IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-352

JONATHAN HUEY LAWRENCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

Lower Tribunal Case No. 57-98-270-CFA-B

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from the denial of Appellant's motion for postconviction relief by Circuit Court Judge Rasmussen, First Judicial Circuit, Santa Rosa County, Florida, following an evidentiary hearing. This proceeding challenges both Appellant's convictions and his death sentence. The issues raised in Appellant's Initial Brief will be presented in numerical order to follow the trial court's order for ease of review. However, it should be recognized that the order of the issues is not reflective of the importance of the issues presented.

The following abbreviations will be used to cite the record in this cause, with appropriate page number(s) following the abbreviation:

"R." -- record on direct appeal to this Court;

"TT." -– trial transcript on direct appeal to this Court;

"PC-R." -- postconviction record on appeal in this proceeding;

"EH." -- postconviction transcript of evidentiary proceedings.

Reference to the penalty phase trial court will be prefaced with PP, and the postconviction trial court will be prefaced with PC.

REQUEST FOR ORAL ARGUMENT

Appellant has been sentenced to death and is, therefore, in peril of execution by the state of Florida. If this Court grants relief, it may save his life; denial of relief may hasten his death. This Court generally grants oral arguments in capital cases in the current procedural posture. Appellant, therefore, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.320 (and case law interpreting the rule) to grant him oral argument in this case and to set aside adequate time for the substantial issues presented to be fully aired, discussed, and for undersigned counsel to answer any questions this Court may have regarding the instant appeal.

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STATEMENT OF CASE

On March 24, 2000, Appellant, Jonathan Lawrence, pled guilty to: principal to first-degree murder of Jennifer Robinson, conspiracy to commit first-degree murder, giving alcoholic beverages to a person under twenty-one, and abuse of a dead human corpse. On March 30, 2000, after a penalty phase trial, the jury voted 11 to 1 that the Court sentence the Defendant to death. On April 13, 2000, the Court conducted a Spencer hearing. On August 15, 2000, the Court imposed the sentence of death. The following statutory aggravating factors were found: (1) Lawrence was previously convicted of another capital felony or a felony involving the use or threat of violence to the person (great weight); and (2) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight). The Court found five statutory mitigators: (1) the capital felony was committed while Lawrence was under the influence of extreme mental or emotional disturbance (considerable weight); (2) the capacity of Lawrence to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (considerable weight); (3) the age of Lawrence (twenty-three years) at the time of the crime (some

weight); (4) Lawrence's caring and giving relationship to his family, especially his mother, (little weight); and (5) the sick and disturbed home life in which Lawrence was raised (considerable weight). The trial court also found four non-statutory mitigating circumstances.

A Petition for Writ of Certiorari was denied on October 14, 2003. Lawrence v. Florida, 124 S.Ct. 394 (2003).

Undersigned counsel was appointed to represent the appellant for postconviction proceedings as of July 1, 2003. The appellant filed his 3.851 Motion on July 12, 2004. An evidentiary hearing was conducted on November 3 and 4, 2006. The PC trial court entered its order denying relief on Appellant's 3.851 Motion on January 26, 2006. Appellant filed his Notice of Appeal on February 20, 2006.

STATEMENT OF FACTS

The facts adopted by this Court were set out in Lawrence v. State, 846 So.2d 440 (Fla. 2003), below:

> On March 24, 2000, Lawrence pled guilty to principal to first-degree murder of Jennifer Robinson, conspiracy to commit first-degree murder, giving alcoholic beverages to a person under twenty-one, and abuse of a dead human corpse. Lawrence's codefendant, Jeremiah Martel Rodgers, picked up eighteen-year-old Jennifer Robinson from her mother's home on May 7, 1998. Rodgers and Robinson met Lawrence, and all three drove in Lawrence's truck to a secluded area in the woods. After imbibing alcoholic beverages, Robinson had sex with Rodgers and then with Lawrence. At some point

thereafter, Rodgers shot Robinson in the back of the head using Lawrence's Lorcin .380 handgun. n1 The gunshot rendered Robinson instantly unconscious, and she died minutes later. Lawrence and Rodgers loaded Robinson's body into Lawrence's truck and drove further into the woods. Lawrence made an incision into Robinson's leg and removed her calf muscle. Rodgers took Polaroid pictures of the body, including a picture of Lawrence's hand holding Robinson's foot. Lawrence and Rodgers buried Robinson at that site.

Investigators traced Robinson's disappearance to Lawrence and Rodgers. When confronted by Investigator Todd Hand, Lawrence denied knowing Robinson and consented to Hand's request to search Lawrence's trailer and truck. After recovering multiple notes written by Lawrence and Polaroid photographs depicting Robinson post-mortem, Hand arrested Lawrence. One page of the recovered notes states in part: "get her very drunk," "yell in her ears to check consicouse [sic]," "even slap hard," "rape many, many, many times," "'slice and dice,' disect [sic] completely," "bag up eatabile [sic] meats," and "bag remains and bury and burn." Another page of notes provides a list of items and tasks, some of which had been checked off or scribbled out. That list includes "coolers of ice = for new meat," strawberry wine, everclear alcohol, scalpels, Polaroid film, and ".380 or-and bowies [knives]." Other items located by investigators during their search of Lawrence's trailer and truck included a box for a Lorcin .380 handgun; empty Polaroid film packages; a piece of human tissue in Lawrence's freezer; a blue and white ice chest; an empty plastic ice bag; disposable gloves; a scrapbook; and several books, including an anatomy book entitled The Incredible Machine, within which had been marked female anatomy pages and pen lines drawn at the calf section of a leg. Lawrence subsequently confessed to his involvement, after waiving his Miranda n2 rights, and led detectives to Robinson's body.

In his statements to law enforcement, Lawrence explained his involvement, which never included a confession regarding

the death of Jennifer Robinson. Rodgers, not Lawrence killed Jennifer Robinson. Further, Lawrence claimed he had no knowledge that Mr. Rodgers intended to kill Jennifer Robinson, nor did he knowingly participate in the planning of Jennifer Robinson's death (Exhibits 3-8, EH 408). Lawrence has stated that they wrote notes before of bad things but never did them.

The following represents Lawrence's perception of the behind-the-scenes facts as they relate to his understanding of the legal process and counsel's representation.

During pre-trial, Ms. Antoinette Stitt and Mr. Elton Killam (Assistant Public Defenders) obtained discovery from the State, which included photographs and Lawrence's statements. When Lawrence was shown crime scene photographs he became upset and declined to look at them (EH 158, 273). During some of Stitt's visits with Lawrence at the jail, Lawrence reported having hallucinations (EH 339). This fact is not mentioned anywhere in the record until the evidentiary hearing. Approximately a month before trial, Stitt and Killam (EH 166) visited Ms. Iona Thompson (Lawrence's mother) at least once or twice a week with the intent to harass Thompson to get Lawrence to plead guilty (EH 131-132). Counsel stated to Thompson that if Lawrence pled guilty they would save his life, but if he went to trial he would get death (EH 131-132).

During one of the visits to Thompson's residence, Killam took Dr. Barry Crown, a neuropsychologist, with him to speak with Thompson. According to Dr. Crown (EH 95-96), Thompson (EH131), and Ms. Laurie Carter (Lawrence's sister) (EH 146), Killam informed Thompson that if Lawrence pled guilty he would get life and if he went to trial he would get the death penalty. At the evidentiary hearing, Killam acknowledged that Crown, Thompson, and Carter might have gotten that impression because he was adamant that Lawrence had no chance to get a not guilty verdict at the guilt/innocence phase of the trial (EH 169). In addition, Killiam was of the "illusion" he would get Lawrence a life sentence (EH 179-189).

On March 24, 2000, the day of trial, Stitt and Killam video recorded a practice plea season with Lawrence (Exhibit 1 – EH 10). Judge Bell's JA provided Stitt a copy of the questions Judge Bell was going to ask Lawrence during the plea (R. Vol. I; Exhibit 10).

During the video, Stitt informed Lawrence that he had no real defense, even though he emphatically and repeatedly claimed he did not know Jeremiah Rodgers (co-defendant) would kill Jennifer Robinson (EH 408).

> MS. STITT: Okay. Do you remember us talking about the fact that **we had no real legal defense to the charges**? And that to put the jurors through a week or a week and a half of witness after witness

> after witness and **gory photo after photo after photo** would do nothing but harm our chances? (EH 290, Exhibit 1).

At the evidentiary hearing, Stitt acknowledged she knew the elements required to prove "principal," and that Lawrence denied having committed those elements – also, if the jury believed Lawrence's explanation, Lawrence had a defense (EH 289). Although Stitt acknowledged that it was her obligation to inform Lawrence that he had a defense, she had no recollection of doing so (EH 289). Killam also testified at the evidentiary hearing that he had no recollection of telling Lawrence that he had a defense, based upon Lawrence's denial of the elements of principal (EH 178-179).

Also, while recording the video, Stitt made a reference regarding doctors speaking with Lawrence about the strategy of pleading guilty.

> MS. STITT: Do you remember the conversations that Mr. Killam and myself, and also the doctors, have had with you about tactically or why we would do that?

(Exhibit 2 at p6). Neither Killam (EH 175) nor Stitt (EH 287-288) had any idea what doctors Stitt was talking about. Stitt and Killam retained the services of Dr. Wood, Dr. Crown, and Dr. Napier to testify on behalf of Lawrence at his penalty phase. Each of the doctors denied any involvement with the strategy to have Lawrence plead guilty or speaking with

Lawrence about a guilty plea (EH 15, 46, 90).

While attempting to convince Lawrence to plead guilty, Killam informed Lawrence during the video recording, that he, Killiam, could save Lawrence's life, but failed to mention that Lawrence could still get the death penalty.

> MR. KILLAM: In other words, the evidence that we would be presenting in your behalf in mitigation of what penalty the jury would recommend to the Judge may not be considered by them because they may have formed an opinion of us and you, possible, that we are trying to present to them something that's just not capable of belief.
>
> Whereas on the other hand, the evidence in mitigation of your penalty, that you were impaired at the time that this happened because of your longstanding mental illness, and that you acted under the substantial domination of Jeremiah Rodgers, we have, we believe, enough evidence to convince the jury of the mitigating evidence in your behalf and thereby obtain a life's sentence for you, which we think that is the only thing that we as attorneys can accomplish in this court proceedings (Exhibit 2 at p. 6-7).

During the evidentiary hearing, Killam acknowledged he did not mention to Lawrence the possibility of getting a death sentence, even if he pled guilty, because he was "under some illusion" he could convince the jury to vote for a life sentence (EH 179-180).

As to Lawrence's competency, Killam testified at the evidentiary hearing that Lawrence "seemed to be comprehending what [h]e was telling him" (EH 209). Killam testified that the issue concerning Lawrence's competency had "already been

litigated and decided at that point" (EH 209).

After the practice plea session concluded, Lawrence immediately entered a plea of guilty to all charges in open court (Exhibit 10). The practice plea questions and the actual plea questions primarily consisted of "yes" and "no" answers (Exhibit 2 and 10). The PP trial court asked counsel whether the practice plea was memorialized and if his secretary had provided counsel with a copy of the questions he would ask (Exhibit 10 at p. 2-3).

At the beginning of the plea colloquy, the PP Court asked counsel if the strategy to plead guilty was Lawrence's decision. Killam responded:

> MR. KILLAM: Yes, Judge. And we feel that he understands our dilemma, that being, we would be faced with overwhelming evidence. And if we were to argue something along the lines of jury nullification, of course, we've not even admitted to do that. And that would be the only thing that ethically we could argue other than the state had not meet their burden, which in the light of the evidence would be losing credibility with the jury in the next phase of the trial (Exhibit 10 at p. 5)

While explaining their strategy to the Court, Killam did not mention that Lawrence denied any knowledge or participation, or that he had explained to Lawrence what defenses might exist.

Also, prior to the plea colloquy, Stitt stated to the Court:

> MS. STITT: …And we believe that not only through our conversations with him, but also **conversations with psychologists** and with his mother that he does have a complete understanding at this point of what he is doing (Exhibit 10 at p. 6)(Emphasis added).

At the evidentiary hearing, neither Stitt nor Killam had any idea who the psychologists were that Stitt mentioned to the court. Further, each of the doctors testified at the evidentiary hearing that they had no conversations with counsel regarding Lawrence's understanding of the entrance of a plea (EH16, 46, 92, 93). Moreover, as discussed below, the doctors actually believed otherwise.

Dr. Wood, who testified at the original penalty phase, stated that he had examined Lawrence two days after Lawrence entered his plea (EH 15)[1]. Dr. Wood testified Stitt informed him that Lawrence had reported having hallucinations during the penalty phase (EH 17). He told Stitt that he didn't think that Lawrence could proceed (EH 17). Dr. Wood also testified at the evidentiary hearing that based upon his evaluation only days after Lawrence's plea, and Lawrence's reporting of hallucinations, he had no hesitation in saying that on its face, Lawrence was incompetent (EH 26). Dr. Wood testified that he told Stitt that Lawrence was not competent to stand trial, but Stitt told him "we may lose more than we would gain

[1] Lawrence entered his plea on Friday, March 24, 2000. Dr. Wood

by trying to interrupt the proceedings" (EH 36). Dr. Wood also testified that he had reviewed the plea colloquy and opined that it is almost impossible for Lawrence to fully understand the significance of what was being asked. Dr. Wood's opinion was based upon Lawrence's psychometric record, his interview with Lawrence, and Lawrence's PET scan, (EH28).

At the evidentiary hearing, Dr. Wood testified to the following on cross-examination by Mr. Molchan (Assistant State Attorney):

Q. Now, and I want to make sure that I understand this, but you were working or down here prior to the plea. And is it correct that you were talking with him on Saturday or Sunday—

A. Which would be after the plea.

Q. After the plea.

A. My memory is that I testified on Monday, and that perhaps his plea was entered the previous Friday. But I'm not sure of that. Well, you have to tell me.

Q. That's fine. But you do recall at some point in interacting with him over a weekend timeframe?

A. That's my memory. I think it was on a Sunday. And we made jokes about defiling the Sabbath.

Q. Okay. And at that point in time did you see any evidence that this individual was incompetent to enter a plea?

A. I certainly saw evidence that he was incompetent to understand the questions that only years later I learned that he was asked by the Court.

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interviewed Lawrence on Sunday, March 26, 2000.

> I'm sure that he did not then, and does not now, understand what it means to be a "principal." And I don't think that he understands even "conspiracy." And I don't think that he is able, as we sit here today, to understand exactly, fully what is going on.
>
> What that means in terms of definition of entering a plea I'm just not too sure. This never came up in our discussions as to what he was pleading to.
>
> For example, I understood that he pled to giving alcohol to a minor.
>
> I suspect as a factual matter that he would be able to competently say that he had done so. And knowingly say that.
>
> The larger issues, the more complicated things that he was charged with, I don't believe that he could have understood.

(EH 34-35).

Dr. Napier, who testified at Lawrence's penalty phase, stated at the evidentiary hearing that he had examined Lawrence in 1996 (EH 47). Based upon that examination and the questions presented in the plea colloquy, Dr. Napier did not belive that Lawrence had a complete understanding of the words or procecess (EH 49). Dr. Napier also testified that the use of questions requiring "yes" and "no" answers gives no clear indications about a person's comprehension or understanding of the questions (EH 50).

Dr. Napier testified he had observed Lawrence during his own testimony and was concerned, from his observations,

whether Lawrence was hallucinating (EH 52). Dr. Napier testified he was not informed that Lawrence had reported having hallucinations during the penalty phase. Dr. Napier stated that had he known, he would have recommended Lawrence be evaluated (EH 53).

Dr. Napier also testified that because of Lawrence's mental illness and prior hallucinations, the showing of gory photographs and the playing of his taped statement could very well have been a trigger to cause Lawrence to hallucinate in the courtroom (EH 58).

Dr. Barry Crown, who testified at Lawrence's penalty phase, stated at the evidentiary hearing that when he became aware of counsel's decision to have Lawrence plead guilty, he informed counsel about Lawrence's significant mental incapacity (EH 91). Dr. Crown also testified he had evaluated Lawrence about a year before the penalty phase and again in 2005 (EH 85). Dr. Crown testified that both evaluations indicated the same condition and he opined that Lawrence was incompetent (EH 81, 84).

Dr. Crown testfied at the evidentiary hearing that he was not informed by counsel that Lawrence had reported hallucinations during the penalty phase. However, had he been informed he would have recommended Lawrence be evaluated for

competency (EH 94).

Dr. Crown opined at the evidentiary hearing that Lawrence did not completely understand the process of the plea, the consequences of his plea, or the meaning of all of the words used in the plea (EH 98). Dr. Crown testified that because of his relationship with his attorneys, Lawrence would be more inclinded to follow their direction, even though the court informed Lawrence he could get the death penalty (EH 99).

During the evidentiary hearing, Dr. Crown was shown the video recording of the practice plea (EH 100). During the video recording, Stitt and Killam explained the charges to Lawrence and their concerns about the jury's perception of them and the case (EH 101-104).

> MISS STITT: Do you remember us talking about the fact that we had no real legal defense to the charges, and that to put the jurors through a week and a half of witness, after witness, after witness, and gory photo, after photo, after photo, would do nothing but harm our chances.
>
> MR. KILLAM: And also, Jon, what we would have to argue to the jury would be that they would have to just completely disregard all of that evidence, and basically find you guilty or not guilty by arguing to them that they should nullify what the evidence shows. In other words that they can still, if they want to, find you not guilty even though your are guilty.
>
> And this is not something that ethically we feel that we can argue.
>
> We can require the State to present evidence of your guilt as to those charges beyond and to the

exclusion of every reasonable doubt.

We feel they have that evidence. And we feel that the only argument that can be made would be one that would not be ethical, other than to argue that the State has not met their burden. And we feel that we would look foolish to the jury in suggesting that they have not met that burden.

MISS STITT: And not credible in front of them, again, when we are asking them to save your life.

MR. KILLAM: In other words, the evidence that we would be presenting in your behalf in mitigation of what penalty the jury would recommend to the Judge, may not be considered by them because they may have formed an opinion of us, and you, possibly, that we are trying to present to them something that is just not capable of belief.

Whereas on the other hand, the evidence in mitigation of your penalty, that you were impaired at the time this happened because of your long-standing mental illness, and that you acted under the substantial domination of Jeremiah Rodgers, we feel that we have enough evidence to reasonably convince the jury of the existence of the mitigating evidence in your behalf. And thereby obtaing a life sentence for you which is the only thing that we, as attorneys, can accomplish in this court proceeding.

(EH103-104).

When asked whether he believed Lawrence could understood what was being said, Dr. Crown responded:

A. That was so convoluted and compounded that I was having difficulty following it. I find it highly unlikely that someone with a thought disorder, including Jonathan Lawrence, would not have difficulty following it.

He is in his standard catatonic stance.

(EH 105). Lawrence testfied at the evidentiary hearing that

he pled guilty (not to murder, but principal; principal means being somewhere when someone is killed EH 411) because he was told he would get a life sentence (EH 409). However, during the practice plea, Stitt stated the only thing left as punishment is life or death. When asked why Lawrence didn't respond to the mention of death when he believed he would get life, Dr. Crown stated; "Well, you're asking me based on my experience, would a normal individual have some levels of emotionality and responsiveness based on what they were hearing? Yes, they would. Would someone who is signifcantly, chronically schizophrenic do that? Unlikely" (EH 114). Dr. Crown also stated that because the people Lawrence trusted (mother and counsel) told him he would get a life sentence, Lawrence considered the mention of death meaningless, not a reality (EH 117).

Dr. Crown also testified that seeing the gory photographs and hearing his taped statement could trigger Lawrence's hallucinations at the penalty phase (EH 115).

On cross-examination at the evidentiary hearing, Dr. Crown was asked whether he held the opinion that Lawrence was not competent at the time he entered his plea. Dr. Crown responded "yes" (EH 118-119).

As to whether he believed that Killam promised that

Lawrence would get life if he pled guilty, he construed Killiam's language as a promise (EH 126-127). Dr. Crown acknowledged that Killam did not use the word "promise" or "guarantee," when Killam told Lawrence and his mother that if Lawrence pled guilty he would get life. However, Dr. Crown testified that a promise could be inferred without utilizing the word *promise*.

During the penalty phase, Lawrence reported to Stitt he was experiencing hallucinations (R1. Vol. IV, p419, 464). When asked at the evidentiary hearing why she didn't request an competency evaluation during the penalty phase, Stitt responded, "Upon consulting with my co-counsel…I believe that Mr. Killam felt that he was experiencing flashbacks as opposed to hallucinations…" (EH 264). Stitt also testified she worried about making the wrong decision by not asking for a competency hearing, which may have hampered her (EH 323).

However, Killam testified that he was not sitting next to Lawrence and didn't remember the conversation Lawrence had with Stitt (EH 211). Yet, Killam testified at the evidentiary hearing he "…felt like the best chance at a life sentence was to proceed with what we were doing" (EH 228).

Stitt testified that she believed Lawrence was incompetent during her entire representation (EH 259).

Lawrence had reported hallucinations during her visits with him at the jail (EH 339). Stitt also filed an Amended Motion for Competency on December 9, 1999 (R. Vol. I, p28). However, given all of Lawrence's symptoms, his medical history, his reports of hallucinations, and Stitt's concern for Lawrence's competency, neither Stitt nor Killam followed up by requesting a competency evaluation.

During opening and closing arguments at the penalty phase, Killam conceded the Cold, Calculated, and Premeditated (CCP) aggravator to the jury. Stitt testified at the evidentiary hearing that Killam did not consult her about such concession (EH 317). Killam also testified he had no recollection of consulting with Lawrence about such concession (EH 185). On the other hand, Killam submitted a Memorandum for Life to the court and argued that the State had failed to prove CCP (R. Vol. II, p318). Killam agreed during the evidentiary hearing that his inconsistent position with the jury on CCP affected his credibility (EH 188).

In an alleged attempt to obtain sympathy from the jury for Lawrence (EH 194-196), Killam demeaned Lawrence's mental illness to the jury on a number of occasions with such phrases as "Little pea brain" (R. Vol. VI, p935), and "Reptilian Brain" (R. Vol. VI, p943).

SUMMARY OF ARGUMENT

Lawrence was represented by counsel bent on persuading him to plead guilty, whether Lawrence was competent or not, whether he was guilty or not, because they felt there was no way a jury would sentence Lawrence to death, and they might lose more than they would gain by trying to interrupt the proceedings. Counsels' ineffectiveness violated Lawrence's constitutional rights in the following manner: (1) misrepresentations to Lawrence, Lawrence's mother, and the Court, (2) proceeding to a plea and penalty phase while Lawrence was not competent, (3) failure to inform Lawrence of a legal defense, (4) incongruent argument on CCP to the Court versus the jury, and (5) demeaning Lawrence to the jury.

These actions constituted prejudice to Lawrence and undermined the confidence in the process. In denying Lawrence's 3.851 Motion, the PC trial court relied entirely upon evidentiary testimony by counsel, which supported the denial and ignored the evidentiary hearing evidence, which contradicted counsels' statements.

Further, Florida Statutes, as applied, constitute a violation of Lawrence's Eighth and Fourteenth Amendments in violation of Atkins v. Virginia, because mental illness meets the same criteria for exemption of execution as the mentally

retarded.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING LAWRENCE FAILED TO ESTABLISH THAT HIS PLEAS WERE NOT KNOWING AND VOLUNTARY IN VIOLATION OF LAWRENCE'S CONSTITUTIONAL RIGHTS?

The standard of review as to whether the trial court erred in finding a plea was entered knowingly and voluntary is abuse of discretion. Mora v. State, 814 So.2d 322 (Fla. 2002).

A defendant's right to be competent for all critical stages of a proceeding is addressed in Dropes v. Missouri, 420 U.S. 162; 43 L.Ed. 103; 95 S.Ct. 896 (1975). The Court in Dropes noted that judges must depend on counsel to some extent to bring issues into focus Id. at 176-177. The Court in Boykin v. Alabama, 395 U.S. 238, 90 S.Ct. 1709, 23 L.Ed, 2d

274 (1969) addressed what understanding a Defendant requires when entering a plea.

> Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an **understanding of the law in relation to the facts"** *Id., at 466.*

(Emphasis added.)

COMPETENCY TO ENTER PLEA AND TO PROCEED

Inasmuch as this claim is being raised in a postconviction proceeding, the requirements set out in Jones v. State, 740 So.2d 520 (Fla. 1999), are controlling.

> In evaluating this issue when first presented in post trial proceedings, the trial court is faced with two questions: (1) whether the court could make a meaningful retrospective evaluation of the defendant's competence at the time of trial; and, if so, (2) whether the defendant was in fact competent at the time of trial. See *Mason v. State*, 597 So.2d 776, 777-79 (Fla.1992)(requiring the two-part inquiry when the defendant proffered in postconviction proceedings **additional significant evidence of incompetence not evaluated in prior competency evaluations**). As to the first determination, "[s]hould the trial court find, for whatever reason, that an evaluation of [the defendant]'s competency at the time of the original trial cannot be conducted in such a manner as to assure [the defendant] due process of law, the court must so rule and grant a new trial." (Emphasis added).

The PC trial court’s order fails to speak to both questions at issue: (1) whether the court could make a determination as to Lawrence’s competency at the time of the

plea, or (2) whether, in fact, Lawrence was competent at the time he entered his plea. However, the order frequently states, "Dr. Wood's generic opinion today is insufficient to establish that Defendant…was incompetent at the time of his plea" (PC-R. Vol. III, p422); "Defendant has failed to establish that his mental illness affected his ability to understand the proceedings and the consequences of his actions…" (PC-R. Vol. III, p424); "Defendant has not established that his mental illness coupled with the actions of counsel resulted in the Defendant not understanding the plea process…" (PC-R. Vol. III, p425); Defendant has not established that his plea was not voluntary or knowing based on this sub-claim" (PC-R. Vol. III, p426); "Defendant has failed to establish his mental illness coupled with the alleged actions of counsel prohibited the Defendant from understanding the process…" (PC-R. Vol. III, p429).

Moreover, the PC trial court found that Lawrence "has not met his burden." The order does not state what the burden is. Neither Florida Rules of Criminal Procedure nor Florida Statutes set out what burden of proof a defendant must show to obtain a finding of incompetence to enter plea. However, in Bouchillion v. Collins, 907 F.2d 589, 592 (5th Cir. 1990), the court held the burden is a preponderance of the evidence:

In a federal habeas proceeding stemming from a state

> court conviction, the burden is on the petitioner to prove, by a preponderance of the evidence, that he was incompetent in fact at the time of the plea.

It was the PC trial court's responsibility to first make a determination as to whether a retrospective evaluation could be done. Arguably, during the evidentiary hearing the PC trial court at least implied that a specific determination of competency could not be determined, and therefore should have ordered a new trial.

> THE COURT: All right. Let me make it clear what the Court's opinion is, just so it is clear for the record.
>
> I don't think that a generic opinion today as to whether or not the defendant was competent on the day he entered his plea is sufficient for the Court to allow him to enter an opinion today with regard to that narrow or issue, ie., was he competent at the time that he entered his plea.
>
> So that's my finding

(EH 38).

Alternatively, the PC trial court's order does not make any specific determination of the first question.

Lawrence was evaluated and found competent in October 1998, upon motion of his counsel, Earl Loveless (Chief Assistant Public Defender)(R. Vol. I, p13). At footnote 2 of the PC trial court's order, the court acknowledged that a prior determination of competence is not controlling where evidence presented contradicts that finding, Culbreath v. State, 903 So.2d 338, 340 (Fla. 2nd DCA 2005).

There was strong additional evidence in the record in 2000 that contradicted the original evaluation, to wit: Stitt filed an Amended Motion for Competency[2] on December 9, 1999 (R. Vol. I, p28); Stitt testified that Lawrence had reported hallucinations when she visited him at the jail (EH 339); Lawrence reported hallucinations on two separate occasions during the penalty phase (R. Vol. VI, P419, 464). There are additional facts discussed in more detail below that also supports Lawrence's incompetency.

Appellant contends there was substantial competent evidence in the record to show by at least a preponderance of the evidence that Lawrence was not competent at the time he entered his plea and during the penalty phase. Inasmuch as the PC trial court did not make a retrospective finding, Lawrence's due process of law was violated and should be provided a new trial.

However, assuming the order sufficiently complied with the first question in Jones, the court's order failed to make a determination about the second question: whether Lawrence was "in fact competent" at the time he entered his plea and during the penalty phase? Again, assuming the order

[2] The Motion refers to a scheduled trial date of March 1999. Appellant can only presume since the Motion was dated and filed in December 1999, the referenced trial date must have been March 2000, which is when Appellant pled.

sufficiently complied with the second question in Jones, the PC trial court abused its discretion in finding that Lawrence failed to establish he was incompetent when he entered his plea and at the penalty phase.

Basically, the PC trial court found Lawrence competent at the time he entered his plea because he found "no change in the Defendant's ability to communicate and comprehend the proceeding from the time of the original finding of competence and the entry of the plea" (PC-R. Vol. III, p424). The PC trial court also rejected the experts' testimony that Lawrence was not competent to enter a plea, citing Wuornos v. State, 644 So.2d 1000 (Fla. 1994) and Walls v. State, 641 So.2d 381 (Fla. 1994), where evidence at hand is hard to square with the expert's opinions (PC-R. Vol. III, p423).

In attempting to establish that the record does not square with the experts' testimony, the PC trial court's order states: "The Court finds and it is clear from the record that every effort was taken on the part of the trial court and the defense attorneys to ensure that the Defendant was cognizant of the proceedings and understood the ramifications of his decision in light of his mental illness" (PC-R. Vol. III, p423). This statement may be true, but their **efforts failed**. The order goes on to provide examples. The following is

offered to establish how the court's finding is incorrect and fails to consider other relevant facts.

In its order, it is apparent from the PC trial court's language that he placed substantial weight upon Stitt's and Killam's general statements over the specific facts. The PC trial court's order is analogous to a physician who makes a diagnosis based upon a general denial of complaint of illness, while ignoring a patient's medical history and specific reports of symptoms indicating a different diagnosis.

Specifically, the order relies upon Stitt's statement that Lawrence's behavior "remained pretty consistent" (PC-R. Vol. III, p424) during her interaction with Lawrence for "over a 22-month period" (PC-R. Vol. III, p424). The PC trial court's assessment of Stitt's lack of concern for Lawrence's competency is wrong. The record does not support the fact that Stitt represented Lawrence for 22 months, because she was not the first attorney to represent Lawrence; Earl Loveless was (chief assistant public defender) (EH 430). The PP trial record indicates that Loveless, not Stitt, filed the first motion to appoint an expert to evaluate Lawrence's competency (R. Vol. I, p13). It was that motion which gave rise to the October 1998 evaluation. Further, Loveless filed a number of motions prior to Stitt filing any motion at all.

In footnote 3, at page 5 of the PC trial court's order, the court surmised that because Stitt didn't believe there was any change in Lawrence's demeanor or ability, she had no good-faith basis for another evaluation. That assessment is incorrect. Stitt filed an Amended Motion for Competency on December 9, 1999, which was first pleading she filed in the case (R. Vol. I, p28). The amended motion was granted on December 16, 1999 (R. Vol. I, p24). However, nothing in the trial record indicates a second competency evaluation or hearing occurred. Stitt's filing of the Amended Motion for Competency contradicts the PC trial court's hypothesis that Lawrence's behavior did not prompt Stitt to "feel the Defendant needed another competency evaluation" (PC-R. Vol. III, p424). The filing of the motion clearly indicates that Stitt had concern for Lawrence's competency since his evaluation in October 1998.

At the evidentiary hearing, Stitt testified that although Lawrence was found competent in 1998, she believed he was not competent throughout her representation (EH 265). The PC trial court's order makes no mention that Stitt also testified Lawrence reported to her that he was experiencing hallucinations during some of her visits with him at the jail (EH 339), which is not mentioned on the record until the

evidentiary hearing. Further, the direct appeal record is clear that Stitt informed the PP trial court on two occasions during the penalty phase that Mr. Lawrence reported to her that he was hallucinating.

> MS. STITT: Our client has just reported that he is having hallucinations and flashbacks.
>
> THE COURT: Ladies and gentlemen, let's take about a 15-minute break at this point. Do not discuss the case among yourselves.
>
> MS. STITT: Your Honor, approximately 5 minutes ago my client reported to me that during the State's talking about the pictures and the position of the body and etcetera, that he began to have a, not only visual but auditory hallucinations and flashback.
>
> I've asked the court for a 15-minute recess for Court Security Officer Jarvis to be with him--he likes Officer Jarvis, he is very calming.
>
> I think that we should reassess the situation in 15 minutes. **If he is still experiencing those I'm not sure what we'll do at that point**, whether or not we'll excuse him from the courtroom so he does not have to hear that part or –

(R. Vol. VI, p419)(emphasis added).

Just a few minutes later, as the State played Lawrence's taped statement during the penalty phase (Exhibit 7), Stitt again informed the PP Court that Lawrence was reporting flashbacks (R. Vol. IV, p464). At no time did Stitt request a competency evaluation.

The PC trial court's order also places weight upon Killam's observations of Lawrence (PC-R. Vol. III, p424). However, Killam testified at the evidentiary hearing that he

believed his first contact with Lawrence was in the year 2000 (EH 160). The PC trial court's order contains some misconceptions of Killam's testimony. The PC Court stated:

> Furthermore, Mr. Killam testified that during his representation he did not observe any degeneration of the defendant's ability to communicate, instead "he seemed as he was described to me" (EH 160). In addition, Mr. Killam testified that the Defendant was a good listener and comprehended what was being discussed and he had the impression that Defendant was "capable of sitting through a trial, conducting himself properly, and making decisions (EH 209).

(PC-R. Vol. III, p424). Killam actually testified as follows:

BY MR. MOLCHAN

Q. Now, 31 years of practice. You've dealt with numbers of defendants. In your dealings with Mr. Lawrence did you at any time, feel that Mr. Lawrence was not understanding you or not getting everything that you got or – understanding what you were telling him?

A. He **seemed** to be a good listener. He **seemed** to be comprehending what I was telling him.

Q. Did you also take into effect that he had entered pleas in two other cases prior to this one?

A. Yes. You know, I was basically getting **secondhand goods** as far as his competence was concerned. And to me **it had already been litigated** and decided at that point.

> Plus, my impressions of him was that he was capable of sitting through a trial, and conducting himself properly, and making decisions, **as much as he was going to be involved in the process as far as who we called as witnesses and that type of thing.**

(EH 209)(emphasis added).

Basically, Killam's perceptions were meaningless, since Lawrence was quiet and he made all of the decisions. In competency determinations, the trial court is the finder of fact. It is incumbent upon the court to consider **all evidence relative** to competence and to render a decision on that basis Carter v. State, 576 So.2d 1291, 1929 (Fla. 1989). Further, it was incumbent upon trial counsel to have requested the PP court for a competency evaluation, especially after Lawrence began to hallucinate. Hill v. State, 473 So.2d 1253, 1256 (Fla. 1985) (This decision stands for the principle that the trial court must conduct a hearing on the issue of a defendant's competency to stand trial when there are reasonable grounds to suggest incompetency).

At the evidentiary hearing, when asked whether he would have granted a request for a competency evaluation, Justice Bell stated, "But if Toni Stitt or Mr. Killam had believed that he was truly having hallucinations and they were concerned about his competency, I certainly would have gone into that. And if they both believed given their experience and relationship with him and their past experiences as capital attorneys, I would have definitely granted the request" (EH 243-244).

The PC trial court failed to consider other relative

evidence described below.

At the evidentiary hearing, Stitt testified to the following relevant facts not mentioned in the PC trial court's order: (1) Lawrence suffered from long- and short-term memory loss (EH 261), (2) Lawrence had difficulty in providing details (EH 262, 273), (3) she had concerns for Lawrence's competency when he reported having hallucinations (EH 263), (4) she didn't request a competency evaluation because of consultation with co-counsel (EH 264), which she felt was in error (EH 265), (5) she involved Lawrence's mother to convince her son to plead guilty because counsel were worried whether Lawrence actually understood what they were talking about (EH 277, 306, 310-311), (6) Lawrence was not always able to answer their questions "yes" or "no", (7) at trial Stitt worried that she had made the wrong decision by not asking for a competency hearing, which may have hampered her (EH 323), (8) the definition of words had to be explained over and over to Lawrence (EH 330), and (9) the taped practice plea was made, in part, so Lawrence knew how to answer the judge's questions (EH 330).

Killam also testified at the evidentiary hearing to other relevant facts not mentioned in the PC trial court's order: (1) Killam started on the case in late 1999 or early 2000 (EH

160), (2) Lawrence's responses were mainly "yes" and "no" answers (EH 157), (3) When conferring with Lawrence, Lawrence had to be led to get details (EH 157), (4) Lawrence became visibly upset after seeing the crime scene photographs (EH 158), (5) Killam had not spoken to doctors Larson or Bingham about their evaluations (EH 181), (6) Stitt spent more time with Lawrence than he did (EH 205), (7) Killam was over by the jury box when Lawrence first reported having hallucinations to Stitt (EH 220), (7) Killam would have asked for an evaluation if he thought Lawrence was hallucinating (EH 221), (8) Killam believed Lawrence was troubled by reliving the incident (EH 226), and (8) Killam believed that the best chance for Lawrence to receive a life sentence was to proceed with what he and Stitt were doing (EH 228).

It is the Appellant's contention that counsel had sufficient, reasonable grounds demonstrating that Lawrence was incompetent to enter a plea and proceed to the penalty phase. However, instead of exposing Lawrence's incompetence to the court, counsel took advantage of Lawrence's incompetence by trying to hide it, deceiving Lawrence, and making misrepresentations to the PP court in order to get Lawrence to enter a guilty plea. Counsel proceeded this way because they expressed their belief that interrupting the proceedings would

hurt Lawrence's chances for receiving a life sentence, and they would lose more than they would gain. Killam and Stitt specifically expressed these statements previously. However, this strategy was not discussed with Lawrence.

Reading between the lines of events can present additional understanding of the true intent of counsel's actions, as described below.

Stitt filed an Amended Motion for a Competency Evaluation just three months prior to the scheduled trial (R. Vol. I, p13).

Thompson testified at the evidentiary hearing that either Stitt or Killam visited her once or twice a week and attempted to get her to convince Lawrence to plead guilty (EH 131-132). Lawrence testified at the evidentiary hearing he didn't want to plead guilty, he wanted a trial (EH 409).

At the evidentiary hearing, Stitt testified she was concerned whether Lawrence understood everything the attorneys were talking about (EH 277) and Lawrence wasn't always able to answer "yes" or "no" to their questions (EH 308). Stitt also testified Thompson was utilized because she could get Lawrence to understand what was being explained better than counsel could.

During the practice plea session, Stitt stated to

Lawrence:

> MS. STITT: Okay. Do you remember us talking about the fact that we had no real legal defense to the charges? And that to **put the jurors through a week or a week and a half of witness after witness after witness** and **gory photo after photo after photo** would do nothing but harm our chances? (EH 290, Exhibit 1).

This statement to Lawrence was used solely to manipulate Lawrence to enter a guilty plea. At the evidentiary hearing, Stitt testified that she knew the State could introduce the gory photographs at the penalty phase (EH 290), which were in fact introduced into evidence[3]. However, she convinced Lawrence to enter a plea of guilty under the guise that the photographs would not be presented to the jury Zakrzewski v. State, 866 So.2d 688 (Fla. 2003). Stitt and Killam both testified that they had shown Lawrence photographs of the crime scene, and Lawrence became upset and didn't want to look at them (EH 158, 273, 292).

At the evidentiary hearing, Dr. Wood testified he told Stitt that Lawrence was not competent to stand trial after he

[3]The following are the gory photo exhibits that were introduced into evidence, which Stitt indicated to Lawrence wouldn't be shown to the jury: (1) Ex. 6A - Polaroid of victim with head wound - admitted at Vol. III, p372; (2) Ex. 11A-G - Polaroids of victim - admitted at Vol. III, p396; (3) 13A-K - crime scene photos - admitted Vol. IV, p407; (4) Ex. 14 - crime scene photo - admitted at vol. IV, p405; (5) Ex. 17A-H - crime scene photos with victim present - admitted at Vol. IV, p416.

learned that Lawrence reported having hallucinations, which was soon after his trial testimony. Dr. Wood testified Stitt told him “we may lose more than we would gain by trying to interrupt the proceedings” (EH 36). Dr. Wood had examined Lawrence just two days after Lawrence entered his plea.

At the evidentiary hearing, Killam was asked if he thought it was wiser to be safe than sorry by asking for a competency evaluation. Killam stated, “And I felt like his best chance at a life sentence was to proceed with what we were doing” (EH 228). At the evidentiary hearing, Dr. Crown testified he informed Killam that Lawrence was incompetent. Dr. Crown testified Killam said, “That’s not going to get us too far” (EH 86). During the evidentiary hearing, Killam acknowledged he did not mention the possibility of a death sentence to Lawrence during the practice plea session because he was “under some illusion” he could convince the jury to sentence Lawrence to life (EH 179-180).

During the practice plea session, Stitt referred to conversations with doctors regarding the strategy of the plea, which didn’t happen.

> MS. STITT: Do you remember the conversations that Mr. Killam and myself, and also the doctors, have had with you about tactically or why we would do that?

(Exhibit 2 at p6). Neither Killam (EH 175) nor Stitt (EH 287-

288) had any idea what doctors Stitt was referring to. Dr. Wood, Dr. Crown, and Dr. Napier denied having any involvement with discussing the strategy to have Lawrence plead guilty or having spoken with Lawrence about entering a plea of guilty (EH 15, 46, 90).

During the plea colloquy, Stitt stated to the Court:

> MS. STITT: …And we believe that not only through our conversations with him, but also **conversations with psychologists** and with his mother that he does have a complete understanding at this point of what he is doing (Exhibit 10 at p. 6)(emphasis added).

At the evidentiary hearing neither Stitt nor Killam had any idea who the psychologists were that Stitt was referring to. Further, each of the doctors testified at the evidentiary hearing that they did not have any conversations with counsel regarding Lawrence's comprehension of the consequences associated with the entrance of a guilty plea (EH 16, 46, 92, 93). Stitt's statements regarding "conversations with the psychologists" amounted to misrepresentations to the court, as well as to her client.

Even after Lawrence started hallucinating during the penalty phase, Stitt failed to request a competency evaluation because Killam believed that Lawrence was only having flashbacks (EH 264). Importantly though, Killam acknowledged he didn't hear what Lawrence told Stitt because he was over by

the jury box (EH 211).

Counsels' actions clearly demonstrate that because they assumed that Lawrence was guilty, he would be convicted. On the other hand, they strongly believed they could convince a jury to recommend a life sentence and they didn't want to be interrupted from that mission, even if Lawrence was not competent.

LAWRENCE'S LACK OF ABILITY TO UNDERSTAND DUE PROCESS

The PC trial court's order relies upon counsel's testimony at the evidentiary hearing, denying that they made any promises to Lawrence that he would get a life sentence in exchange for a guilty plea (PC-R. Vol. III, p425). However, the PC court should have relied upon the context of the actual conversation with Lawrence during the recorded practice plea (Exhibit 1 and 2), which could not be refuted.

> MR. KILLAM: In other words, the evidence that we would be presenting in your behalf in mitigation of what penalty the jury would recommend to the Judge may not be considered by them because they may have formed an opinion of us and you, possible, that we are trying to present to them something that's just not capable of belief.
>
> Whereas on the other hand, the evidence in mitigation of your penalty, that you were impaired at the time that this happened because of your longstanding mental illness, and that you acted under the substantial domination of Jeremiah Rodgers, we have, we believe, enough evidence to convince the jury of the mitigating evidence in your behalf and thereby obtain a life's sentence for you, which we think that is the only thing that we as

> attorneys can accomplish in this court proceedings (Exhibit 2 at p. 6-7).

During the practice plea (Exhibit 1), “death” was mentioned only once as a possible punishment. When asked why Lawrence didn’t respond when Stitt mentioned “death” if he believed he would get life, Dr. Crown stated, “Well, you’re asking me based on my experience, would a normal individual have some levels of emotionality and responsiveness based on what they were hearing? Yes, they would. Would someone who is signifcantly, chronically schizophrenic do that? Unlikely” (EH 114). Dr. Crown also stated that because the people he trusted (his mother and counsel) told him he would get a life sentence, Lawrence considered the mention of the word “death” meaningless, not a reality (EH 117). Counsel had Lawrence practice his responses to the Court’s questions (EH 438).

It is the Appellant’s contention the PC trial court should have considered what was actually stated to Lawrence on the tape recording, rather than counsels’ general evidentiary hearing opinions years later. Further, the PC trial court should have assessed those statements in conjunction with Lawrence’s known mental illness and low average intelligence (EH 121), along with the assessments of the mental health experts.

Again, the PC trial court’s order relied upon Stitt and

Killam's testimony regarding their belief that Lawrence understood the process, thereby totally ignoring the mental health experts' opinions (PC-R. Vol. III, p426). Even discounting the opinions of the mental health experts, the order ignores specific facts Stitt testified to at the evidentiary hearing that contradicted the court's finding that Lawrence understood the process or comprehended the meaning of the words used.

For example, Stitt testified as follows: (1) Lawrence suffered from long- and short-term memory loss (EH 261), (2) Lawrence had difficulty in providing details (EH 262, 273), (3) she involved Lawrence's mother to sway Lawrence to plead guilty because Stitt and Killam were worried whether Lawrence actually understood what they were talking about (EH 277, 306, 310-311), (4) Lawrence was not always able to answer their questions with a "yes" or a "no", (5) definitions of words had to be explained over and over to Lawrence (EH 330), and (6) the taped practice plea was made, in part, so Lawrence knew how to answer the judge's questions (EH 330). This specific testimony clearly contradicts the PC trial court's belief that the efforts by Stitt and Killam ensured Lawrence's understanding of the process. In reality, their repeated discussions were, in fact, rehearsals so Lawrence "wouldn't

mess up (EH 438, 330).” Lawrence was coached to respond like a puppet so his inabilities would not be revealed to the court.

Further, the PC trial court’s order is completely devoid of the mental health experts’ opinions regarding Lawrence’s ability to understand the process.

Dr. Wood testified at the evidentiary hearing that Lawrence suffers frontal lobe damage (EH 21) and schizophrenia (EH 24). Dr. Crown testified that Lawrence has low-average intelligence (EH 67, Exhibit 13). And contrary to the PC trial court’s finding that Dr. Wood’s opinion was generic (PC-R. Vol. III, p422), Dr. Wood specifically stated that based upon his evaluation of Lawrence two days after the plea was entered and he review the questions presented by court years later, he believed Lawrence was incompetent to enter that plea (EH 34).

Dr. Crown opined at the evidentiary hearing that Lawrence did not completely understand the process of the plea, the consequences of his plea, or the meaning of all of the words used in the plea (EH 98). Dr. Crown also testified that because of Lawrence’s relationship with his attorneys, he would be more inclinded to follow their direction, even though the court mentioned the possibility of the death penalty (EH

99).

Also during the evidentiary hearing, Dr. Crown viewed the video recording of the practice plea (EH 100). The video recording showed Stitt and Killam explaining the charges to Lawrence and their concerns for their credibility to the jury (EH 101-104).

> MISS STITT: Do you remember us talking about the fact that we had no real legal defense to the charges, and that to put the jurors through a week and a half of witness, after witness, after witness, and gory photo, after photo, after photo, would do nothing but harm our chances.
>
> MR. KILLAM: And also, Jon, what we would have to argue to the jury would be that they would have to just completely disregard all of that evidence, and basically find you guilty or not guilty by arguing to them that they should nullify what the evidence shows. In other words that they can still, if they want to, find you not guilty even though you are guilty.
>
> And this is not something tht ethically we feel that we can argue.
>
> We can require the State to present evidence of your guilt as to those charges beyond and to the exclusion of every reasonable doubt.
>
> We feel they have that evidence. And we feel that the only argument that can be made would be one that would not be ethical, other than to argue that the State has not met their burden. And we feel that we would look foolish to the jury in suggesting that they have not met that burden.
>
> MISS STITT: And not credible in front of them, again, when we are asking them to save your life.
>
> MR. KILLAM: In other words, the evidence that we would be presenting in your behalf in mitigation

> of what penalty the jury would recommend to the Judge, may not be considered by them because they may have formed an opinion of us, and you, possibly, that we are trying to present to them something that is just not capable of belief.
>
> Whereas on the other hand, the evidence in mitigation of your penalty, that you were impaired at the time this happened because of your long-standing mental illness, and that you acted under the substantial domination of Jeremiah Rodgers, we feel that we have enough evidence to reasonably convince the jury of the existence of the mitigating evidence in you behalf. And thereby obtaing a life sentence for you which is the only thing that we, as attorneys, can accomplish in this court proceeding.

(EH 103-104).

When asked whether he believed Lawrence understood what was being said, Dr. Crown responded:

> A. That was so convoluted and compounded that I was having difficulty following it. I find it highly unlikely that someone with a thought disorder, including Jonathan Lawrence, would not have difficulty following it.
>
> He is in his standard catatonic stance.

(EH 105).

The PC trial court's order fails to consider all relevant evidence in finding that Lawrence understood the process or the words used in the practice plea. The finding of the PC trial court's order expresses only the "effort" (PC-R. Vol. III, p423) of counsel and the court to ensure Appellant was cognizant. However, the order fails to discuss the facts, which established Lawrence's inability to understand. The

questions presented to Lawrence at the practice plea (Exhibit 1) are basically the same questions asked by the court, which required only “yes” or “no” answers.

INSUFFICIENCY OF PLEA COLLOQUY TO DETERMINE LAWRENCE’S INVOLUNTARY PLEA

While the PC trial court’s order basically found that the plea colloquy conducted by Judge Bell was sufficient to establish that Lawrence entered his plea knowingly and voluntarily (PC-R. Vol. III, p428), that finding ignores the current state of the law. When questioning a mentally ill defendant who is contemplating a plea of guilty, the Court in Rivera v. State, 746 So.2d 542 (Fla. 2nd DCA 1999), stated the following:

> The plea colloquy consisted of ten questions. Rivera answered each question with either a yes or no. The trial court inquired if Rivera understood the plea agreement and if he was freely and voluntarily entering into it. Rivera answered affirmatively. **This court has previously held that an affirmative answer during the plea colloquy to these types of questions is insufficient to refute a defendant's claim for relief** (emphasis added).

Almost the entire plea colloquy required “yes” or “no” answers (R. Vol. I, p1-32). While the PC trial court’s order concludes that the questions were repeated and phrased differently to ensure that Lawrence understood the nature of his plea (PC-R. Vol. III, p428), the effect of the questions still required only “yes” and “no” answers, which had been

previously practiced. The court's order completely fails to discuss the unrefuted mental health experts' opinions as to whether such questions and answers could indicate whether Lawrence was able to understand the questions or the consequences of his plea. The PC court's order doesn't state why or how Lawrence, suffering with a mental illness and low-average intelligence, could understand the questions and process utilized by the court in light of the mental experts' opinions.

At the evidentiary hearing Dr. Wood testified:

> I'm sure that he did not then, and does not now, understand what it means to be a "principal." In a deep sense, what it means to be a principal to murder. And I don't think that he understands even "conspiracy." And I don't think that he is able, as we sit here today, to understand exactly, fully what is going on. (EH 34).

* * *

> Q. Just so we are clear with regard to the question that was asked by Mr. Molchan regarding the impossibility to know what was going on. We were referring to the "yes" and "no" answers in the Plea Colloquy, isn't that correct?
>
> A. Yes, I don't believe those short answers to those long questions can disclose whether he knows what he is doing (EH 41).

Dr. Napier testified at the evidentiary hearing to the following about the plea colloquy:

> In many instances a person responding "yes" or

> “no” give no clear indication about the person’s comprehension or understanding of the questions.
>
> I do many evaluations for competency to proceed, and dealings with individuals who have severe mental defect. And they may give a “yes” or “no” answer, but upon looking at the further level of understanding they do not have the faintest idea, or comprehension of what they are saying “yes” or “no” to. They may have believed that they understood it, but when you ask them like, “Tell me what that means” or “What does that mean to you” or “Could you further explain,” it is very clear that they had no understanding about what they were answering “yes” or “no” to (EH 50).

Dr. Napier also testified that Lawrence would enter a plea and answer questions in a specific manner if his attorneys instructed him to do so (EH 52), which they had (EH 438).

Dr. Crown testified it was his opinion that Lawrence didn’t understand the meaning of many of the words used at his plea colloquy (EH 80-81), the consequences of the plea, or the process of the plea (EH 98). On cross-examination, Dr. Crown testified Lawrence was not competent at the time he entered his plea to the Court (EH 118-119), which was rejected by the PC court’s order.

He further testified that “yes” and “no” answers are the most simplistic form of answering questions (EH 98). Dr. Crown also testified he expected Lawrence would trust his lawyers more than the judge, because he didn’t have any interaction with the judge (EH 99). Lawrence testified that Stitt told him

how to answer the questions, and he rehearsed the answers before taping them, “so [h]e wouldn’t mess up” (EH 437-438). Lawrence testified that he did not understand all of the questions the judge had asked (EH 437). When Mr. Molchan asked Lawrence if his lawyers promised him anything, Lawrence responded, “They said I wouldn’t get the death penalty if I pleaded guilty” (EH 445).

Stitt testified that because Lawrence had long-term and short-term memory difficulty she had to explain the meaning of words “over and over” (EH 330). Further, Stitt testified the practice plea was done in close proximity to the actual pleas so that Lawrence knew how to answer the questions for the judge (EH 330). Stitt also recruited Lawrence’s mother into the plea process. When asked why Thompson was needed, Stitt testified, “…because we were worried about whether [M]r. Lawrence actually understood what we were talking about” (EH 277), and “she had a different kind of influence over Jonathan” (EH 280). Yet, Killam had no idea why Thompson was brought into it (EH 224) or why Stitt even made the tape (EH 168).

Neither the plea colloquy conducted by the Court (Exhibit 10) nor the practice plea conducted by trial counsel (Exhibits

1 and 2) informed Lawrence that regardless of what the jury recommended, the judge would make the final decision concerning his sentence.

The Appellant contends that the PC trial court did not rely upon competent substantial evidence in its finding that Lawrence was competent at the time he entered his plea or during the penalty phase. Appellant also contends the PC trial court erred by failing to consider all relevant evidence presented. Appellant further contends the trial record and evidentiary hearing record establishes by clear and convincing evidence (although it is contended that the burden of proof is only “preponderance of the evidence”) that Lawrence was incompetent at the time of the plea and during the penalty phase. Lawrence would not have entered a guilty plea had he been competent and not manipulated by his counsel. Lawrence did not enter a knowing and voluntary plea; therefore, the judgment and sentence should be set aside. Lawrence should be permitted to withdraw his plea of guilty to all charges and be provided a new trial, if found competent to stand trial.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT LAWRENCE'S COUNSEL WAS NOT INEFFECTIVE DURING PRE-TRIAL AND THE GUILT PHASE IN VIOLATION OF LAWRENCE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS CAUSING LAWRENCE'S CONVICTIONS AND DEATH SENTENCE TO BE CONSTITUTIONALLY UNRELIABLE?

Ineffective Assistance of Counsel generally - Strickland v. Washington, 466 U.S. 668 (1984), requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

Guilty Pleas - In addition to the general requirements addressed in Strickland, Hill v. Lockhart, 474 U.S. 52, 88 L.Ed. 2nd 203, 106 S.Ct. 366 (1985), also sets out a two-pronged test for determining claims of ineffective assistance of counsel relating to guilty pleas. The first prong is the same as the deficient performance prong of Strickland. The second prong states that a defendant must demonstrate "a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial" Hill at 59.

In Grosvenor v. State, 874 So.2d 1176 (Fla. 2004), this Court interpreted the decision in Hill as follows:

> In sum, we must follow the holding of Hill v. Lockhart. A defendant who has pleaded guilty who claims that defense counsel was ineffective for failing to advise of an available defense establishes Strickland's prejudice prong by demonstrating a reasonable probability that, but

> for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.
>
> Counsel's effectiveness is determined according to the totality of the circumstances. Strickland*, 466 U.S. at 690*. Therefore, in determining whether a reasonable probability exists that the defendant would have insisted on going to trial, **a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial.** As the Supreme Court emphasized in Hill, these predictions "should be made objectively, without regard for the 'idiosyncrasies of the particular decision maker.'" *474 U.S. at 59-60* (quoting Strickland*, 466 U.S. at 695*)(emphasis added).

COUNSEL FAILED TO INFORM LAWRENCE OF A DEFENSE

In denying this claim, the PC trial court's order failed to mention Grosvenor, or to consider all the factors set out therein. The only factor the court considered was "the Defendant has failed to establish that being informed of such a defense would have altered the outcome of the case or would have succeeded at trial" (PC-R. Vol. III, p431). The court's interpretation of the defense's success at trial is in error. Gilbert v. State, 913 So.2d 84 (Fla. 2nd DCA 2005).

> Here, the postconviction court reasoned that even with Perez's testimony, Gilbert's defense would have failed and a revocation court could have found him in violation of probation.
>
> **This was error.** Gilbert's case was not tried. Rather, he alleged that he forewent a revocation hearing because of his counsel's ineffectiveness. Therefore, when determining the probability that the

> outcome of the proceeding would have been different, the "proceeding" **the postconviction court should have examined was not a hypothetical revocation hearing, but the plea proceeding**. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The deficiency prong in *Hill* mirrors that in *Strickland,* but the prejudice prong is asserted by demonstrating "a reasonable probability that, but for counsel's errors, [the defendant] ... would have insisted on going to trial." 474 U.S. at 58-59, 106 S.Ct. 366. Therefore, a defendant who admits to violating probation, but thereafter claims that counsel failed to investigate the defendant's possible defenses, establishes prejudice by demonstrating a reasonable probability that, but for counsel's errors, the defendant would have insisted on proceeding to a revocation hearing. *See* ***Grosvenor v. State,*** 874 So.2d 1176, 1181 (Fla. 2004).
>
> **To meet the prejudice prong, a defendant is not required to allege that the defense would have succeeded.** Grosvenor, 874 So.2d at 1177. Gilbert's motion asserted that he would not have admitted the violations but for his counsel's failure to investigate Perez, who would have cast doubt as to his alleged willful and substantial violation of probation at a revocation hearing. This allegation sufficiently identified the requisite prejudice (emphasis added).

In considering the first prong of the totality of the plea – success of a defense – the PC trial court relied upon counsel's belief (rather than Lawrence's belief) that Lawrence's claims were false (PC-R. Vol. III, p430). However, the PC court's order fails to explain how counsel's belief that Lawrence was guilty (EH 167), relieved counsel of their obligation to inform their client of a defense.

It is undisputed that Stitt (EH 289) and Killam (EH 178) knew they were obligated to inform their client about any defense that may exist. Both Stitt (EH 288-289) and Killam (EH 178) were aware that Lawrence had maintained that he did not kill Jennifer Robinson (EH 408), he did not know Jeremiah Rodgers (co-defendant) would kill Jennifer Robinson (EH 408), and that Lawrence claimed that his actions were not for the purpose of planning to kill Jennifer Robinson (EH 408). Stitt (EH 289) and Killam (EH 167) testified at the evidentiary hearing they didn't recall telling Lawrence he had a defense if the jury believed him. However, their statements to Lawrence in Exhibit 1 and 2, clearly establish they told him he didn't have a defense.

> MS. STITT: Okay. Do you remember us talking about the fact that **we had no real legal defense to the charges**? And that to put the jurors through a week or a week and a half of witness after witness after witness and gory photo after photo after photo would do nothing but harm our chances? (EH 290, Exhibit 1)(emphasis added).
>
> * * * *
>
> MR. KILLAM: And also, Jon, what we would have to argue to the jury would be that they would have to just completely disregard all of that evidence, and basically find you guilty or not guilty by arguing to them that they should nullify what the evidence shows. In other words that they can still, if they want to, find you not guilty even though your are guilty (EH 103-104, Exhibit 1).

Stitt and Killam didn't recall telling Lawrence about a

possible defense, because they didn't, which is corroborated by their conversation with Lawrence in Exhibit 1 and 2, as well as Lawrence's testimony at the evidentiary hearing (EH 434). Lawrence testified that he wanted a trial (EH 411). Lawrence further testified that he pled guilty only because his lawyers told him if he went to trial he would get the death penalty, and if he pled guilty he would get life (EH 409).

The PC trial court relied upon Killam's denial at the evidentiary hearing that he didn't tell Lawrence he had no defense (PC-R. Vol. III, p430, EH 167). Yet, Killam's own words in Exhibit 1 disprove his evidentiary hearing testimony. In finding that Lawrence's claim of a defense would be unsuccessful, the PC trial court's order suggests that Stitt's belief that Lawrence's admission of certain acts reinforced the falsity of his defense (PC-R. Vol. III, p430). The PC trial court's order fails to consider that "acts" are only one element of "principal." Besides, counsel's belief is irrelevant, as opposed to their obligation to inform their client of a defense.

LAWRENCE HAD A DEFENSE

Appellant concedes that the alleged notes (R. Vol. II, p352-353) and Lawrence's actions after Jennifer Robinson was

killed constitute strong circumstantial evidence towards establishing the charge of “principal.” However, Lawrence had explained the contents of the notes. The combination of Lawrence’s explanation of the notes, his mental illness and Rodgers’ influence over Lawrence could well have persuaded a jury that Rodgers duped Lawrence into believing that this was just another fantasy that wouldn’t be carried out. Both counsel appeared to be convinced of these facts.

Lawrence explained his participation in a number of statements provided to law enforcement.

On May 8, 1998, Mr. Lawrence provided a taped statement to law enforcement (Exhibit 3). The following questions and answers were conducted:

Q. OK, before I shut this down here, did you shoot that girl?

A. No.

Q. Did you have anything to do with killing her?

A. No.

(p10, L11).

Further, the notes did not contain any names, including Jennifer Robinson’s name (R. Vol. II, p352-353). Lawrence explained in his statement on May 12, 1998, at 6:27 p.m. (EH 10, Exhibit 7) that they were going to take Jennifer home

sometime that night (p12), he thought Jennifer might bring a friend (p529), he didn't know Rodgers was going to kill Jennifer (p19), they wrote bad things down and then throw the paper away and not do them (p21), and he did not plan the killing of Jennifer (p26). In Exhibit 3, Lawrence stated that his brother was going to come along with them, but after his brother received a phone call he declined to go.

While the notes were presented as circumstantial evidence to demonstrate planning and intent, Ms. Iona Thompson (Lawrence's mother) (EH 139) and Ms. Lorie Carter (Lawrence's sister) (EH 148) testified at the evidentiary hearing that Lawrence always carried pen and paper to write things down because he couldn't remember things from one moment to the next. There were a number of items written on the notes that had nothing to do with killing anyone (R. Vol. II, p352-353).

Killam told Lawrence during the practice plea (Exhibit 1) that he intended to utilize Rodgers's domination over Lawrence and Lawrence's mental illness as a strategy for obtaining a life sentence.

> Whereas on the other hand, the evidence in mitigation of your penalty, that you were impaired at the time this happened **because of your long-standing mental illness, and that you acted under the substantial domination of Jeremiah Rodgers,** we feel that we have enough evidence to reasonably convince the jury of the existence of the mitigating evidence in you behalf. And thereby obtaing a life sentence for you which is the only thing that we, as

attorneys, can accomplish in this court proceeding (EH 103-104).

Killam argued to the jury during opening statement (R. Vol. III, p318), during closing argument (R. Vol. VI. P934-937), and to the court in his sentencing memorandum (R. Vol. VII, p317) that Lawrence suffered from mental illness and was dominated by Jeremiah Rodgers. This argument did not go without support. All three doctors, Wood, Napier, and Crown, testified during the penalty phase and the evidentiary hearing that Lawrence was easily controlled by others and suffered from mental illness. Lawrence had no history of violence until Rodgers came into the picture. Counsel should have utilized the same argument during the guilt phase to persuade a jury of Lawrence's lack of intent or knowledge to kill Jennifer Robinson.

Florida Standard Jury Instructions in Criminal Cases sets out the elements of "Principal" as follows:

3.01 Principals

If the defendant helped another person or persons [commit][attempt to commit] a crime, the defendant is a principal and must be treated as if [he][she] had done all the things the other person or persons did if:

1. the defendant had a conscious intent that the criminal act be done and
2. the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually [commit][attempt to commit] the crime.

To be a principal the defendant does not have to be present when the crime is [committed][or][attempted]

The believability of his claim of innocence was a question for the jury. Counsel were ineffective in failing to inform Lawrence that if his version of events were believed by the jury, whether counsel believed him or not, Lawrence could be found not guilty of Principal to First-Degree Murder.

SECOND PRONG - PLEA COLLOQUY

The PC trial court's order fails to consider the plea colloquy as part of the totality of the plea on this issue. At the plea colloquy, Killam basically informed the PP court there was no defense. He stated that they could only argue either nullification or the State failed to meet their burden (Exhibit 10, p5). Both counsel and the PP court were aware that Lawrence had "some problem with his judgment and his ability to reason and think" (Exhibit 10, p4). Yet, the majority of the plea consisted of "yes" and "no" answers to questions posed by the Court, thereby making it extremely difficult, if not impossible, for the PP court to determine whether Lawrence understood the consequences of his answers, as described above by the mental health experts. Plus, the questions and answers were practiced a number of times before the actual plea, which the PC trial court's order acknowledged

(PC-R. Vol. III, p425).

The PP court didn't ask either counsel or Lawrence whether Lawrence had a defense. Because Lawrence suffered from mental illness, the PP court should have required Lawrence to describe what acts he did that satisfied the elements of Principal and what his intentions for those acts were. Further, the PP court also failed to inform Lawrence that the sentence of life or death rested ultimately with the court.

The mental health expert testimony was overwhelming; Lawrence was unable to adequately understand the words, process, or consequences of his plea. However, the PC court's order either ignored or rejected those opinions. Every single expert testified that these types of questions and answers do not provide insight as to whether Lawrence was entering the plea knowingly or voluntarily. Further, the court in Rivera held: "This court has previously held that an affirmative answer during the plea colloquy to these types of questions is insufficient to refute a defendant's claim for relief."

The PC trial court erred in failing to consider this prong in analyzing whether the plea colloquy affected whether Lawrence would have required a trial, when taken in conjunction with the totality of circumstances.

THIRD PRONG – THE DIFFERENCE BETWEEN THE SENTENCE IMPOSED

UNDER THE PLEA AND THE MAXIMUM POSSIBLE SENTENCE THE DEFENDANT FACED AT TRIAL.

The PC trial court's order fails to consider the sentencing differences between the plea versus a trial as part of the totality of the plea on this issue. While Lawrence believed he would receive a life sentence if he pled guilty because of assertions by his counsel (EH 445-446), the court and counsel knew there would be no difference in the potential sentence, whether Lawrence pled guilty or went to trial.

Thompson testified that Jonathan never wanted to plead guilty (EH 132, 140). Carter testified that prior to the practice plea (Exhibit 1), "Miss Stitt…come out and got mom and said that she needed to talk to Jon because he didn't, he didn't want to plead guilty. And mom needed to come in and talk to him" (EH 147).

Killam acknowledged that Lawrence did not receive any benefit from the State by pleading guilty (EH 217). Even Judge Bell informed Lawrence during the plea colloquy that even if he pled guilty, he was subject to the punishment of death (Exhibit 10). However, that information was presented in a "yes" and "no" format, which Lawrence either didn't understand or considered "meaningless" because his attorneys told him otherwise.

The record clearly establishes Lawrence did not intend to

plead guilty. It was counsels' actions; Lawrence's lack of factual and rational understanding of the process; and the belief that he would get a life sentence that caused him to plead guilty. There was no difference in the potential sentence whether he pled guilty or went to trial.

MISREPRESENTATIONS –

The PC trial court's order found that counsel made no misrepresentations (PC-R. Vol. III, p430). Contrary to the court's characterization of "no misrepresentations," Stitt stated the following to the trial court:

> MS. STITT: …And we believe that not only through our conversations with him, but also **conversations with psychologists** and with his mother that he does have a complete understanding at this point of what he is doing. (Exhibit 10, P6)(Emphasis added).

At the evidentiary hearing neither Stitt nor Killam had any idea who the psychologists were that Stitt was referring to. Further, each of the doctors testified at the evidentiary hearing that they had no conversations with counsel regarding Lawrence's understanding of the entrance of a plea (EH16, 46, 92, 93). Stitt's statement regarding conversations with the doctors can only be characterized as a misrepresentation.

Lawrence's mental illness, acquiescence to authority, and low-average intelligence allowed him to be easily manipulated (EH 52). Both counsel testified at the evidentiary hearing

that they didn’t want to take the case to trial because the State had the evidence of guilt, Lawrence was guilty, and they didn’t want to lose credibility with the jury (Exhibit 1 and 2). Therefore, in order to get Lawrence to plead guilty, Stitt and Killam made a number of misrepresentations to Lawrence and Thompson to assure a plea of guilty.

At the evidentiary hearing, Killam (EH 158) and Stitt (EH 273) both testified that during their visits with Lawrence, he was upset after seeing the crime scene photographs and hearing the taped statements; he didn’t want to look at them or hear them. Stitt used that fact to manipulate Lawrence to enter a guilty plea. Stitt stated to Lawrence the following:

> MS. STITT: Okay. Do you remember us talking about the fact that we had no real legal defense to the charges? And that to put the jurors through a week or a week and a half of witness after witness after witness and **gory photo after photo after photo** would do nothing but harm our chances?

(Exhibits 1 and 2,p6)(Emphasis added).

The only rational explanation for Stitt making the above statement to Lawrence about the witnesses and photos was to imply that if he pled guilty, witnesses would not be called and the photos would not be shown to the jury. Yet, Stitt knew, or should have known, those items would be introduced into evidence at the penalty phase. Apparently she was under the misguided belief “Not as much of that would have happened”

(EH290); “Having the death penalty phase in and of itself would have spared the parade of witnesses that we thought would only harm Jonathan” (EH 291). She was wrong and she knew it, or should have known it. Given Killam’s experience, he knew there would be substantial testimony and photographs produced at the penalty phase, but he failed to correct Stitt’s misstatement because he didn’t want to conduct the guilt phase either.

Dr. Napier (EH 58) and Dr. Crown (EH 115) both testified that the introduction of crime scene photographs and Lawrence’s taped statement at trial could very well have triggered Lawrence’s hallucinations.

During the practice plea, Stitt stated to Lawrence: “Do you remember the conversations that Killam and myself, and also the doctors, have had with you about tactically or why we would do that?” (Exhibit 1). When asked what doctors she was referring to, Stitt testified that she wasn’t sure which doctors she was speaking about in Exhibit 1 (EH 286). When asked what doctors she spoke with about the tactics to plea guilty, Stitt responded: “I believe Mr. Killam spoke to the physicians or doctors” (EH 287). Contrary to Stitt’s testimony, Killam’s testified he didn’t know what doctors Stitt was talking about during the practice plea in Exhibit 1

(EH 102). Killam didn't recall talking to Lawrence about the tactics of entering a plea with doctors present (EH 176).

Dr. Wood (EH 15, 166), Dr. Napier (EH 46), and Dr. Crown (EH 90, 91-92) all denied speaking with either Lawrence or counsel about the strategy of a plea or Lawrence's ability to understand the consequences of entering a plea.

In spite of Lawrence's testimony (EH 409, 412), as well as Thompson's (EH 140), Carter's (EH 146), and Dr. Crown's testimony (EH95-96) that they were told that if Lawrence went to trial he would get the death penalty and if he pled guilty he would get life, the PC trial court found counsel's claim credible that they made no promises (PC-R. Vol. III, p430).

However, Killam stated, "They may have gotten that impression because I was probably pretty adamant that I did not think he had a chance in a jury trial of guilt/innocence" (EH 169). Killam also acknowledged that a promise[4] could be inferred by the intelligence level of the person that's getting the information (EH 218). Killam acknowledged in Exhibit 1 he did not tell Lawrence that he could receive the death penalty (EH 180) because he was under an "illusion" he would get Lawrence a life sentence (EH 179-180).

In an effort to induce Lawrence to plead guilty, Stitt

[4] Promise: a. a declaration that one will do or refrain from doing something specified. Webster's Dictionary (1983).

and Killam made misrepresentations to Lawrence, Thompson, and the Court. They continually expressed to Lawrence and Thompson that they would save Lawrence's life if he pled guilty. While perhaps not utilizing the word "promise," they cannot deny they assertively expressed a substantial degree of certainty of that result to an individual with low intelligence and suffering from a major mental disorder, and counsel barely expressed the caveat of the possibility of a death sentence. It was not unreasonable for Lawrence or Thompson to take counsel at their word.

INTIMIDATION–

Thompson testified she was told that Jonathan would not plead guilty and they needed him to do so in order to save his life (EH 131). She testified that both lawyers spoke with her around eight to 12 times asking her to get Jonathan to plead guilty (EH 133). Thompson testified Stitt told her that they had to do a practice plea on tape before the judge would come into the courtroom (EH 134). Thompson also testified that the attorneys told her she had to answer the questions either "yes" or "no," and she knew from Stitt's questions how she was to answer the questions in order to save Lawrence's life (EH 137-138). Thompson admitted at the evidentiary hearing that her statement to the Court was not true that her son made the

decision to plead guilty EH137).

Even though Lawrence continually maintained his innocence about not being involved with killing Jennifer Robinson, he was, in reality, defrauded into pleading guilty. This fact was demonstrated by counsel's declarations to Lawrence: (1) counsel told him he was guilty, (2) he had no defense, (3) that going to trial would lose their credibility with the jury, (4) the jury wouldn't believe him, (5) he would get the death penalty if he went to trial, (6) the only way to save his life was to plead guilty, and (7) the photos and witnesses wouldn't be introduced at the penalty phase.

Lawrence contends that, but for counsel's actions, he would not have entered a plea of guilty[5], but would have insisted on going to trial. The PC trial court's assessment of Lawrence's contention that he would have insisted on a trial is based upon an incorrect application of the law.

MOTION TO SUPPRESS THE DEFENDANT'S STATEMENTS

ADMISSIBILITY OF DEFENDANT'S STATEMENTS

The PC trial court's order denied this claim because it

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5 Ironically, at the plea Mr. Killam used the term "we pled guilty" and acknowledged it was imprecise and has used that term before (EH 182). Ms. Stitt also acknowledged that her use of the term "we are going to enter a plea" was a misstatement EH 280). However, the trial court in its sentencing order characterized Lawrence's use of the term "we" as evidence to contradict his assertion that the list was written at the direction of Rodgers. Yet, **we** know that Killam

was reasonable strategy for counsel not to move to suppress the statements (PC-R. Vol. III, p431), and Judge Bell found the statements were voluntary (PC-R. Vol. III, p432).

The standard a trial court applies to determine, pre-trial, whether a statement is admissible is set out in DeConingh v. State, 433 So.2d 501 (Fla. 1983) and in Traylor v. State, 596 So.2d 957 (Fla. 1992).

> To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary that any direct promises or threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind. Id. at 964.

The character of the circumstances surrounding the statements taken from Lawrence over a five-day period is as follows: Lawrence was arrested for the murder of Jennifer Robinson on May 8, 1998, sometime between 5 p.m. and 7:30 p.m. (R. Vol. I).

May 8, 1998, 8:50 p.m. (Exhibit 3) – Detective Hand knew that Lawrence did not understand his rights. During this statement, Det. Hand asked Lawrence if he knew what a "waiver" was; Lawrence did not (Exhibit 3 p2). Apparently, Det. Hand didn't know either, since he tried to define "waiver" at the

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and Stitt didn't plead guilty.

evidentiary hearing as: “A waiver is anything that you would sign **waiving** any kind of liability or legal standing. I would define it as that” (EH 349)(Emphasis added). Defining a word using the same word itself, like Det. Hand did, does not indicate a clear understanding of that word. Det. Hand also testified he had no doubt that Lawrence was “emotionally impaired” (EH 348).

Det. Hand testified that Lawrence was detained until early morning hours and couldn’t remember if Lawrence was provided with food (EH 459). Lawrence testified that Det. Hand made him nervous and was afraid of him (EH 415, 421, 436), because Det. Hand yelled at him (EH 421, 425); threw papers around the room (EH 421); threatened him that if he didn’t cooperate he would get the electric chair (EH 421, 425, 429); and, while alone in the woods, he thought Det. Hand might shoot him (EH 426). Further, Lawrence testified he was tired and confused because he hadn’t slept for days because he had to lay on a concrete bed without a mattress (EH 419, 427); the lights were never turned off (EH 420); Det. Hand told Lawrence, Mr. Loveless and he worked together (EH 430, 431); Lawrence thought he had to answer Det. Hand’s questions (EH 422, 423, 424, 425, 432); he was confused about his rights (EH 422); Det. Hand gave him a Pepsi during interrogation, but he

wasn't fed until he was transported to the jail (EH427); during the interrogations, Lawrence practiced answering the questions before beginning the taped sessions so he would get it right and not mess up (EH 428); and Det. Hand revealed information to him that Mr. Rodgers told Det. Hand so Lawrence would get it right (EH 435).

May 9, 1998, at approximately 10:49 a.m. (Exhibit 4) – This statement was recorded while Lawrence and Det. Hand were in the woods (p1). Lawrence testified Det. Hand made him nervous and he was afraid that Det. Hand might shoot him (EH 426).

May 9, 1998, at approximately 4:52 p.m. (Exhibit 9) - Judge Bell appointed a public defender to represent the Defendant on the charges associated with the murder of Jennifer Robinson.

May 12, 1998 - Three custodial statements (Exhibits 5, 6, and 7) were taken from Lawrence: (1) a statement at 3:48 p.m. about the death of Justin Livingston. No Miranda[6] rights were given (Exhibit 5). This statement was not introduced into evidence; (2) another statement was taken at 4:24 p.m. about the shooting of Mr. Smitherman. No Miranda rights were given (Exhibit 6). This statement was not introduced into evidence,

[6]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

and (3) a third statement at 6:27 p.m. regarding Jennifer Robinson. This statement was introduced at the penalty phase (Exhibit 7). Lawrence was read his rights on tape (p1). However, the record is clear that although Lawrence was represented by counsel, she was not present. Notwithstanding the finding of voluntariness by Judge Bell, Det. Hand initiated questioning Lawrence without the presence of counsel (Supp. Vol. VII, p.1132).

May 14, 1998, 3:58 p.m. (Exhibit 8) - Another custodial statement was taken from the Defendant concerning the death of Justin Livingston. This statement was introduced at the penalty phase.

January 31, 2000 - the Defendant provided a deposition in State of Florida v. Jeremiah Martel Rodgers, Case No. 98-322-CFA. Within that deposition the Defendant stated, (1) he had spoken to detectives on a number of occasions both on and off tape, (2) he did not speak with his lawyer, (3) the detectives told him, almost every time they talked to him, he had to answer questions or he would be in trouble and might get the electric chair, (4) because the detectives threatened him with the electric chair, he was nervous and couldn’t get the threat out of his mind, (5) during questioning, he couldn’t think too straight (6) the detectives talked to him for two or three

days, (7) they wouldn't let him sleep for a few days, (8) they continually questioned him, and (9) they would take him to the woods and then back to the jail.

Inasmuch as Lawrence was either represented by counsel or not advised of his rights, the statements should not have been introduced at trial and counsel was ineffective for failing to file a Motion to Suppress

VOLUNTARINESS OF STATEMENTS

March 3, 2000 – A hearing was conducted on the State's Motion to Determine Voluntariness of Lawrence's statements (Supp. Vol. VII, p.1132). At that hearing, Det. Hand was asked whether he initiated the questions about the Robinson murder (Supp. Vol. VII, p1151). Det. Hand stated, "No. I initiated the question about why he was doing this [referring to Lawrence smelling his hand], but once he started on his explanation of it, I let him go with that" (Supp. Vol. VII, p1151). Exhibit 7 (Lawrence's statement) clearly establishes that Det. Hand asked Lawrence hundreds of questions, on subjects other than the smell of fat, and Lawrence did not just "go with that." At the evidentiary hearing, Det. Hand testified he knew Lawrence was represented by counsel at the time of the statement (EH 354). He also testified that he never asked Lawrence if he wanted his attorney present (EH

354). Lawrence's counsel did not ask Det. Hand any questions during the hearing and did not object to the voluntariness of the statements.

Justice Bell testified at the evidentiary hearing that he did not know about the facts testified to by Thompson and Lawrence concerning the events surrounding Lawrence's statements. If he had, he would have needed additional information before determining the voluntariness of Lawrence's statements, but counsel did not file a Motion to Suppress (EH 252). One consideration the PP court made in its order about the statements being voluntary was the lack of objection by defense counsel (Exhibit 11).

COUNSEL'S STRATEGY OF NOT FILING A MOTION TO SUPPRESS

In its order denying Lawrence's 3.851 Motion, it was found that counsel's strategy was reasonable (PC-T. Vol. III, p432). However, the court did not consider that Killam and Stitt didn't know the facts that surrounded the statements, nor had they consulted with Lawrence before agreeing to the strategy. Strickland v. Washington, 466 U.S. 668, 688 (1984).

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the

> overarching duty to advocate the defendant's cause and **the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.** Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. (Emphasis added).

Trial counsel could not and did not make an informed recommendation to Lawrence about entering pleas without first attempting to suppress those statements.

Killam’s reasoning for not filing a Motion to Suppress was that Stitt was supposed to be responsible for filing it. However, he believed the Motion would not be of any consequence, that it would not be successful, and it was inconsistent with their strategy (EH 162). What is significant about Killam’s opinion is he didn’t recall being told that his client was yelled at, threatened with the electric chair, that Det. Hand threw papers around, that Det. Hand had obtained a waiver to take a blood sample without Lawrence’s attorney present, or that Det. Hand took Lawrence’s statement without his attorney present (EH 164). Killam also stated that because he believed there would be a guilty verdict, it wouldn’t be strategically wise to waste the Court’s time since the issue of guilt was settled (EH 167). Obviously, Killam is wrong about the issue of guilt since Lawrence hadn’t committed to plead guilty until March 24,

2000, the day of the plea, which was also the date the trial was set (Exhibit 1 and 2).

Killam didn't come on board until 2000 (EH 160), and he stated that he was primarily responsible for the penalty phase (EH 153). Killam testified he was familiar with what he felt was essential to his function in the trial (EH 154). When asked about what he discussed with Lawrence, Killam stated, "I believe I focused on his relationship with the co-defendant, Mr. Rodgers, and what planning took place. What their intentions were. Of course, I talked to him about his childhood, and traumas, environmental and genetic, that may have impacted his behavior" (EH 156). Notice that no mention was made by Killam about a discussion regarding a Motion to Suppress. With regard to the decision to file a Motion to Suppress, Killam stated:

> That would have been her responsibility because she had the Guilt Phase portion of the case. I didn't, **I didn't take part in that decision**, except to say that I didn't think it would be any consequence. I didn't believe it would be successful if we filed one. And it would be inconsistent with the idea that we were trying to present to the Court; someone who was cooperative, and who could adjust to prison, and had been a follower and was dominated by someone (EH 161) (Emphasis added).

Stitt testified she was unaware that any statements were taken without an attorney present while she represented

Lawrence (EH 268). When asked why she didn't inform the court that the statement of May 12 was taken without her knowledge, Stitt replied: "I suppose it slipped my mind, I don't know" (EH 268).

When asked what was discussed with Killam about the statements, Stitt stated:

> Q And you can -- you can, if you are successful in suppressing the statements, arrange different kinds of strategies knowing they're not going to come into a trial; correct?
>
> A By that time **co-counsel and I agreed** that the best strategy for saving his life, because we did not know whether or not we were going to call him to the stand because of his particular problems; and we felt like the statements would help explain that he was a lesser participant and under the influence of Jonathon Lawrence -- I mean, of Jeremiah Rodgers. (EH 270).

Additionally, Stitt acknowledged that she had attempted that same strategy in another death case, but it didn't work (EH 272). Neither counsel testified they had explained that strategy to Lawrence or that Lawrence had agreed to it.

The statement taken on May 14, 1998 (Exhibit 8), was a custodial interrogation about an offense for which the Defendant was not charged (Livingston murder) at that time. This statement was introduced into evidence at the penalty phase. Although the statement references Miranda warnings, it

is still tainted because it was obtained after the unconstitutional statement of May 12, 1998 (Exhibit 5), on the same subject – Livingston Murder. This statement was tainted because there is no indication that Lawrence was read his rights.

In Schneble v. State, 215 So.2d 611 (Fla. 1968), the Court cited Bruton v. United States, 391 U.S. 123 (1968), and stated:

> The Court of Appeals reversed Evans' conviction, on the ground that his second confession was tainted by his prior unconstitutional confession, but affirmed Bruton's conviction. Id at 612.

The first statement on May 12, 1998 (Exhibit 5), regarding the Livingston murder, was unconstitutional because Lawrence was not read his rights nor would he have understood them even if given. Therefore, the statement taken May 14, 1998 (Exhibit 8), regarding the Livingston murder, although Mirandized, was a result of the first unconstitutional statement.

It is also clear Lawrence's statements were not knowing and therefore not voluntary. Exhibit 3 clearly indicates that neither Lawrence nor Det. Hand knew the meaning of "waiver." It is interesting to note that in all six statements the question of whether Mr. Lawrence understood the meaning of a specific word never appears again.

Further, Det. Hand's credibility is questionable given his misstatement during the hearing about the voluntariness of Lawrence's statements, when he said he didn't ask Lawrence any questions. Further, Det. Hand obtained Lawrence's signature to obtain a blood sample without his attorney present (Exhibit 14, EH 354), just two days before the Court entered an order.

Although the Court conducted a hearing on the voluntariness of the statements, it was the State that filed the motion and questioned Det. Hand; trial counsels did not question Det. Hand, nor did they object to the voluntariness of the statements. Trial counsel were ineffective for failing to establish that all of the statements were given without a knowing and voluntary waiver.

Evidentiary hearing testimony and the records establish; (1) Lawrence didn't understand his rights (EH348, Exhibit 3), (2) Det. Hand threatened Lawrence with the electric chair if he didn't cooperate (EH 421, 425, 429, 435), (3) Lawrence couldn't sleep for days because he slept on concrete without a mattress and they didn't shut the lights off (EH 420, 427, 433), (4) Det. Hand offered him soda only (427), (5) Det. Hand had Lawrence practice his answers before going on tape to keep from messing up (EH 428), (6) Lawrence suffers from low-average intelligence, (7) Lawrence suffers from mental

illness, and (8) Lawrence's counsel wasn't present, even though one had been appointed (EH 430), (9) Det. Hand told Lawrence that Loveless (Lawrence's first appointed attorney) and he worked together (EH 430), and (10) Lawrence experienced olfactory hallucinations while being interrogated (EH 357, 431).

Trial counsel's failure to file a Motion to Suppress prejudiced Appellant because it was Lawrence's statements that primarily provided the evidence that was utilized against him in all three cases, and was the basis for trial counsel to maneuver Lawrence into pleading guilty in all three cases.

MOTION TO DISQUALIFY JUDGE

The PC trial court's order found that counsel's failure to file a Motion to Disqualify was a strategic decision, and the Defendant has failed to establish otherwise (PC-R. Vol. III, 433). Stitt testified that her strategy to keep Judge Bell was because he knew about Lawrence's problems better than other judges (EH 326). Stitt also testified that she had no recollection of ever consulting Lawrence about the strategy (EH 315). So counsel failed to discuss this strategy with her client. State of Florida v. Nixon, 125 S.Ct. 551 (2004).

The law regarding the disqualification of a judge was explained in the Co-defendant's appeal before the First

District Court of Appeals. Rodgers v. State, 369 So.2d 604 (Fla. 1st DCA 2004).

> Appellant, Jeremiah Martel Rodgers, appeals his convictions and sentences and argues that the trial judge erred in denying his motion to disqualify. Upon careful review of the record, we conclude that a reasonably prudent person, faced with the facts of this case, would be placed in fear of not receiving a fair and impartial trial before the trial judge. See Livingston v. State, 858 So.2d 353, 354 (Fla. 1st DCA 2003) (holding that the question of whether a trial judge erred in denying a motion to disqualify is whether a reasonably prudent person, faced with the facts of the case, would be put in fear of not receiving a fair and impartial trial before the presiding judge); see also Livingston v. State, 441 So.2d 1083, 1087 (Fla. 1983) ("[A] party seeking to disqualify a judge need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge.'") (quoting *State ex rel.* Brown v. Dewell, 131 Fla. 566, 179 So. 695, 697-98 (Fla. 1938)); Levine v. State, 650 So.2d 666, 667 (Fla. 4th DCA 1995).

On March 3, 2000, a hearing was conducted wherein the Court acknowledged that he would not be trying the Co-defendant's case because the State would not be objecting to the Writ of Prohibition.

> THE COURT: Let me tell you the schedule as I understand it. I've been informed by the filing by the State and the Writ of Prohibition in the Rodgers' case that the State does not concur that there's grounds for the Court to have recused itself, and that they're not going to oppose the Writ of Prohibition because of the nature of the proceeding. So my assumption is, though I have not heard from the First DCA, if the State is not going to stand in the way, that they'll grant the Writ of Prohibition. If that happens, then my intent would be is we would do the selection on this case on

Monday.

(Supp. R. Vol. VII, p. 1172).

Trial counsel knew of the proceedings in State v. Rodgers, Case No. 98-322-CFA, because they were present at the hearing that gave rise to the basis for Mr. Rodgers' belief that he would not receive a fair trial. Counsel knew that Mr. Rodgers' attorney wasn't present when the Court commented on Lawrence's statements.

Similar circumstances existed in Lawrence's case; during the plea colloquy the Court stated:

> THE COURT: Thank you. And I have not heard what evidence is going to be presented, obviously, in the penalty phase. But from my involvement previously in the Co-defendant's case that I am no longer involved in and in this case - and this question is directed toward counsel - that part of the theory is that your client was more of a follower-type and that Mr. Rodgers was the principal leader in this case?

(R. Vol. I, p. 10-11).

* * * * *

> THE COURT: Do you understand that even **though you earlier have confessed**[7] to the crimes to law enforcement that you are still entitled to have the issue of your guilt or

[7]Confession - In Criminal Law. A voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it. Black's Law Dictionary, Revised Fourth Edition (1968).

> innocence decided by a jury as an adversarial or contested issue? You still have a right to go to trial and make the state prove those charges even though you have already **confessed** them to law enforcement officers? Do you understand that?

(R. Vol. I, p. 22)(Emphasis added).

During the hearing on voluntariness of Defendant's statements on March 3, 2000, the Court stated that he had reviewed those statements (Supp. Vol. VII, p1154). During the plea colloquy with the Defendant, the Court stated that he had not heard what evidence would be presented (Exhibit 10, p10). However he said he read the statements and knew of some psychological issues that would be presented at the penalty phase (Exhibit 10). What is also disconcerting is that the Court commented about the statements by characterizing them as "confessions."

Lawrence did not confess to murdering Robinson or Livingston, and did not confess to shooting Smitherman. The Court's use of "confession" should have alerted counsel with a well-grounded fear that Lawrence would not receive a fair trial at the hands of the judge. Trial counsel should have moved the Court for disqualification. Stitt testified at the evidentiary hearing that she knew Judge Bell was disqualified from Mr. Rodgers' case, but she felt that Judge Bell's personal feelings might allow him to override the jury's

recommendation of death (EH 315). However, she stated that she knew Judge Bell was bound by the law, regardless of his personal feelings (EH 315). Neither Killam nor Stitt testified at the evidentiary hearing that this issue was discussed with Lawrence (EH 315).

Counsel's decision not to file a Motion to Disqualify Judge Bell was their decision entirely, without consulting with Lawrence, and was therefore ineffective.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT LAWRENCE'S COUNSEL WERE NOT INEFFECTIVE DUE TO INADEQUATE ADVERSARIAL TESTING OF THE STATE'S CASE DURING THE PENALTY PHASE IN VIOLATION OF LAWRENCE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS?

Ineffective Assistance of Counsel, generally - Strickland v. Washington, 466 U.S. 668 (1984), requires a defendant demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

COUNSEL'S CONCESSION TO THE JURY THAT THE CCP AGRAVATOR WAS PROVEN

The PC trial court's order found as a matter of law that the line of Nixon cases [Nixon v. State of Florida, 857 So.2d 172 (Fla. 2003); State of Florida v. Nixon, 125 S.Ct. 551 (2004)]; is not applicable to this case (PC-R. Vol. III, p434, at footnote 11). Further, in the footnote, the order cites part of the Florida v. Nixon, 543 U.S. 175, 192 (2004) court's holding: "counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent."

Conveniently though, the order fails to include the first part of the holding: "**When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive**, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." (Emphasis added). The testimony of Killam (EH 185) indicates that Lawrence was not informed of the strategy.

What is also importantly noted in Florida v. Nixon, 543 U.S. 175, 191 (2004), is that counsel for Nixon pointed out inconsistencies in the State's case, which the Nixon court refused to consider because the inconsistencies were not considered by the Florida Supreme Court. The inconsistency in this case is clear. Lawrence's counsel argued to the PP trial court in his Memorandum for Life that the State had failed to

prove CCP, after having conceded same to the jury (R. Vol. II, p318).

While Nixon v. State of Florida, 857 So.2d 172 (Fla. 2003), specifically dealt with concession of guilt, it is the contention of the Defendant that the same holding should apply regarding concession to the jury that an aggravator exists – especially in this case, because counsel pled Lawrence guilty due to his "illusion" that the jury would recommend life. Killam shifted the advantage of a potential death recommendation back to the State by admitting to the CCP aggravator. In State of Florida v. Nixon, 125 S.Ct. 551 (2004), the United States Supreme Court overruled Nixon v. State of Florida above, limiting its holding that a new trial per se was not required, but that a new trial could be had if the circumstances established that prejudice ensued.

> A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant. Id. at page 558.

During closing argument, Killam conceded that the State had proven the aggravator of CCP at least four times:

> The CCP, the cold, calculated, and premeditated aggravator that the State has attempted to show in this case, we admit it's there to that extent because you have this note, this planning, and all of that business.

(R. Vol. VI, p932).

* * * * *

> So, you said, well, this was cold and calculated. He wrote out these notes, he figured out what he was going to do; all this he did because it was just a cold, calculated, premeditated thing.

(R. Vol. VI, p936).

* * * * *

> When all this was done--all this cold, calculated, premeditated stuff--Jeremiah was influencing him, a person who, according to the testimony, which is unrebutted before you, is easily led.

(R. Vol. VI, p937).

* * * * *

> These mental mitigators greatly outweigh the alleged cold, calculated, and premeditated, because there wasn't anything any warmer or any colder about Jonathan Lawrence's blood when this happened, because he's always been the same.

(R. Vol. VI, p940).

Astonishingly, Killam switched to a different position when he wrote his memorandum to the court in opposition to the death penalty – completely opposite of his position he took during his closing argument to the jury (R. Vol. II, p318). The memorandum states:

> The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Defense specifically denies.
>
> Through the testimony of three experts (and gone unrefuted by any expert by the State) the evidence was clearly established by the greater weight of the evidence that the Defendant was clearly incapable on his own of forming any such plan that rises to the

> level of clearly establishing the heightened premeditation and advance planning necessary to support
> this aggravating circumstance.
>
> Through the testimony of his mother, Mrs. Iona Thompson, it was made clear that the defendant could not even go to the grocery store without a set of written instructions as to what to purchase. Through the testimony of his brother-in-law Mr. David Carter, it was established that the Defendant had to be shown again and again how to do the three basic steps required to pump out a septic tank. In addition, through the testimony of another former short-time employer it was established that he could not follow even rudimentary instructions without writing them down. It was clearly established by the defense that the defendant could not have formed any "plan" without the help of another. It is supported by the testimony that the defendant was given instructions by another, which he either wrote down at the direction of another person (i.e. the co-defendant Jeremiah Rodgers) or was accompanied by self same co-defendant when other items were purchased an/or used.
>
> Further, it is unrefuted that Jonathan Lawrence (by statements given to Law Enforcement) even knew that Jennifer Rodgers was to be killed. It is agreed that the Defendant went along on the supposed date that the co-defendant set up with the victim but only at the direction of Jeremiah Rodgers [sic](Robinson), the co-defendant. Heightened premeditation is reduced to the fantasy of an organically damaged schizophrenic brain bathed in ethanol.

At the evidentiary hearing, Killam testified he didn't recall having a conversation with Lawrence about conceding the aggravator of CCP (EH 185). Stitt testified at the evidentiary hearing that she did not participate with Killam in preparing opening and closing arguments for the Penalty Phase, nor did she know Killam was going to concede the CCP

aggravator (EH 317-318). Killam failed to inform or discuss the strategy with Lawrence or co-counsel about this concession. Yet, Killam and Stitt went to great lengths to convince Lawrence to enter a plea of guilty because their/his credibility would be diminished if they went to trial, and, according to counsel, it would be his best chance for a life recommendation. Not only did Killam fail to test the State's case regarding CCP on four separate occasions, he conceded the aggravator to the jury without Lawrence's knowledge. Killam agreed during the evidentiary hearing that his inconsistent position with the jury on the CCP aggravator affected his credibility (EH 188).

This concession was not only a denial of Lawrence's right to have his counsel test the State's case and require the jury to make a determination beyond a reasonable doubt, it increased the State's chance to get a recommendation of death, which Killam acknowledged at the evidentiary hearing (EH 185).

Appellant contends that the line of Nixon cases should also apply to the concession of an aggravator when counsel fails to discuss strategy with the client, and, in this case find that counsel was ineffective for failing to test the state's case, especially since counsel took an inconsistent position on CCP.

DEROGATORY AND PREJUDICAL COMMENTS

The PC trial court's order found that Killam's remarks to the jury were a reasonable trial tactic in order to dramatize Lawrence's mental illness (PC-R. Vol. III, p435).

In State v. Davis, 872 So.2d 250 (Fla. 2004), trial counsel was attempting to utilize what he thought was a reasonable trial tactic. However, this Court stated:

> Applying these standards and principals, we conclude that the expressions of racial animus voiced by trial counsel during voir dire so seriously affected the fairness and reliability of the proceedings that our confidence in the jury's verdicts of guilt is undermined. We cannot agree with the trial court's conclusion that an explicit expression of racial prejudice can be considered a legitimate tactical approach. Whether or not counsel is in fact a racist, his expressions of prejudice against African Americans cannot be tolerated.

While Davis specifically dealt with race, it is the Defendant's contention that the same rationale regarding prejudice should apply to mentally ill individuals, mentally retarded individuals, or brain-damaged individuals.

During closing argument, Killam demeaned the Defendant because of his mental disability and thereby caused the jury to view Lawrence with a jaundiced eye.

> This **little brain** that has no activity in the left frontal and temporal lobe along--which is, by the way, the doctor--Dr. Wood--wrote a paper right on point on that being related to schizophrenia. So, you've got this brain that's been impacted by this man – **this little pea brain**.

(R. Vol. VI, p935)(Emphasis added).

* * * * *

> There's a sixteenth century poem that expresses this, I think, a little bit better than I can, and I'd like to read it to you. **I'm having a little left frontal lobe problems right now**, and I'm afraid I'll forget this.

(R. Vol. VI, p939)(Emphasis added).

* * * * *

> But it's real clear that the left frontal temporal lobe damage affects your ability to think. Once that's knocked out, then you're back here and your **reptilian brain acting out a fight like an animal.** That man has a conscience, **he's not totally bad.**

(R. Vol. VI, p943)(Emphasis added).

At the evidentiary hearing, Killam attempted to validate the above statements as trying to convince the jury that "He does not have the same brain as they do, and he does not think like they do" (EH 194-196). However, instead of saying that clearly to the jury, Killam chose to use insulting language that could only prejudice the jury. This Court should not agree with the PC trial court's conclusion that an explicit expression of mentally ill prejudice can be considered a legitimate tactical approach. If not, where will the use of derogatory adjectives end as a reasonable trial tactic to describe different people? For example: Old people's brains aren't like young people's, women's brains aren't like men's, or Jewish people's brains are different from Catholic's, etc.

VOLUNTARINESS OF STATEMENTS

The PC trial court's order found that because counsel's strategy was to show dominance by Jeremiah Rodgers and Lawrence's mental illness, contesting the reliability of the statements would have been contrary to their theme and, therefore, counsel was not ineffective (PC-R. Vol. III, p436).

In Crane v. Kentucky, 476 U.S. 693, 106 S.Ct. 2142, 90 L.Ed. 2d 636 (1986), the Court stated:

> Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support [sic] an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

The PC trial court's order interprets Appellant's claim too narrowly. The reliability of Lawrence's statements goes as much to completeness as to the circumstances surrounding the statements. Lawrence provided six statements to law enforcement (Exhibits 3-8), yet only two were introduced into evidence. Given that counsel did not move to suppress the statements, counsel should have attempted to introduce the

other four statements in order to provide a full and complete picture to the jury about Lawrence's ability to remember, his intentions, his actions, his ability to understand the questions, and the actions of law enforcement Larzelere v. State, 676 So.2d 394 (Fla. 1996). Section 90.108, Florida Statutes (1991). However, only the two most incriminating statements were introduced during the penalty phase (Exhibit 7 and 8).

Exhibits 3-8 establish many thing: Lawrence didn't know what a waiver was, his brother was going to come along with them, Lawrence had memory problems, he didn't shoot Jennifer Robinson, Lawrence cooperated with law enforcement, law enforcement stated they wanted to help him, Lawrence didn't shoot Mr. Smitherman, Lawrence didn't kill Justin Livingston, etc.

Although counsel explained that the statements, which were introduced into evidence, helped to further their defense theme that Rodgers dominated Lawrence, the introduction of the other four statements would have provided a more complete picture of Lawrence's mental capacity the experts testified to.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT LAWRENCE'S RIGHT TO EQUAL PROTECTION WAS NOT VIOLATED PURSUANT TO ATKINS BECAUSE ATKINS DOES NOT

APPLY TO THE MENTALLY ILL?

The PC trial court's order found that Atkins is inapplicable because the Defendant is not contending that he is mentally retarded but mentally ill. However, the court fails to consider the specific claim that Atkins should also apply to the mentally ill under the theory of Equal Protection.

The Court in Atkins v. Virginia, 536 U.S. 304 (2002), set out the criteria as to why mentally retarded individuals are excluded from execution:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

The same criteria must be applied to the mentally ill as well. Therefore, Florida's sentencing statutes deprive Lawrence with equal protection and amounts to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, as well as Florida's corresponding constitutional amendments.

In What Atkins Could Mean for People With Mental Illness, 33 N.M.L. Rev. 293 (Spring, 2003), the following conclusion was argued regarding the applicability of Atkins to the mentally ill for the proposition of Equal Protection.

A credible Eighth Amendment argument against the

execution of people who are mentally ill cannot be made, because only one legislature in a death penalty state has barred such executions. But that fact simply strengthens the equal protection argument. Because murderers with proven significant mental illness at the time of the offense are no more culpable or deterrable, nor any more dangerous, than juvenile murderers or murderers who suffer from mental retardation, the only possible basis for the states' continued willingness to execute members of the first group is the type of "irrational prejudice" against which Cleburne inveighed.

Up to this point in this essay, the evidence of such prejudice has been primarily negative in nature, in the sense that it consists of rebutting possible "rational" explanations for continued execution of people with mental illness. But there is plenty of positive evidence of irrational prejudice as well. Research about attitudes toward individuals with mental illness strongly suggests that most of us view such people to be abnormally dangerous. n137 Although, as indicated above, this perception is clearly inaccurate, if held by legislators and jurors bent on ensuring public safety through executions, n138 it explains both why there is no legislative momentum toward barring their execution and why mental illness, supposedly a mitigating factor, is so highly correlated with death sentences.

These findings also suggest the nature of the irrational prejudice at work, which research from the mammoth Capital Jury Sentencing Project clarifies. n139 In one aspect of that study, 187 jurors who served on fifty-three capital cases tried in South Carolina between 1988 and 1997 were queried about their emotional reactions to capital offenders. n140 Regression analysis of their responses revealed that, of the eight emotions studied (including fear, sympathy, anger, and disgust), only "fear" of the offender correlated significantly with the final vote on sentence. n141 The researchers also found that the most feared type of offender was one perceived to be a "madman" or "vicious like a mad animal." n142 The type of offender most likely to fit the "madman" category, of course, is one who exhibits symptoms of mental

> illness at the time of the offense. Even an offender with mental retardation is likely to be less feared and thus less likely to be irrationally sentenced to death than the person with significant mental illness. Indeed, the researchers found that while jurors were "likely to have felt sympathy or pity" for people with both types of disability, they were more likely to be simultaneously "disgusted or repulsed" only by the latter type of defendant. n143
>
> Now that people with mental retardation cannot be executed, execution of people who have significant mental illness at the time of the offense is difficult to defend on rational grounds, whether the forum is judicial, legislative, or executive. n144 The primary reason such executions continue is a disproportionate fear of people with mental illness. Prohibiting imposition of the death penalty on these people would dramatically highlight the irrationality of that fear.

Lawrence requests this Court declare Florida Death Penalty Statutes unconstitutional as applied, because Lawrence's mental illness qualifies him to equal protection to receive a sentence no greater than he would have received if he were mentally retarded.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING NO MERIT TO LAWRENCE'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING LAWRENCE'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT?

The Appellant acknowledges that this Court has previously ruled in opposition of this issue. However, the issue is being presented here for future preservation.

A study has found that capital jurors in Florida fail to apply the statutory sentencing guidelines in the manner required by Florida law, due process, and the Eighth Amendment to the United States Constitution. See William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am.J.Crim.L. 1 (1988) (study focusing on North Florida capital cases). Existing research results, combined with this evidence, indicate that at least some of the jurors in Lawrence's case would have committed any of several overt acts that would invalidate his sentence. Studies show that jurors have mislead counsel and the court during voir dire; considered extraneous matters and extrinsic influences; believed death mandatory in a case such as this; failed to follow the requirements of 921.141, Florida Statutes in finding Lawrence eligible for the death penalty; applied inappropriate, nonstatutory and constitutionally unacceptable aggravating factors in selecting death as the appropriate punishment for Lawrence; or, acted so that any combination of these factors contributed to his death sentence. The conclusions reached in

these studies indicate Lawrence would have been prejudiced by such overt acts and extraneous influences. Unless Lawrence or his representatives are permitted to conduct discreet, anonymous interviews with the jurors in this case, Lawrence will be denied due process and equal protection under the laws. His access to the courts will be impaired, and his postconviction proceedings will not meet the standards of due process demanded in death cases.

Furthermore, Rule 4-3.5(d)(4) is unconstitutionally vague. The language of the rule fails to put counsel on notice of what behavior is subject to disciplinary action. By its terms the rule requires only that counsel provide notice to the court and opposing counsel of her intention to interview jurors. The rule is to be interpreted in accordance with the complementary evidentiary rule found in 90.607(2)(b), Florida Statutes. Powell, 652 So.2d at 356. This means the eventual determination of whether the attorney's conduct was proper will be made on the basis of information that could not have been known to the attorney before the interview took place, i.e., whether the juror can testify to overt prejudicial acts or extraneous influences on the verdict. Because the cases describing what evidence, once discovered through juror interviews, inheres in the verdict and what does

not, counsels are unable to determine in advance of conducting interviews whether their actions will subject them to discipline. Mr. Lawrence will be denied due process of law and access to the courts if counsels are not permitted to interview jurors in preparation for postconviction proceedings.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING LAWRENCE'S CLAIM THAT HE IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND/OR UNUSUAL PUNISHMENTS?

The Appellant acknowledges that this Court has ruled in opposition to this claim. However, this issue is being presented here for future preservation. The practice of executing Florida's condemned by means of judicial electrocution unnecessarily exposes Lawrence to substantial risks of suffering and degradation through physical violence, disfigurement, and torment. These risks inhere in Florida's practice of judicial electrocution and have been repeatedly documented. See, Provenzano v. Moore, 744 So.2d 413 (1999)(Shaw, J., dissenting, joined by Anstead, J.); Jones v. State, 701 So.2d 70, 82-88 (Fla. 1997)(Shaw, J., dissenting,

joined by Kogan & Anstead, JJ.); id., at 71 (Anstead, J., dissenting, joined by Kogan & Shaw, JJ.); Buenoano v. State, 565 So.2d 309 (Fla. 1990); Jones v. State, 701 So.2d 70 (Fla. 1997); and Jones v. Butterworth, 691 So.2d 481 (Fla. 1997).

Persons such as Lawrence face an unconstitutional risk of being tormented, degraded, and dehumanized by Florida's practice of botching judicial electrocutions. Florida's manner of effectuating judicial electrocution necessarily entails substantial and constitutionally intolerable risks that Lawrence will become the victim of a "somewhat ghastly" display of violence, disfigurement, and degradation. The State of Florida has purportedly extended a “choice" to Lawrence, but it is no choice at all and the legislation enacting the "choice" is unconstitutional. Should Lawrence be forced to make such a choice, this adds to his psychological torture. This waiver provision is unconstitutional. Accordingly, Lawrence may not be executed by lethal injection without violating the constitutions of the United States and Florida. The law enacting lethal injection is unconstitutional, is an unconstitutional special criminal law, and violates the prohibition against ex post facto laws. Lawrence’s rights guaranteed by the Eighth and Fourteenth Amendments will be violated.

ISSUE VII

WHETHER LAWRENCE'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS LAWRENCE MAY BE INCOMPETENT AT THE TIME OF EXECUTION?

Lawrence has been incarcerated since 1998. Statistics have shown that an individual incarcerated over a long period of time will suffer diminished mental capacity. Inasmuch as Lawrence may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated. See Ford v. Wainwright, 477 U.S. 399 (1986). This claim is not yet ripe; however, is being raised for preservation purposes.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST THAT THE DEFENDANT BE EXAMINED FOR COMPETENCY DURING THE PENALTY PHASE OF THE TRIAL IN VIOLATION OF LAWRENCE'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

This issue is taken out of numerical order in accordance with the PC trial court's order.

The standard of review for claims of ineffective assistance of counsel is *de novo*, as set out in Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The PC trial court's order denying Lawrence's 3.851 Motion found that counsels' decision not to request a competency hearing was based on reasoned professional judgment, and no prejudice occurred because Judge Bell made an informed decision that Lawrence was not hallucinating but disturbed by flashbacks (PC-R. Vol. III, p441).

DEFICIENT PERFORMANCE

The PC trial court's reliance upon Killam and Stitt is based upon their conclusions, not facts (symptoms) (PC-R. Vol. III, p440). Further, the PC trial court's order fails to state whether the facts established "reasonable grounds to suggest incompetency." Hill v. State, 473 So.2d 1253, 1256 (Fla. 1985) (This decision stands for the principle that the trial court must conduct a hearing on the issue of a defendant's competency to stand trial when there are reasonable grounds to suggest incompetency).

There were additional reasonable grounds to establish Lawrence's incompetency as described in detail in Issue I above. However, a summary of the undisputed facts established in the record on direct appeal and at the evidentiary hearing is set out below.

(1) Stitt filed an Amended Motion for Competency on

December 9, 1999 (R. Vol. I, p13), (2) Stitt testified Lawrence reported experiencing hallucinations during some of her visits with him at the jail (EH 339), (3) Lawrence reported having hallucinations and flashbacks to Stitt on two occasions during the penalty phase (R. Vol. IV, p419, 464), (4) Stitt had concerns for Lawrence's competency when he reported having hallucinations (EH 263), Stitt didn't request a competency evaluation because of consultation with co-counsel (EH 264), which she felt was in error (EH 265), (6) Counsel and the court knew Lawrence had a problem with judgment and ability to reason and think (R. Vol. I, p3-4), (7) Stitt testified that Lawrence had difficulty understanding counsel (EH 277), (8) Lawrence had difficulty giving "yes" and "no" answers (EH 308), (9) Stitt spent more time with Lawrence than Killam (EH 205), (10) Killam didn't hear what Lawrence related to Stitt regarding hallucinations (EH 220), (11) Stitt told Dr. Wood that Lawrence reported hallucinations (EH 17), (12) Dr. Wood told Stitt Lawrence needed an evaluation, and Stitt responded "we may lose more than we would gain by trying to interrupt the proceedings" (EH 36), (13) Killam testified that Lawrence's competency had "already been litigated and decided at that point" (EH 209). (14) Rather than being safe than sorry by asking for an evaluation, Killam stated he felt

like the best chance at a life sentence was to proceed with what they were doing (EH 228), (15) At the evidentiary hearing all three doctors testified that when Lawrence reported having hallucinations, an evaluation should have been requested.

Counsel were ineffective for failing to investigate and request a competency evaluation. Jones v. State, 740 So.2d 520, 522 (Fla. 1999) (the failure to take action to determine a defendant's competency would rise to the level of ineffective assistance of counsel if there was evidence to support the defense.); Broomfield v. State, 788 So.2d 1043, 1044 (Fla. 2nd DCA 2001)(We reverse because trial counsel was ineffective in failing to investigate Broomfield's competency at the time of his pleas.)

PREJUDICE

The PC trial court's order refers to Justice Bell's finding at the penalty phase that Lawrence was not hallucinating as a determination that the results would not have been different. However, case law establishes that had counsel requested a competency evaluation, it would have been error for the court to deny the evaluation, based upon the above facts. Kothman v. State, 442 So.2d 357 (Fla. 1st DCA 1983); Calloway v. State, 651 So.2d 752 (Fla. 1st DAC 1995); Brockman v. State, 852 So.2d 330 (Fla. 2nd DCA 2003).

Further, the PC trial court's order fails to consider at the evidentiary hearing, when asked whether he would have granted a request for a competency evaluation, Justice Bell stated: "But if Toni Stitt or Mr. Killam had believed that he was truly having hallucinations and they were concerned about his competency, I certainly would have gone into that. And if they both believed given their experience and relationship with him and their past experiences as capital attorneys, I would have definitely granted the request" (EH 243-244).

Appellant contends it is illogical, if not hypocrisy, to find that counsel were not ineffective because there was a previous finding that Lawrence was competent and counsel didn't observe any changes in Lawrence, yet ignore that counsel treated Lawrence as if he were incompetent. Restated, counsel didn't believe Lawrence understood all they were telling him, they misled Lawrence about what evidence would be introduced because they knew he would get upset, they had Lawrence practice many time the questions and answers the court would ask, they had to repeat the definitions of words over and over, they utilized his mother to convince him to plead guilty because she had more influence upon Lawrence, etc. These are not the reasonable actions of an attorney who believes his client is competent to enter a plea or to

proceed.

Therefore, the trial court erred in finding that counsel was not ineffective.

ISSUE VIII

WHETHER lAWRENCE'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

Mr. Lawrence did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence Mr. Lawrence would receive. State v. Gunsby, 670 So.2d 920 (Fla. 1996). In Jones v. State, 569 So.2d 1234 (Fla. 1990) this Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "**cumulative errors** affecting the penalty phase" Id. at 1235 (emphasis added). The flaws in the system, which sentenced Mr. Lawrence to death, are many. They have been pointed out throughout this pleading and also in Mr. Lawrence's direct appeal. There has been no adequate harmless error analysis. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an

improperly imposed death sentence--safeguards that are required by the Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court (detailed elsewhere in this motion) significantly tainted the process. These errors cannot be harmless.

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

That his convictions and sentences, including his sentence of death, be vacated and a new trial provided.

CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to Charlemane Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on June 14, 2006.

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