IN THE SUPREME COURT OF FLORIDA

JOSHUA D. NELSON,

Appellant,

vs.

Case No. SC10-540
(L. C. Case No. 95-911-CFA)

STATE OF FLORIDA,

Appellee.
_____/

On Direct Appeal from a Final Order of the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida, Denying the Appellant's Second Amended Initial Motion for Post Conviction Relief.

Baya Harrison
310 North Jefferson St.
Monticello, FL 32344
Tel: 850.997.8469
Fx: 850.997.5852
bayalaw@aol.com
Court Appointed Registry
Counsel for Appellant,
Joshua Nelson
Fla. Bar No. 099568

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PRELIMIARY STATEMENT

This is a direct appeal from a final order (R11/1111-31) with attachments rendered on March 5, 2010, by the Circuit Court of the Twentieth Judicial Circuit of Florida, denying Nelson's collateral second amended initial motion to vacate his judgments of conviction and sentences, including a death sentence (R9/820-826.) Appellant Joshua D. Nelson was the defendant in the trial court and will be referred to as such or as "Nelson." Appellee, the State of Florida was the plaintiff in the trial court and will be referred to as "the state."

The record on appeal is in 12 volumes. References to specific pages of the record will be by the letter "R" followed by an appropriate volume, a slash sign and page number.

References to the record in Nelson's original appeal of his state court judgments of conviction and sentences will be by the letters "OR" followed by an appropriate volume number, the phrase "trial transcript" and a page number.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case:

This is a direct appeal of a final order (R11/1111-31[1]) with attachments rendered on March 5, 2010, by the Hon. Lynn Gerald, Jr., Circuit Judge, Twentieth Judicial Circuit of Florida, that denied Nelson's June 15, 2009, Sworn Complete Second Amended Initial Motion for Post Conviction Relief" (R9/777-837.) filed per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851(e)(1).

Jurisdiction:

The Supreme Court of Florida has jurisdiction over the parties and subject matter of this cause because this is a direct appeal of a final order that denied Nelson post conviction relief in a capital case. Art. V, Sec. 3(b)(1), Fla. Const. "We have jurisdiction over all death penalty appeals." *Parker v. State*, 873 So. 2d 270, 275, f. 1 (Fla. 2004). This includes jurisdiction of direct appeals from final orders denying post conviction relief in capital cases. *Parker v. State*, 542 So. 2d 356-57 (Fla. 1989).

Course of the Proceedings:

On or about April 4, 1995, Nelson and co-defendant Keith M.

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[1] "R11/1111-31" refers to volume 11 of the record on appeal in the post conviction proceedings followed by a slash and the appropriate page numbers.

Brennan, were indicted by a Lee County, Florida, grand jury and charged with (Count I) premeditated, first-degree murder, (Count II) first-degree felony murder and (Count III) armed robbery. (R8/777-79.) The victim was Thomas Owens. (R8/779.) Separate trials were ordered.

Nelson's jury trial commenced on September 16, 1996, in Ft. Myers. He was found guilty on all three counts. (R8/779; R11/1112.) Counts I and II were merged for sentencing purposes.

A penalty phase was held on November 7, 1996 per the provisions of Section 921.141, Florida Statutes (1995). The state argued that three statutory aggravators were extant in the case: (1) The murder was committed in the course of an armed robbery of the victim during which his vehicle was taken; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). Nelson asserted that there was sufficient evidence of four statutory mitigators: (1) Nelson was acting under extreme emotional disturbance at the time of the homicide per Section 921.141(6)(b), Fla. Stat. (1995); (2) he was an accomplice playing only a minor role in the homicide per Section 921.141(6)(d); (3) he acted under the substantial domination of Brennan per Section 921.141(6)(e); and that he lacked the capacity to appreciate the

criminality of his conduct at that time, per Section 921.141(6)(f). *Nelson v. State*, supra, 748 So. 2d 237, 240 (1999). His counsel asserted the following in the way of non-statutory mitigation: (1) Nelson gave a voluntary confession, (2) Nelson was not the person who actually killed the victim, (3) death was caused by the codefendant Brennan, (4) Nelson suffered from a deprived childhood, (5) Nelson's childhood saddled him with emotional handicaps, (6) outside influences further caused Nelson emotional handicaps, (7) Nelson suffered great situational stresses leading up to the time of the homicide, (8) Nelson was suffering emotional turmoil before and at the time of the homicide, (9) Nelson's anger stemmed from circumstances beyond his control, (10) Nelson suffered physical, mental, and sexual family abuse, (11) Nelson has no prior criminal convictions for violent felonies, (12) the homicide was committed for emotional reasons, (13) there was a conditional guilty plea offer made by Nelson subject to a life sentence which was refused by the state, (14) Nelson has potential for rehabilitation in prison, and (15) the death penalty as applied to Nelson was disproportionate. (R9/831-32.) At the conclusion of the penalty phase (Nelson did not testify during that proceeding), the jury recommended imposition of the death penalty by a vote of 12-0.

On November 27, 1996, after a *Spencer*[2] hearing, Nelson was sentenced to death for the murder and to 189 months in prison regarding the robbery. (R8/779; R9/820-26; R11/1112.) In so doing, the trial court, Hon. William J. Nelson, Circuit Judge, deceased, found three statutory aggravators had been proven beyond a reasonable doubt by the state: (1) The murder was committed in the course of a robbery, Section 921.141(5)(d), Fla. Stat. (1995); (2) the murder was especially heinous, atrocious, or cruel (HAC), Section 921.141(5)(h); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP), Section 921.141(5)(i). (R9/827-29.) Judge Nelson (no relation to the defendant), rejected the four statutory mitigators raised by the defense as referenced above. (R9/829-31.) However, the Court found that one other statutory mitigator, Nelson's age of eighteen years at the time of the crime as provided for by Section 921.141(6)(g), was established by a preponderance of the evidence, and it was given "great weight." (R9/831.) The fact that Nelson gave a voluntary confession was given substantial weight. (R9/832) The remaining non-statutory mitigators were given moderate to little if any weight. *Nelson v. State*, supra, 748 So. 2d 237, 240 (1999).

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[2] *Spencer v. State*, 615 So. 2d 668, 690, 691 (Fla. 1993).

A direct appeal of the judgments of conviction and sentences followed. Nelson claimed that the trial court erred by (1) failing to properly determine the admissibility of testimony of the state's DNA expert, (2) denying Nelson's right to confrontation by admitting hearsay testimony of Brennan's out-of court statements which implicated Nelson, (3) failing to properly weigh Nelson's alcohol and drug abuse history, (4) violating Nelson's Eighth Amendment rights by weighing the cold, premeditated and calculated (CCP) aggravator since there was in the record evidence of a pretense of justification and no careful planning, (5) violating Nelson's Eighth Amendment rights by weighing the heinous, atrocious or cruel (HAC) aggravator since the evidence did not support the finding that Nelson intended to cause the victim unnecessary and prolonged suffering, (6) violating Nelson's Eighth Amendment rights by giving a vague jury instruction on the HAC aggravator, and (7) failing to hold that the death penalty was not proportionate. *Nelson v. State*, 748 So. 2d at 240; R8/782-83. On May 27, 1999, this Court rejected those points on appeal and affirmed the judgments of conviction and sentences, including the death sentence. *Nelson v. State*, supra, 748 So. 2d 237 (Fla. 1999). Rehearing was denied on September 30, 1999. The mandate was issued on November 1, 1999. A timely petition for writ of certiorari was filed in the Supreme Court

of the United States, but was denied on January 18, 2000. *Nelson v. Florida*, 528 U.S. 1123 (2000).

On January 5, 2001, Nelson filed an initial sworn, shell "Motion to Vacate Judgments of Conviction and Sentence With Special Leave to Amend" in the circuit court in Lee County. (R1/17-85.) He was represented by Capital Collateral Regional Counsel ("CCRC"; R1/93.) CCRC asserted some 34 claims, all of which were incomplete and many of which had no relevance whatsoever to the case at bar.

On October 29, 2004, CCRC moved to withdraw as Nelson's counsel citing a conflict of interest. (R6/580-82.) After an evidentiary hearing, the motion was granted. On October 24, 2007, Michael McDonnell, Esq., was appointed in its stead. (R7/638-45.)

On January 26, 2009, Nelson through Mr. McDonnell filed an "Amended Initial Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend." (R7/691-719.) On March 4, 2009, Mr. McDonnell was allowed to withdraw and the undersigned was appointed in his place as registry counsel. (R8/730.)

On March 9, 2009, the undersigned, after submitting his notice of appearance (R8/732), filed a motion to amend Nelson's amended post conviction motion (R8/733-38) and followed with a memorandum (R8/763-

69). The motion to amend was granted.

On June 15, 2009, Nelson filed a sworn "Complete Second Amended Initial Motion for Post Conviction Relief including Integrated Memorandum of Law." (R9/777-837; R11/1112.) On July 14, 2009, the state filed an "Answer to Second Amended Motion to Vacate Judgment and Sentence." (R9/855-68.)

A telephonic *Huff* [3] hearing presided over by Judge Gerald was held on August 20, 2009. (R10/900-35.) An evidentiary hearing on certain of the claims set forth in the Second Amended Initial Motion for Post Conviction Relief was held on October 29, 2009. (R11/1112-13.) Nelson and defense counsel investigator Stephen Holland testified on behalf of Mr. Nelson. Harold Stevens, Esq., Nelson's lead trial counsel, testified for the state. (R10/1034-1118.) Both sides thereafter submitted written closing arguments and legal memoranda. (R10/948-72, 973-1005; R11/1113.)

Disposition in Lower Tribunal:

On March 5, 2010, Judge Gerald rendered his final order denying post conviction relief (R11/1100-31) with attachments. On March 18, 2010, Nelson filed a notice of appeal of that final order to this Court. (R12/1348-49.)

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[3] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

Statement of the Facts:

The Facts as Determined by This Court on Direct Appeal

This Court made the following findings regarding the facts of the case on direct appeal of the judgments and sentences:

> The evidence presented at trial established the following facts. Nelson and Keith Brennan wanted to leave the city of Cape Coral. The two devised a plan to murder Tommy Owens and steal his car. Nelson and Brennan knew that Owens kept a baseball bat in his car. On the evening of March 10, 1995, Owens was lured under false pretenses to a remote street. Nelson and Brennan were able to convince Owens to exit his car, whereupon Nelson hit Owens with the bat. After a number of blows, Owens eventually fell to the ground. Nelson and Brennan tied Owens' legs and arms. Owens pleaded for his life, stating that the two could take his car. After a brief discussion, Nelson and Brennan concluded that to avoid being caught, they should kill Owens. Brennan attempted to slice Owens' throat with a box cutter. Owens was not unconscious when the attacks began and he begged Nelson to hit him again with the bat so as to knock him unconscious before the stabbing continued. Nelson did as Owens requested and Brennan continued to attack Owens with the box cutter. Nelson and Brennan also continued to strike Owens a number of times with the bat. The two eventually dragged Owens' body to nearby bushes, where Owens later died.
>
> Nelson and Brennan picked up Tina Porth and Misty Porth and the four left the city in Owens' car. After stopping in Daytona Beach, the four left the state and drove to New Jersey. At different times during the trip, Nelson and Brennan informed Tina and Misty that they had murdered Owens. Both Tina and Misty testified at trial.
>
> Nelson and Brennan were apprehended by law enforcement officers in New Jersey. Nelson gave a video and audiotaped confession. In the confession, Nelson detailed his account of the

> murder, both at the crime scene and at the place where the bat was recovered. The videotaped confession was played to the jury. Additionally, an analyst for the Florida Department of Law Enforcement testified that blood stains on Nelson's shoes, the box cutter, and a pair of underwear that the box cutter was wrapped in all matched Owens' DNA.
>
> Nelson was found guilty of first-degree murder and robbery with a deadly weapon. At the penalty phase, the jury recommenced death by a twelve-zero vote. The trial court found three aggravators: (1) the murder was committed in the course of a robbery; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). The trial court also found that one statutory mitigator (age of eighteen at the time of the crime) and fifteen nonstatutory mitigators were established. The statutory mitigator was given great weight. The first nonstatutory mitigator was given substantial weight, and the remaining nonstatutory mitigators were given from moderate to little weight. The trial court concluded that Nelson failed to establish the following statutory mitigators: (1) that he acted under the effect of extreme emotional disturbance, (2) that he was an accomplice with minor participation, (3) that he acted under the domination of another person, and (4) that his capacity to appreciate the criminality of his conduct was impaired. The trial court followed the jury's recommendation and imposed the death penalty for the first-degree murder conviction. The trial court sentenced Nelson to 189 months in prison for the robbery conviction.

Nelson v. State, 748 So. 2d 237, 239-40 (Fla. 1999).

Collateral Claims Presented in Post Conviction Proceeding

Nelson presented four post conviction claims, all involving alleged constitutional ineffective assistance of trial counsel. Those claims were:

1. Claim I: Trial counsel was ineffective for failing to assure that Nelson was tried by a fair and impartial jury during the guilt/innocence and penalty phases of the trial. This included counsel not objecting to the inclusion of certain jurors who felt that death should be automatic if Nelson was convicted of first-degree murder. It also included not objecting to the state's challenge to at least one person who opposed the death penalty in general but could otherwise follow the law and serve as a fair juror. (R9/790-97.)

2. Claim II: Nelson asserted in a second claim that a substantial amount of non statutory mitigating evidence regarding (a) Nelson's history of substance and drug abuse, (b) his subjection to sexual abuse by a step-father in a dysfunctional family situation, and (c) his bi-polar and ADHD conditions -- was not presented to the jury by his trial counsel during the penalty phase of the trial. (R9/802-08.) In addition, Nelson claimed (d) that his attorney failed to object to improper, prejudicial statements made by the prosecution during closing arguments in the penalty phase of the trial. (R9/808-10.) Furthermore, he contended that (e) his trial counsel failed to preserve his right to a fair trial regarding the issue of a tattoo that came up between the end of the guilt/innocence phase and the penalty phase of the trial that was very prejudicial to the defendant. (R9/810-12.) Finally,

Nelson asserted that (f) the jury that tried him was never duly sworn as required by law. (R9/812.)

3. Claim III: The cumulative effects of various ineffective acts and omissions of his trial counsel resulted in his conviction and death sentence. (R9/813.)

4. Claim IV:[4] Co-defendant Brennan's resentence to life in prison was newly discovered evidence entitling Nelson to be resentenced to life in prison as well, especially given the inconsistent positions taken by the state regarding Brennan's greater maturity and, therefore, culpability. (R9/814-16.)

Evidence Presented During Post Conviction Evidentiary Hearing

Mr. Nelson was the first witness during the post conviction evidentiary hearing. He was represented at trial by Mr. Harold Stevens. (R10/1044.) Keith Brennan was his co-defendant. (R10/1044.) Nelson had just turned 18 by a few months as of the date of the homicide. (R10/1045.) Brennan was just shy of his 17th birthday at that time. (R10/1045.) Nelson was living at home with his mother and stepfather, Gregory Percifield. Both his mother and Percifield were present at the beginning of the trial, but left

[4] Mislabeled as Claim III in the Complete Second Amended Initial Motion for Post Conviction Relief. (R9/814.)

before it concluded. (R10/1045.) Nelson's natural father testified during the penalty phase. (R10/1045.)

Nelson was not drinking alcohol or using drugs on the night of the homicide but had been using drugs for an extended period of time before that. (R10/1046.) Shortly before the homicide, the defendant had been committed to the Southwest Florida Addiction Services facility in Lee County. (R10/1049) He was ordered there due to his drug use and "committing crimes." (R10/1049.) He ran away from the facility twice. (R10/1049.)

Percifield had become involved with Nelson's mother, Peggy Percifield, while they had been living in Indiana. While married to Nelson's mother, Percifield physically and sexually abused him for about a year and one-half. (R10/1047.) The sexual abuse caused Nelson to become very angry and to "explode" all at once. (R10/1047.) Nelson told his mother and Mr. Stevens about this prior to trial. His mother told him that she would kill Percifield if he did it again, but it was nothing "other than words." (R10/1048.) Percifield nevertheless began pressuring him (for sex) not long thereafter. (R10/1049.)

Nelson did not testify during the penalty phase although he wanted to. (R10/1048.) He said that an issue about a tattoo that he applied to his arm

before the penalty phase had come up and, according to his counsel, if he testified, the tattoo matter would be used against him. (R10/1048.) There was a substantial period of time between the guilt/innocence and penalty phases of his trial. (R10/1050.) He did not recall the trial judge telling the jurors not to discuss the case during this interim period. (R10/1050-51.) He was housed at the Lee County Jail. (R10/1050) It was there that he applied the tattoo himself. (R10/1051.) The tattoo read "Natural Born Killer." (R10/1051.) Somehow the media found out about it, and stories about the tattoo appeared in the local newspaper and on television. (R10/1051-52.) He believed that a fellow inmate told a guard about the tattoo -- and then it got to the news media. (R10/1059-60.) He recalled that the issue was addressed in court at the beginning of the penalty phase. (R10/1052.) He remembered that several jurors indicated that they had seen the media coverage of the matter yet they remained on the jury. (R10/1053.) Nelson felt great remorse for what he had done and wanted to testify to that effect at the penalty phase, a wish that he conveyed to Mr. Stevens. (R10/1053.) However, Mr. Stevens told him that it would not be beneficial for him to do so. (R10/1054.)

On cross-examination, Nelson said that he testified during the guilt/innocence phase and referenced his treatment for drug and alcohol

abuse, his stay at the Southwest Florida Treatment Center, and the sexual wrongdoing by his stepfather. (R10/1056.) He reiterated that he did not testify at the penalty phase based upon the advice of counsel because the state was going to use the information about the tattoo against him. (R10/1057.) Nelson would not concede that not testifying during the penalty phase because of the tattoo issue was a "strategy" decision. (R10/1057-58.) Nor would he concede that he would not have anything to add had he testified during that phase of the trial. (R10/1058.) He was not sure but he might have expressed some remorse at the end of his guilt/innocence trial testimony. (R10/1060.) He agreed that Mr. Stevens would have had no way of knowing that he was going to apply the tattoo before he (Nelson) did so. (R10/1060.)

Stephen Holland was the next witness for Mr. Nelson. He reported that Dr. Sidney Merin, a psychologist, testified for Nelson during the penalty phase of his state court trial. (R10/1067.) He confirmed that Nelson's mother was present at the beginning of the trial. She has since passed away. R10/1067. Her husband, Mr. Percifield (Nelson's step-father) was present for the first few days of the trial as well. (R10/1067.) Holland tried to find him, to no avail. (R10/1068.) There was about a three-week gap (from September 19, 1996-October 7, 1996) between the end of the guilt/

innocence phase and the beginning of the penalty phase. (R10/1070.) He reviewed the trial record and found that Mr. Stevens did not ask for an instruction -- and the trial court did not instruct the jury -- to refrain from reading or viewing media reports about the case during this interim period. (R10/1070.) It was during this interim period that Nelson applied the tattoo to himself while in the Lee County Jail. (R10/1070-71.)

Holland read press clippings regarding the case that appeared during this interim period. (R10/1069.) This included news stories regarding the tattoo issue. (R10/1069.) The tattoo said, "natural born killer." (R10/1072.) Two of the newspaper stories were introduced in evidence by stipulation as the defendant's Exhibits 1 and 2. (R10/1071-72.) Holland confirmed in this regard that a major issue during the trial was why Nelson participated in the crime. (R10/1072.) Holland also verified that several of the jurors admitted that they had seen some media coverage of the "Natural Born Killer" tattoo before the penalty phase began. (R10/1073.) This included jurors Krause, Dolan, Crawford and Wotitzky. (R10/1075.) All of these jurors remained on the jury during the penalty phase. (R10/1076.) Holland added that the record revealed a trade off between defense counsel, Mr. Stevens, and the prosecutor, whereby the State would not bring up the tattoo issue if the

defense would not argue that Nelson was remorseful about the killing of Thomas Owens. (R10/1073-74.)

Holland stated that Nelson's mother and his step-father, Mr. Percifield, were present at the beginning of the guilt/innocence phase of the trial, but they were not there under subpoena. (R10/1076.) Neither testified. (R10/1076.) On cross-examination, Holland acknowledged that he did not determine what additional information Percifield and Nelson's mother could have added to what was already in the record. (R10/1077.) He did not know whether they would have cooperated with the defense. (R10/1079.) Nor did he uncover any mental health mitigation that was not presented during the trial. (R10/1078.) As far as the jurors who had read about the tattoo matter prior to the penalty phase were concerned, he admitted that some indicated that they did not recall the details. (R10/1080.)

On redirect examination, Holland averred that juror Krause stated that he was upset by the tattoo and by the fact that he read that Nelson's attorney was going to rely upon a mental health expert during the penalty phase of the trial. (R10/1081-82.)

Harold Stevens was Nelson's lead trial counsel. He has been a member of the Florida Bar since 1978 and handled over 100 criminal cases, including first-degree murder cases during his career. (R10/1083-04.) The

Nelson case was his first capital murder case. (R10/ 1083-04.) He was board certified in criminal law since 1994 (R10/1095.)

Stevens conducted extensive pretrial discovery and hired a mitigation specialist to assist in the event there was to be a penalty phase. (R10/1084-85.) He also employed Dr. Sidney Merin, a psychologist, to assist the defense team regarding mental health issues. (R10/1085.) Mr. Stevens interviewed Nelson's mother and Mr. Percifield and found them to be cooperative. (R10/1086.) However, they absconded after opening statements at the guilt/innocence phase when it was revealed to them that "part of our defense was going to be that Josh was suffering sexual abuse at the hands of Mr. Percifield. They simply disappeared." (R10/1086.) They could not be located after that. (R10/1086.)

Stevens was not aware of any testimony regarding mental health mitigation or substance abuse that they were unable to bring out either during the guilt/innocence phase (through Nelson himself) or penalty phase (through Dr. Merin) of the trial. (R10/1086-87.) He did no hold back any available mental health information for strategic reasons. (R10/1087.) He was able to put on the stand during the penalty phase three of Nelson's aunts as well as his natural father. (R10/1087-88.) He gave Dr. Merin all the mental health information he had. (R10/1088.) He did not withhold any

objections to evidence during the penalty phase. (R10/1089.) He needed the extra time between the guilt/innocence and penalty phases of the trial to get the family members down from Indiana so that they could testify. (R10/1089.) He may have consulted further with Dr. Merin during this interim period. (R10/1090.) The Court advised the jurors not to discuss the case with each other but did not tell them not to read news reports or watch television during this time. (R10/1090.) He acknowledged that he should have asked the judge to advise the jurors not to read or watch news accounts of the trial -- but he did not know (had no reason to suspect) that anything might take place during this interim period. (R10/1091-92.) As far as swearing the jurors was concerned, he acknowledged that, at the time, the practice was that the jurors were not sworn in the courtroom, but in the jury room. (R10/1092.) That practice has now changed. (R10/1092.) He did not know of any prejudice to Nelson regarding this practice. (R10/1093.)

Stevens discussed with Nelson whether he should testify during the penalty phase. (R10/1093.) The feeling was that Nelson had already brought out in the guilt/innocence phase what he might testify to in the penalty phase. (R10/1093.) They (he and co-counsel) were blindsided by the tattoo issue and, since there was a popular movie named “Natural Born Killers” being shown at the time, they felt that it would be prejudicial to

Nelson if he took the stand and there was testimony about it. (R10/1094.) So there was a tradeoff reached -- the state would not mention the tattoo issue if the defense did not put Nelson on and have him express remorse. (R10/1094.) Nelson agreed to this strategy. (R10/1094-95) He said that he had consulted with another mental health expert, a Dr. Boorstein, and he provided Stevens with a report. However, that report was not helpful to Nelson. (R10/1096-97.)

Stevens added that Percifield had denied sexually abusing the defendant. (R10/1097.) Counsel said "even if Nelson's mother and Mr. Percifield had been under a subpoena, he did not think this would have stopped them from absconding. (R10/1098-1100.) Stevens did not ask for a continuance for the penalty phase until these two witnesses could be located and brought to court. (R10/1099.)

Stevens admitted that there was no strategic reason for not asking the trial judge for a cautionary instruction regarding avoiding reading about or viewing news accounts about the case during the interim between the end of the guilt/innocence phase and the beginning of the penalty phase -- instead, this constituted an "oversight." (R10/1100-1101.) He also admitted that the key question during the penalty phase was why Nelson would have done what he did. He felt that the "Natural Born Killer" tattoo answered that

question. (R10/1101.) He did not give a reason for not seeking to remove from the jury those jurors who had been advised of the tattoo situation during the aforementioned interim period. (R10/1102.)

On redirect examination, the prosecutor asked Mr. Stevens whether Mr. Nelson's mother was contacting witnesses and telling them something about whether they should or should not testify. Stevens answered, "I would think that she helped us to find the aunts and that type of thing." (R10/1102.) The prosecutor then asked Mr. Stevens, "do you remember any of them testifying about her asking them not to come to court or not to testify?" Stevens answered, "no." (R10/1102.)

SUMMARY OF THE ARGUMENT

The trial court erred in rejecting Nelson's post conviction claim that he was denied effective assistance of trial counsel when at least three persons holding strong views to the effect that the only appropriate punishment upon a conviction for first-degree murder was the death penalty were allowed to serve on the jury. All of these persons should have been successfully challenged for cause.

Defense counsel had the law on his side in this matter but failed to properly present the trial court with that legal authority so that a challenge for cause would have to be sustained. Furthermore, trial counsel failed to act so that persons who held general views against capital punishment but could put aside those views and follow the law could serve on the jury.

The result was a jury heavily skewed in favor of capital punishment and against the imposition of a natural life sentence.

The trial court also erred in rejecting Nelson's claim that trial counsel failed to protect him from adverse publicity generated after the guilt/innocence phase of the trial concluded and before the penalty phase began. The media discovered that Nelson had applied a tattoo to his arm that read "natural born killer." Stories about the matter appeared in the local newspaper and on television. Defense counsel had not asked the trial court

to instruct the jurors not to read or watch media accounts of the case during this interim period. As a result, some six of the jurors were advised of the tattoo matter before the penalty phase began. The tattoo answered the question the jurors must have been pondering -- what was the reason why Nelson participated in such a horrific crime? The situation was complicated by the fact that Nelson wanted to testify during the penalty phase and express remorse. However, had he done so, the state would have introduced evidence of the tattoo. Thus, Nelson was put in a no win situation by his attorney where he had to forfeit his right to testify during the penalty phase lest evidence about the tattoo come in. This was very prejudicial to Nelson because the jury never knew that he was remorseful.

Third, defense counsel failed to subpoena Nelson's mother and stepfather who came to the trial expecting to be called as witnesses. Both could have given very helpful mitigating evidence during the penalty phase. However, defense counsel did not subpoena them and, when some information damaging to the step-father came out during the guilt/innocence phase, both potential witnesses left and failed to attend the penalty phase. This constituted more ineffectiveness by counsel and prejudice suffered by Nelson.

Finally, the newly discovered evidence discussed below to the effect that the state took inapposite positions regarding Nelson's degree of culpability for the homicide and armed robbery warrants at the very least a new penalty phase trial.

ARGUMENT

Point I: The trial court erred in rejecting Nelson's claim that trial counsel was ineffective for failing to assure that Nelson was tried by a fair and impartial jury during the guilt/innocence and penalty phases of the trial.

Standard of Appellate Review:

This is a direct appeal of a final order of the trial court that denied Nelson's motion for post conviction relief in a capital case based upon claims of ineffective assistance of trial counsel. These claims involve mixed questions of fact and law. The order is reviewed *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits:

This point on appeal relates to Claim I of the Complete Second Amended Initial Motion for Post Conviction Relief in which Nelson claimed that he was denied effective assistance of counsel when Mr. Stevens failed to make sure that he was tried by an impartial jury. (R9/790-97.) The post conviction trial court found that Nelson's jury was neither unfair nor partial; thus no ineffective assistance of counsel claim was proven. (R11/1113-19.) Nelson asserts that this was reversible error.

A criminal defendant has a constitutional right to the effective assistance of counsel at trial in a capital case including both the guilt/innocence and penalty phases. *Strickland v. Washington*, 466 U.S. 668 (1984). Nelson claims he was denied that right during his trial. This is so because Nelson's counsel, Mr. Stevens, made errors that were significantly below the minimum standard of attorney effectiveness. Thus, trial counsel was not functioning as "counsel" in the context of the Sixth and Fourteenth Amendments to the United States Constitution and the Florida Constitution.

Article I, Section 16, of the Florida Constitution guarantees to every defendant in a criminal case an " . . . impartial jury . . . " Likewise, Amendment VI of the Constitution of the United States entitles a defendant to "an impartial jury of the State . . ." It is up to defense counsel to see that the client is protected in this regard. Failure to do so may constitute ineffective assistance of counsel. *Johnson v. State*, 921 So. 2d 490 (Fla. 2005); *Davis v. State*, 461So. 2d 67 (Fla. 1984); *Davis v. State*, 892 So. 2d 1073 (Fla. 2d DCA 2004).

Defense counsel failed Nelson in this regard. At two critical stages of the proceedings -- during voir dire and once the jury's verdicts were returned (that is, between the end of the guilt/innocence phase and the beginning of the penalty phase), situations arose that demanded careful attention to

making sure that a fair and impartial jury was a reality for the defendant. Unfortunately, counsel failed to react appropriately to these situations. The defendant suffered prejudice as a result because the jury that was seated was neither fair nor impartial, it found him guilty of first-degree murder and armed robbery, and it returned a death recommendation by a vote of 12-0. And based upon that jury recommendation, the trial judge imposed a death sentence. (R11/1113.) Nelson argues more particularly:

First Degree Murder = the Death Penalty

Nelson's first post conviction claim was that defense counsel failed to properly protect Nelson against potential jurors who would automatically vote for death in the penalty phase if Nelson were convicted of first-degree murder -- by not effectively challenging these persons for cause. (R9/790-92.) The post conviction court mistakenly asserted in this regard that "the defendant does not allege any specific facts in support of his contention that a valid basis existed for the defense's challenge for cause." (R11/1113.) Respectfully, this is not correct.

As Nelson alleged in his amended post conviction motion (R9/790-92), during *voir dire*, defense counsel asked all the potential jurors who were in the jury box, whether they agreed with potential juror Hancock that "everyone convicted of premeditated murder should receive the death

penalty." (OR, Vol. XIV, trial transcript, p. 163; R11/1113.) The trial court's post conviction order suggests that the trial transcript does not reflect which jurors raised their hands. (R11/1114.) The post conviction trial court is mistaken. The transcript, although not as clear as it might be, reveals that potential jurors Hancock and McMillin specifically indicated in the affirmative, as did other unidentified potential jurors. (OR Vol. XIV, trial transcript, p. 163.) Later during voir dire, defense counsel, without objection or exception from the prosecutor, identified those persons who said that they believed that anyone convicted of premeditated first-degree murder should automatically be sentenced to death. Those persons included potential jurors Torrone, Carlsen, Dolan, McLaughlin, Hancock, Wotitzky and Ligon. (OR Vol. XIV, trial transcript, p. 174.)

At this point, defense counsel moved to challenge these individuals for cause based upon their feelings (that a first-degree murder conviction should result per se in the imposition of the death penalty) as noted above. (OR, Vol. XIV, trial transcript, p. 174.) Obviously, the law does not permit potential jurors to hold the view that they would automatically impose the death penalty upon a determination that the defendant was guilty of first-degree murder. *Morgan v. Illinois,* 504 U.S. 719 (1992)*; O'Connell v. State,* 480 So. 2d 1284 (Fla. 1986). If there is reasonable doubt about the

juror's pro death penalty feeling in this regard as expressed by the potential juror himself or herself, the challenge for cause must be granted. *See Kessler v. State*, 752 So. 2d 545, 550 (Fla. 1999), quoting *Turner v. State*, 645 So. 2d 444, 447 (Fla. 1994).

The voir dire transcript reflects that the trial court asked defense counsel for legal authority for his cause challenges, but defense counsel could not provide any. (OR, Vol. XIV, trial transcript, pp. 174-75.) In particular, defense counsel failed to cite to the trial court Section 913.03(10) Florida Statutes (1995), which provides in part that a "juror (who) has a state of mind regarding the defendant (in) the case . . . that will prevent the person from acting with impartiality . . . can be challenged for cause. Defense counsel also failed to cite case decisions such as *Morgan v. Illinois,* 504 U.S. 719 (1992) and *O'Connell v. State*, 480 So. 2d 1284 (Fla. 1986), referenced above. The trial court, left with no guidance from defense counsel, then stated that it would ask these persons, notwithstanding their announced positions, whether they could "follow the law." (OR Vol. XIV, trial transcript, p. 175.) The trial court proceeded to do just that. (OR, Vol. XIV, trial transcript, pp. 175-77.) After advising the jury in this manner, the trial court said that all the subject jurors indicated that they would follow the law

and, therefore the cause challenges were denied. (OR, Vol. XIV, trial transcript, p. 175-77.)

Thus, instead of recognizing that a statement by many potential jurors that they believed that a first-degree murder conviction automatically warranted the death penalty should have set off alarm bells that a miscarriage of justice was about to take place, defense counsel sat on his hands while the trial court threw the murder-equals-death penalty jurors a soft question that allowed them to be superficially rehabilitated. This is not the correct way to handle the matter. *Hill v. State*, 477 So. 2d 553 (Fla. 1985). Where potential jurors initially hold positions that would render them unfair jurors, merely stating that the potential jurors could follow the law is not sufficient to overcome a cause challenge. *Salgado v. State*, 829 So. 2d 342 (Fla. 3d DCA 2003). Under these circumstances, the Court was obligated to press these venire persons to make absolutely sure that they could put aside their murder-automatically-equals the death penalty feelings and follow the law regarding the consideration of aggravating and mitigating circumstances as a way of determining whether to vote for life or death. "If there is basis for any reasonable doubt as to any juror possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be

excused on motion of a party, or by the court on its own motion." *Singer v. State*, 109 So. 2d 7, 24 (Fla. 1959). Defense counsel should have been prepared to cite the solid case law referenced above for the proposition that all these jurors deserved to be challenged for cause. While venire persons Torrone, Hancock, Ligon and McLaughlin were later successfully challenged for cause or peremptorily, jurors "Carlsen, Dolan and Wotitzky served on the Defendant's jury." (R11/1114) Defense counsel also failed to exercise a peremptory challenge under Section 913.08 (a), Fla. Statutes (1995), as to venire persons Carlson, Dolan and Wotitzky, although defense counsel had enough remaining peremptory challenges to do so.

The bottom line, then, is that three murder-equals-death persons ended up sitting on Nelson's jury as a result of defense counsel's ineffectiveness. The prejudice is clear and reversal is required.

Potential Juror Sankis

There is more. John Joseph Sankis was a potential juror. When first asked by the trial court whether the fact that he had a friend on the police force would cause him to be less than impartial, he answered, "no." (OR Vol. XV, trial transcript, pp. 290-91.) He also stated that he had not been the victim of a crime and that he had prior jury experience including serving as jury foreman. (OR Vol. XV, trial transcript, pp. 291.) He later stated that

he opposed the death penalty in general. "I do not believe in the death penalty." (OR Vol. XV, trial transcript, pp. 291.) He added in answer to questions from the trial judge and the prosecutor that there were no circumstances where he could vote for the death penalty. (OR Vol. XV, trial transcript, pp. 291-93.) However, when asked by defense counsel whether he could put aside his general opposition to the death penalty and follow the law including the rules for consideration of the aggravating and mitigating circumstances, he said that he could do that. The record shows the following exchange between defense counsel, the Court and Mr. Sankis in that regard:

Stevens: Mr. Sankis, I gather you don't feel that you would follow the law because you don't believe in the death penalty?

Sankis: Correct.

Stevens: Wouldn't you agree with me that the death penalty cases require a cross segment of society on a jury?

Sankis: Yes.

Stevens: And that the ideal jury should have people that draw from both sides, those that favor and those that oppose the death penalty, would you agree with that?

Sankis: Yes.

Russell: I am going to object to the question. I guess it's already been answered but I don't know what the ideal jury is and I think it's --

The Court: I am going to permit it.

Russell: -- unfair.

Stevens: And having for example, only people who are in favor of the death penalty would not be fair?

Sankis: I would not think so.

Stevens: Now given the way you feel about the balanced jury composition, couldn't you put aside your own personal opposition to the death penalty and follow the law as instructed by Judge Nelson in order to give this defendant a fair trial?

Sankis: Exactly what do you mean by that?

Stevens: Well, I mean, could you sit and deliberate fairly?

Sankis: Yes.

Stevens: And listen to the instructions?

Sankis: Yes.

Stevens: And take those things into consideration which the judge says you should take into consideration, and weigh them fairly?

Sankis: Yes.

Stevens: I have no further questions, Your Honor.

The Court: Sir, with that in mind, is there any circumstances in this case, in which you could ever vote for the death penalty?

Sankis: No.

(OR, Vol. XV, trial transcript, pp. 298-300.)

The record indicates that Mr. Sankis was later told that he was free to leave. (OR Vol. XV, p. 305.) However, it is not clear if his dismissal was based upon any kind of legal challenge, peremptory or for cause.

The trial court put too much emphasis on Mr. Sankis' general opposition to capital punishment even though he assured Mr. Stevens that he could follow the law. This was error and Mr. Stevens should have taken steps to see that Mr. Sankis was not summarily dismissed as a juror from the proceedings. In *Witherspoon v. Witt*, 469 U.S. 412 (1985), the Supreme Court of the United States held that a potential juror may not be challenged for cause simply for holding moral or religious views against the death penalty -- so long as he or she can put aside those views and follow the law as provided by the trial court. And trial counsel has the obligation to effectively cite the correct law to the court in order to assure that persons such as Mr. Sankis were not improperly excluded from the proceedings. *O'Connell v. State*, 480 So. 2d 1284 (Fla. 1986). This Mr. Stevens did not do.

The result was a jury skewed in favor of the imposition of the death penalty upon a conviction for first-degree murder coupled with the summary dismissal of Mr. Sankis who had reservations about capital punishment but could set aside his feelings and follow the law. Clearly Mr. Nelson's right to

fair and impartial jurors to decide his fate was lost due to his lawyer's ineffectiveness, and a new trial is required to redress the situation. This is especially true where the defendant had insult added to injury by inclusion of pro death penalty jurors and exclusion of persons opposed to capital punishment. *O'Connell v. State*, 480 So. 2d 1284 (Fla. 1986).

Point II: The trial court erred in rejecting Nelson's claim that he was denied effective assistance of counsel during the penalty phase of his state court trial because his attorney failed to protect him from adverse publicity related to the tattoo issue.

Standard of Appellate Review:

Like Issue I, this issue involves a direct appeal of a final order of the trial court that denied Nelson's motion for post conviction relief in a capital case based upon a claim of ineffective assistance of trial counsel. This claim involves mixed questions of fact and law. The order is reviewed *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits:

This was Nelson's Claim II(d)[5] of his Complete Second Amended Initial Motion for Post Conviction Relief. (R9/810-12.) The trial court

[5] It should have been labeled Claim II(e) and was referred to as such in the trial court's final order denying it. (R11/1125-27.)

rejected Nelson's claim of lawyer ineffectiveness based upon the tattoo matter. (R11/1125-27.) This was error.

There was about a three-week gap (from September 19, 1996 until October 7, 1996) between the conclusion of the guilt/ innocence phase and the beginning of the penalty phase. (R10/1070; R11/1125.) During that time, Nelson, while incarcerated in the Lee County Detention Center, applied a tattoo on his arm that read, "Natural Born Killer." (R11/1125; R10/1070-71.) As stated above, Steve Holland reviewed the trial record and discovered that defense counsel did not ask for a cautionary instruction at the conclusion of the guilt/innocence phase -- and the trial court did not instruct the jury -- to refrain from reading or viewing media reports about the case during this interim period. (R10/1070.) Nor did defense counsel seek an order of sequestration from the trial court. (R11/1125.)

Holland read press clippings regarding the case that appeared during this interim period. (R10/1069.) This included news stories regarding the tattoo issue. (R10/1069-72.) (R11/1125.) Two of the newspaper stories were introduced in evidence as the defendant's Exhibits 1 and 2. (R10/1071-72.) Mr. Holland confirmed in this regard that a major issue during the trial was why Nelson participated in the crime in the first place. (R10/1072.) Holland also verified that six of the jurors admitted that they

had read media coverage of the trial and all but one learned about the "natural born killer" tattoo before the penalty phase began. (R10/1073.) This included jurors McFalls (who read the article about the tattoo), Crawford (who did not mention reading about the tattoo), Dolan (who read about the tattoo in the newspaper), Kraus (who read about the tattoo and felt that he would be biased against Nelson because of the tattoo and because the defendant was going to bring in a mental health expert to testify), Dennis (who read about the tattoo) and Wotitzky (who learned about the tattoo). (R10/1075; R11/1114; OR penalty phase transcript, pp. 48-60.) All of these jurors remained on the jury during the penalty phase. (R10/1076; R11/1114, 1125.) This created a dilemma for the defense in terms of how to deal with the media revelation about the tattoo. Holland testified that a trade off between defense counsel, Mr. Stevens, and the prosecutor was the result whereby the state would not bring up the tattoo issue if the defense would not put Nelson back on the stand to express remorse about the killing of Thomas Owens. (R10/1073-74.) Sequestration of the jury or, at the very least, a cautionary instruction from the trial court about reading/watching media accounts of the case, would have prevented this situation from happening. However, as stated, Mr. Stevens neither asked that the jury be

sequestered nor that the trial judge instruct the jurors not to consider accounts of the proceedings in the media. This is clear ineffectiveness.

Admittedly, Nelson is required to show prejudice in this regard. *Pope v. State*, 569 So. 2d 1241 (Fla. 1990). That is not difficult and is based on common sense. Nelson went into the penalty phase with a pro death penalty jury that did not contain one person who had even general qualms about capital punishment. The jury had found him guilty of a heinous crime. Surely the jury would want to hear the defendant state unequivocally during the penalty phase that he had remorse for what he had done. The last thing that needed to happen was a situation where the jurors could receive extraneous, explosive, highly prejudicial, and easy to misinterpret non-record information as to why Nelson participated in this terrible crime. But that is exactly what they got. Stated differently, the jury was placed in a position where it would really have no choice but to vote for death because, from news accounts, Nelson was just a cold blooded, "Natural Born Killer," unwilling to feel any remorse whatsoever for his actions.

The trial court rejected this post conviction claim in part because sequestration would not have been practical ("reasonable") given the three-week intermission. (R11/1125.) But that gap was due to the fact that Mr. Stevens was not ready to proceed to the guilt phase right after the conclusion

of the guilt/innocence phase. (R10/1089.) The trial court also credited Mr. Stevens' post conviction hearing explanation that the jury had "heard graphic, brutal evidence at trial, (and) he was not expecting anything newsworthy to happen, and he 'didn't think it could get any worse.'" (R11/1125.) But it did get worse because the jury was exposed to Nelson's extra-judicial poor judgment vis a vis the "natural born killer" tattoo --which offered an explanation of why he killed the victim in this case. Mr. Stevens could have prevented this but he failed to do so. This constituted ineffective assistance of counsel and Nelson suffered prejudice as a result. Vacature of the death sentence and a new penalty phase trial is the only proper remedy.

Point III: The trial court erred in rejecting Nelson's claim that he was denied effective assistance of counsel during the penalty phase of his state court trial because his attorney failed to call his mother and stepfather as witnesses in his behalf.

Standard of Appellate Review:

De novo except for the determination of factual issues which warrant deference by the reviewing court. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits:

This was sub claim II(b) of the defendant's Complete Second Amended Initial Motion for Post Conviction Relief. Nelson claimed that defense counsel was ineffective for not taking the proper steps to see that his

mother, Peggy Percifield, and stepfather, Gregory Percifield, testified during the penalty phase. The sub claim was rejected by the trial court. (R11/1121-22.) Nelson asserts that this was error.

Nelson was entitled to present, during the penalty phase of his state court trial, evidence regarding " . . . other factors in the defendant's background that would mitigate against imposition of the death penalty." Sec. 921.141(6)(h), Fla. Stat. (1995). Failure to present the testimony of all material witnesses, including lay witnesses, who could reasonably be expected to provide useful information in this regard can constitute ineffective assistance of counsel in a capital case. *Law v. State*, 847 So. 2d 599 (Fla. 2003); *Gutierrez v. State*, 778 So. 2d 372 (Fla. 2001); *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984). This is especially important in Mr. Nelson's case because on direct appeal, Justice Pariente noted in a concurring opinion that " . . . in this case, we have not had the benefit of a presentence investigation report, school records, treatment records or other information. This additional information would more fully assist us in performing our proportionality review and in assessing the strength of the evidentiary foundation for the mitigating factors." Justices Shaw, Anstead and Kogan joined in that opinion. *Nelson v. State*, 748 So. 2d at 247. Justice Pariente added, "one has only to consider the unemotional, matter-of-

fact way that Nelson confessed to the murder on videotape to realize that something in this eighteen year old's life had gone seriously wrong long before the committed the brutal crimes in this case. *Ibid*. Justice Anstead added, "(i)nformed decision-making is essential to the integrity of the judicial sentencing process." *Ibid*.

Nelson's mother was prepared to testify, among other things, that the defendant had a very troubling childhood that included being forced to drink vodka at a very young age when he began to cry. (R10/1196.) Mr. Stevens admitted that there is no better witness than a mother asking that a jury spare her son's life. (R10/1196.) However, Stevens did not have her under subpoena and, when information to the effect that Percifield sexually abused Nelson came out during the guilt/innocence phase of the trial, both Percifield and Peggy absconded so that they were not available for the penalty phase. (Steven testified: "She absconded, she took off," R10/1196.) Mr. Steven acknowledged that he did not move to continue the penalty phase nor did he try very hard to locate either Nelson's mother or Mr. Percifield. (R10/1197-98.) He should have done both.

The trial court found that "the fact that they (Percifield and the defendant's mother) absconded cannot be attributed to any failure or omission of trial counsel, who attempted to locate them." (R11/1122.) But

there is nothing in the record to suggest that Mr. Stevens made any real attempt to locate them. That is what subpoenas are for.

Nelson wanted to testify during the penalty phase. (R10/1048.) He could have reiterated the fact that Percifield sexually abused him. But since Mr. Stevens did not have either Percifield or his wife under subpoena and did not ask that the penalty phase be continued until they were found and brought to court, this opportunity was lost. In this regard, it is quite possible that Mr. Percifield would have admitted the sexual abuse. Or, even if once he was on the witness stand he asserted his Fifth Amendment right against self-incrimination or denied the sexual abuse charge, Nelson was there to refute it. Surely this would have had a powerful mitigating impact upon the jury and judge.

Point IV: The trial court erred in denying Nelson's newly discovered evidence claim based upon the position taken by the State regarding the reversal of Brennan's death sentence.

Standard of Appellate Review:

This Court reviews an order of the trial court that denies a post conviction claim of newly discovered evidence in a capital case *de novo* to determine whether the lower tribunal abused its discretion. The newly discovered evidence must have been unknown to the trial court, the defendant and counsel at the time of trial and not susceptible of being known

by the exercise of due diligence. The newly discovered evidence must be of such a nature that, had it been presented at trial, it would probably have produced an acquittal or life recommendation. The reviewing court must give deference to the trial court regarding its factual determinations, and those findings will not be disturbed so long as there is competent and substantial evidence in the record to support them. *Fototopolus v. State*, 838 So. 2d 1122 (Fla. 2002). "When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we review the trial court's findings on questions of fact, the credibility of witnesses and the weight of the evidence for competent, substantial evidence." *Jones v. State*, 709 So. 2d 512, 521, citing *Melendez v. State*, 718 So. 2d 746, 747-48 (Fla. 1998).

Merits:

After he was convicted and sentenced to death, Brennan's death sentence was reversed by this Court [6] because Brennan was seven days short of his 17th birthday at the time of the homicide. (R9/814-16.) *See Brennan v. State*, 754 So. 2d 1 (Fla. 1999.) Later, in a motion for rehearing filed by the state in an effort to get this Court to recede from its holding in *Brennan*,

[6] This claim was mislabeled as Claim III in the Complete Second Amended Initial Motion for Post Conviction Relief. (R9/814.)

supra, the attorney general took the position and advanced the legal theory that, notwithstanding his chronological age at the time of the offense, Brennan was just as involved in the murder as was Nelson -- and that Brennan was actually more emotionally mature than Nelson. The trial court found in this regard that "(t)he issue of emotional maturity was raised in a motion for rehearing of the Florida Supreme Court's decision to reduce Brennan's death sentence to life imprisonment because he was 16 years of age at the time of the offense." (R11/1129.) The state argued specifically in "although biologically older, Joshua Nelson (who was just a few months past his 18th birthday) appears in some was to be less mature emotionally than Keith Brennan." *See* the state's motion for rehearing in *Brennan v. State*, 754 So. 2d 1 (Fla. 1999); FSC Case No. 90,279. The attorney general reluctantly admits making this argument in its response to Nelson's motion for post conviction relief but tries to characterize it as nothing more than an "observation." ("The State's position that Nelson 'appears in some ways to be less mature emotionally' than Brennan was not a change of theory on behalf of the prosecution, but only an observation based on the evidence presented at the respective penalty phrase trials." (R9/863; 969.)

Whether the state's position in the *Brennan* case was a change of theory of the degree of culpability between Brennan and Nelson (that is, that

Brennan was more culpable because he was more mature than Nelson) -- or just an "observation," the result is the same. There is certainly nothing in the record to show that the state revealed this theory to Mr. Stevens during Nelson's penalty phase trial. Had the state done so -- and had it advanced this "theory" or "observation" to the jury and judge, clearly, the jury and judge would have had a very strong reason to arrive at a life over death decision for Nelson. This is especially true given the fact that Dr. Merin, a psychologist, testified during Nelson's penalty phase trial that Nelson had the emotional age of a 12 or 13 year old child. (R11/1128.)

The trial court erred in denied this claim at R11/1128-30. Relief in the form of a new penalty phase trial is required. *See State v. Parker*, 721 So. 2d 1147 (Fla. 1998).

CONCLUSION

The Supreme Court is requested to consider all four of Nelson's post conviction claims cumulatively. When taken together, Claims I-III warrant a finding of ineffective assistance of trial counsel with resulting prejudice sufficient to warrant a new guilt/innocence and penalty phase trial, and Claim IV entitles Nelson to a new penalty phase trial based upon newly discovered evidence. For the reasons set forth herein, the Court is requested to:

1. Reverse the final order (R11/1111-31) of the trial court rendered on March 15, 2010, that denied Nelson post conviction relief.

2. Remand the cause to the trial court.

3. Order that Nelson's post conviction motion be granted, that the judgments and sentences against Nelson be vacated, and that Nelson be afforded a new guilt/innocence and penalty phase trial.

4. Grant Nelson such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

Baya Harrison
310 North Jefferson St.
Monticello, FL 32344
Tel: 850.997.8469

Fx: 850.997.5852
bayalaw@aol.com
Court Appointed Counsel for
Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of Appellant has been furnished by electronic mail delivery and by U. S. Mail delivery, this 10th day of September 2010, to counsel for the appellee, State of Florida:

Hon. Steven B. Russell, State Attorney, and
Assistant State Attorney Dean Plattner
Office of the State Attorney
Twentieth Judicial Circuit of Florida
The Lee County Courthouse
1700 Monroe Street
Post Office Box 339
Ft. Myers, Florida 33901

Carol M. Dittman, Esq.
Senior Assistant Attorney General
Office of the Attorney General of Florida
Florida Department of Legal Affairs
Concourse Center 4
3507 Frontage Road
Suite 200
Tampa, Florida 33607

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant was prepared using a Times New Roman font, 14 point, not proportionally spaced, in compliance with the Florida Rules of Appellate Procedure.

_____
Baya Harrison