one was not provided. An inquiry should also apply to privately retained counsel. An inquiry by the court is required in Nelson when the following occurs:

> It follows from the foregoing that where a defendant, before the commencement of trial, **makes it appear** to

> the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant.

Id. At 259. [emphasis added].

It cannot be argued that Petitioner and his grandfather did not at least make it appear to the trial court that they wanted counsel discharged, when it was stated that Mr. Allbritton was requested to withdraw.

Had the trial court asked Mr. Allbritton, he would have found[10]: (1) this was Mr. Allbritton's first death case, (2) he had not hired an investigator, (3) he had not hired any experts, (4) he continually filed motions for continuance to hire a mental health expert, but didn't, (5) he was presently preparing for another death case and a high profile drug case, and (6) had not performed any penalty phase investigation of any kind.

Further, the trial court should have informed the Petitioner of his options should he desire to discharge counsel. Inasmuch as the Petitioner had previously been declared indigent, he would have been eligible for a

[10] See Petitioner's Initial Brief on postconviction appeal.

reappointment of a public defender. No record evidence established that Petitioner either knew of his rights should he discharge private counsel, or that the trial court informed him of such.

Appellate Counsel was ineffective by failing to properly attack the constitutional application of Nelson by not equally protecting the Sixth Amendment right of a defendant who retains private counsel. Further, Appellate Counsel failed to point out to this Court specific facts alleging incompetence of trial counsel in a Motion for Rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Casandra Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on August ___, 2005.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point

_____
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