

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,481

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WILLIAM L. THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

This proceeding involves the summary denial of Mr. Thompson's motion for post-conviction relief. The motion was brought pursuant to Florida Rule of Criminal Procedure 3.850. The following symbols will be used to designate references to the record in this appeal:

"R." -- original court proceedings;

"PC-R." -- record on appeal from post-conviction proceedings.

**STATEMENT OF FONT**

Mr. Thompson's Reply Brief is written in Courier font size 12.

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## REPLY TO ARGUMENT I

The State argues that the circuit court was correct when it ruled that Mr. Thompson had either received all of the records to which he is entitled or had waived his right to receive the records (Answer Brief at 22). The fact that the trial court denied Mr. Thompson's public records claim on inconsistent alternative grounds -- either full compliance by the State or Mr. Thompson's waiver -- reveals the need for a hearing on this issue.<sup>1</sup> The circuit court's failure to hold a hearing prevented it from making accurate fact-findings regarding the public records; as a result, the court had no choice but to deny Mr. Thompson a hearing on alternative grounds, assuming that one of the two might be correct. However, the record in Mr. Thompson's case does not support either conclusion.

The State contends that the State Attorney's Office and the Metro Dade Police Department complied with record requests and that the State Attorney had no obligation to provide records in the possession of other agencies. Mr. Thompson has always argued that it is not the State Attorney's duty to provide records held

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<sup>1</sup>The State alleges that Mr. Thompson's Rule 3.850 motion "did not contain a request for a public records hearing." (Answer Brief at 23). Mr. Thompson specifically requested a hearing on all the claims contained in his motion to vacate. Counsel for Mr. Thompson also repeatedly informed the circuit court that a public records hearing should be held before the Huff hearing.

by other agencies and, in fact, that the State Attorney cannot vouch for the compliance of any other agency, including the Metro Dade Police Department. The fact that the State Attorney is not responsible for the compliance of the other agencies who possess records to which Mr. Thompson is entitled proves Mr. Thompson's point that a public records hearing is required: argument by the State Attorney that other agencies have complied in the absence of representatives of those agencies is insufficient for the court to determine whether those agencies have complied.

In support of its argument, the State cites Hoffman v. State, 613 So. 2d 405 (Fla. 1992), for the proposition that requests for public records should be made directly to the agencies. Mr. Thompson did exactly what was required of him under Hoffman and Chapter 119, Florida Statutes, by requesting records directly from the individual agencies. Either the State has adopted Mr. Thompson's argument about the limited role of the State Attorney's Office in regard to requests upon other agencies, or the State's real complaint is that all agencies upon whom public records requests were made should have received a copy of the Rule 3.850 motion. The agencies were aware of Mr. Thompson's public records requests, which were properly served under the public records law in effect at the time. The purpose of including the public records claim in the Rule 3.850 motion is to inform the circuit court of the issues before it. Mr.

Thompson is not required to serve copies on the agencies that are not in compliance with his requests for the simple reason that agencies that fail to respond to records requests are already aware of their noncompliance.

The State relies on Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993), for the proposition that access to public records will be deemed waived absent pursuit of the records before the circuit court. Mr. Thompson has repeatedly requested the public records to which he is entitled and sought the circuit court's assistance in obtaining records from agencies that had not responded to Mr. Thompson's requests. Lopez does not apply to the situation in this case.

The State repeatedly argues that Mr. Thompson waived his right to public records because he did not file a motion to compel. The State relies on Ventura v. State, 673 So. 2d 479 (Fla. 1996), to defend the circuit court's order in this case. Notably, the State quotes only that part of Ventura in which this Court recognized that "Ventura should have requested the records and moved the trial judge to compel compliance at an earlier date." (Answer Brief at 27). The State misrepresents this Court's holding in Ventura by taking one sentence out of the following context:

In reality, both sides are responsible for the delays in this case. Ventura should have requested the records and moved the trial court to compel compliance at an earlier date. **Likewise, the State should**



**have complied with the public records request in a timely fashion. Clearly, however, Ventura was entitled to receive and requested records for which no legitimate exemptions were filed.** This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure.

Ventura v. State, 673 So. 2d at 481 (emphasis added). Clearly, Ventura directs that both the State and the defendant have responsibilities under public records law. The failure of State agencies to comply with requests that are properly served cannot be the basis to deny the defendant access to records to which he is entitled.

Further, the State's argument about Mr. Thompson's failure to file a motion to compel does not defeat Mr. Thompson's claim that the circuit court erred in denying his Rule 3.850 motion before he had access to the records that entitle him to relief. Under the public records law in effect at the time, Mr. Thompson was not required to file a motion to compel in order to preserve his right to public records. The record in this case demonstrates that Mr. Thompson did all that was required to obtain the records and to preserve his right to receive them. The fact that Mr. Thompson did not file a motion to compel does not rebut his argument that he aggressively pursued the records to which he is entitled. The State also misrepresents the record when it claims that counsel for Mr. Thompson admitted that she had a duty to file a motion to compel (Answer Brief at 27).

Notably, the State does not cite any instance in the record where counsel for Mr. Thompson allegedly made this admission.

During the time that the circuit court had jurisdiction over Mr. Thompson's case, his counsel did everything she could to obtain the records that would prove Mr. Thompson's entitlement to relief. On August 19, 1996, this Court remanded Mr. Thompson's case to the circuit court, upon the State's motion, because the circuit court had erroneously denied the Rule 3.850 motion without conducting a Huff hearing. Rule 3.852, Florida Rules of Criminal Procedure, which requires that a motion to compel be filed within thirty days of an agency's failure to respond to a request for public records, went into effect on October 31, 1996, and was stayed November 26, 1996. The stay was not lifted until March 3, 1997. During the brief time that Rule 3.852 was in effect -- from October 31st through November 26th -- Mr. Thompson could not have filed a motion to compel because a motion to disqualify judge was pending before the circuit court. The motion, which was based on the circuit court's comments at an October 31st hearing, was filed on November 8th and was not denied until January 27, 1997. When the Rule 3.852 stay was lifted on March 3rd, Mr. Thompson renewed his public records requests upon those agencies that had not responded. His counsel would have followed the requirements of the new rule and filed the appropriate motions at the appropriate time, but Mr.

Thompson's Rule 3.850 motion was denied on March 6, 1997, only three days after the stay was lifted.

The State also mentions that Mr. Thompson did not file a motion for rehearing: "Even after the trial court entered its order on March 6, 1997, the Appellant failed to move for rehearing and instead filed his notice of appeal, depriving the lower court of jurisdiction on March 25, 1997. The Appellant's contentions are thus without merit." (Answer Brief at 35). The State's suggestion that Mr. Thompson's claim is without merit because he did not file a motion for rehearing is outrageous. A motion for rehearing is only one option available to a defendant whose motion has been denied.<sup>2</sup> In light of the court's apparent bias against Mr. Thompson, counsel knew that a motion for rehearing was an exercise in futility. The State implies that the circuit court would have done something to help Mr. Thompson obtain the records in his case if only his counsel had not deprived the circuit court of jurisdiction by filing a notice of appeal. The State is attempting to blame Mr. Thompson for the circuit court's premature denial of his claims and the State's noncompliance with his record requests. Counsel for Mr. Thompson repeatedly requested a public records hearing and clearly

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<sup>2</sup>Rule 3.850 (g) states that "[t]he prisoner may file a motion for rehearing of any order denying a motion under this rule within 15 days of date of service of the order." Fla.R.Crim.P. 3.850(g)(emphasis added).

informed the court that a Huff hearing was premature because Mr. Thompson did not have all the public records. After the circuit court ignored counsel's arguments and relied solely on the State to deny every claim, there was nothing more to be said on behalf of Mr. Thompson.

Mr. Thompson's initial Rule 3.850 motion, and every amended Rule 3.850 motion, included a claim that the State agencies had not complied with his public records requests. Counsel for Mr. Thompson repeatedly informed the circuit court that State agencies were in noncompliance and that Mr. Thompson was requesting the court's assistance in obtaining records so that he could file a complete Rule 3.850 motion. Counsel again informed the court that a public records hearing was required before Mr. Thompson could be expected to argue his entitlement to an evidentiary hearing at a Huff hearing. The circuit court ignored counsel's arguments and relied on the State's claim that the agencies had complied with Mr. Thompson's requests. The State now alleges that the State Attorney's Office is not responsible for the compliance of other State agencies. This has been the crux of Mr. Thompson's argument: because the State Attorney is not responsible for other agencies, it cannot vouch for their compliance. The State has unwittingly admitted that the State Attorney's argument to the circuit court is an insufficient basis upon which to deny Mr. Thompson's public records claim. Mr.

Thompson's case should be remanded so that he can obtain the public records necessary to prove the claims that entitle him to relief.

### **REPLY TO ARGUMENT II**

The State misstates the basis for Mr. Thompson's motion to disqualify the judge: "The trial court denied this motion as insufficient, because it was based on adverse rulings and questions seeking to clarify the parties' positions during the course of the litigation below." (Answer Brief at 35). Counsel for Mr. Thompson is well aware of the requirements for a motion to disqualify judge and would not have made such a motion based only on a judge's adverse rulings. Mr. Thompson's motion was based on comments by the circuit court judge that revealed bias and prejudgment of the issues. Bias against a party is a sufficient basis to disqualify a judge. In fact, disqualification is required if there is even "an appearance of bias." Taylor v. Hayes, 418 U.S. 488, 501 (1974). The Supreme Court has expressly rejected a standard that would require a litigant to prove actual bias. In re Murchison, 349 U.S. 133, 136 (1955).

Contrary to the State's claim, Mr. Thompson's motion to disqualify was not based on adverse rulings. Judge Barr revealed at the October 31, 1996, status hearing that she had prejudged Mr. Thompson's entitlement to relief before hearing argument from

counsel regarding the necessity for an evidentiary hearing.

Judge Barr's comment to the State Attorney -- "You say there is a way I can summarily deny this?" -- was made before any argument regarding an evidentiary hearing had been made. The purpose of the status hearing was to schedule a Huff hearing and to inquire what other issues were before the court. Judge Barr's apparent agreement with the State that Mr. Thompson was not entitled to a hearing forced counsel for Mr. Thompson to move to disqualify before presenting argument on the substance of Mr. Thompson's claim because the outcome of the Huff hearing was a foregone conclusion.

The State claims that Judge Barr called counsel to the bench to question the State on its position. The State claims that "the judge's questioning of a party, with respect to a relevant matter which has been previously set forth in the party's pleadings and argued in open court, so as to clarify the party's position, is not a ground for disqualification." (Answer Brief at 38). Counsel for Mr. Thompson agrees that questioning a party about its position is an insufficient basis on which disqualify a judge. However, that is not what occurred here. Judge Barr did not merely question the State about its position, which was clear at that point anyway and required no clarification. Judge Barr eagerly asked the State whether she could summarily deny Mr. Thompson's motion before hearing any argument on the substance of

Mr. Thompson's claims. Her comments clearly reveal her prejudice of the issues.

Nowhere in his Initial Brief does Mr. Thompson refer to Judge Barr's adverse rulings as a basis on which to disqualify her. However, the inconsistent ruling on the public records issue and the erroneous finding of procedural bar on Mr. Thompson's other claims is a result of Judge Barr's prejudice of Mr. Thompson's entitlement to relief. Because Judge Barr had already decided to summarily deny Mr. Thompson's Rule 3.850 motion, she blindly accepted the State's arguments on both the public records claim and the other claims in Mr. Thompson's motion. As a result, this Court is faced with the inconsistent and illogical ruling on the public records -- either that the agencies complied or Mr. Thompson waived his right to the records. The court's finding of a procedural bar for claims that could not possibly be barred because this is Mr. Thompson's first Rule 3.850 motion since his resentencing is also the result of Judge Barr's eagerness to deny Mr. Thompson relief and her automatic acceptance of the State's arguments. Curiously, the State's Answer to Argument III (the summary denial of Mr. Thompson's motion) seems to admit that the circuit court relied only on the State and ignored all arguments of counsel for Mr.

Thompson:

The lower court's ruling in turn specifically sets forth both its rationale - i.e. - whether a claim was procedurally barred,

insufficient or conclusively refuted by the record - **and its reliance upon the State's response**, with respect to each individual claim.

(Answer Brief at 41-42). Mr. Thompson did not rely on adverse rulings to disqualify Judge Barr but on her prejudgment of the issues revealed in her comments at the hearing. The fact that she denied all of Mr. Thompson's claims without considering his arguments and relying only on the State is further evidence of her bias against Mr. Thompson and demonstrates the prejudice he suffered as a result of the court's bias. This Court should remand Mr. Thompson's case to another judge who had not already determined that Mr. Thompson's Rule 3.850 motion is meritless.

#### **REPLY TO ARGUMENT III**

This appeal is based on the summary denial of Mr. Thompson's first Rule 3.850 motion since his resentencing. As discussed in Argument I, Mr. Thompson was denied access to the public records that would enable him to investigate and prove the claims that entitle him to relief. This Court remanded Mr. Thompson's case to the circuit court to conduct a Huff hearing to determine his entitlement to an evidentiary hearing. Counsel for Mr. Thompson repeatedly told the circuit court that he could not demonstrate his entitlement to relief on all the claims in his motion because he had been denied access to public records. As in Ventura v. State and Walton v. State, the circuit court in this case has prematurely dismissed Mr. Thompson's claims before the State



provided the public records. Despite the State's refusal to provide records, Mr. Thompson has pled detailed claims, including ineffective assistance of counsel claims, demonstrating that he is entitled to an evidentiary hearing.

#### **REPLY TO ARGUMENT VI**

The State attempts to recast this claim in order to support its argument that it is procedurally barred. As Mr. Thompson has alleged, the State claimed that Barbara Savage was unavailable to testify at Mr. Thompson's resentencing. Public records received by Mr. Thompson's counsel since that time reveal that the State was involved in making Ms. Savage unavailable so that her prior testimony would be read into the record. The State claims that "the circumstances of Savage's unavailability were fully set forth at both the resentencing and appeal" (Answer Brief at 52) completely misses the point that new evidence reveals that those circumstances were not as the State represented to the court previously. The State also argues that this claim is procedurally barred because there were claims related to Ms. Savage that were raised on direct appeal. The claims already raised include the erroneous finding of Ms. Savage's unavailability; the denial of funds for the defense to attempt to locate her; the denial of Mr. Thompson's confrontation clause rights; and the denial of the right to present mitigation through her testimony. Mr. Thompson admits that he has previously raised

claims regarding Ms. Savage's testimony; however, that does not bar him from raising other claims related to Ms. Savage that are supported by newly discovered evidence.

The State also claims that Mr. Thompson has failed to prove prejudice because the outcome of the resentencing would have been the same even if Ms. Savage had been available. The State suggests that because Mr. Thompson pled guilty, he was not prejudiced by Ms. Savage's testimony about the crime. The State ignores that Ms. Savage's testimony was relevant to the court's finding of the aggravating factors that support Mr. Thompson's death sentence. To suggest that Mr. Thompson was not prejudiced by Ms. Savage's testimony because he pled guilty assumes that the death sentence was a foregone conclusion. To the contrary, Ms. Savage's testimony contained highly prejudicial details that made a death sentence more likely. Ms. Savage's testimony was relied upon by the sentencing court to support the aggravating factors; the State also relied upon her testimony when it urged the jury to sentence Mr. Thompson to death.

#### **REPLY TO ARGUMENT VII**

Mr. Thompson has alleged that the circuit court erred in allowing the State to read Ms. Savage's testimony at the resentencing because doing so repeated the Hitchcock error that forced this Court to order a resentencing. The State has responded that because Mr. Thompson's counsel previously located

Ms. Savage and secured an affidavit from her, there was no error.

Introducing an affidavit, after the State read over 100 pages of prejudicial testimony, does not cure the error. Without an opportunity to question Ms. Savage about the truth of her prior testimony and her possible motives in testifying against Mr. Thompson and to fully explore the available mitigation, the circuit court denied Mr. Thompson his right to a fair sentencing.

Mr. Thompson's resentencing was infected with the same Hitchcock error that caused this Court to order a resentencing. When Ms. Savage testified, both the trial court and counsel for Mr. Thompson believed that his defense was limited to the statutory mitigating factors. Therefore, his counsel did not fully examine Ms. Savage who could have been a source of significant mitigation. In addition, Mr. Thompson's original counsel was ineffective in his cross-examination of Ms. Savage and this error was repeated at the resentencing when her prior testimony was read to the jury. The prior proceeding was tainted by Hitchcock error and it was improper to allow the State to use any testimony from that proceeding.

#### **REPLY TO ARGUMENT VIII**

The State has misrepresented the focus of this claim in order to rely on the same procedural bar argument. Mr. Thompson has argued that the circuit court erred in allowing the State to present evidence of a nonstatutory aggravating factor -- Mr.

Thompson's prior death sentence -- and then precluding Mr. Thompson from rebutting that evidence. The State rephrases the claim as the "improper exclusion of mitigating evidence" and argues that this claim was raised and rejected on direct appeal.

The State encouraged the jury to sentence Mr. Thompson to death because he had previously been sentenced to death two times. This improper argument misled the jury about its role in sentencing and suggested that a sentence other than death would be contrary to popular opinion because of the prior sentence. Mr. Thompson merely attempted to rebut the nonstatutory aggravating factor by explaining to the jury why he had been sentenced to death. Judge Durant's proffered testimony reveals that he would have sentenced Mr. Thompson to life if any mitigation had been presented. Thus, it is Mr. Thompson's first lawyer's ineffectiveness in failing to discover and present the available mitigation that led to the imposition of the first death sentence. The circuit court's error in admitting this nonstatutory aggravation caused Mr. Thompson to be prejudiced once again by his first lawyer's ineffectiveness because the prior death sentence was used as a reason to support a death sentence in this proceeding.

The fact that this jury returned a death recommendation by a vote of 7 to 5 despite the substantial mitigation demonstrates that Mr. Thompson was prejudiced by the court's error in

excluding this testimony. Eighth Amendment jurisprudence clearly establishes that a capital defendant must be permitted to present any evidence relevant to his character and the circumstances of the offense, Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

#### **REPLY TO ARGUMENT IX**

The State responds to Mr. Thompson's ineffective assistance of counsel claim by dividing the multitude of errors into four categories. However, this Court must consider the cumulative effect of the errors committed at Mr. Thompson's resentencing; a cumulative analysis leads to the inescapable conclusion that Mr. Thompson was prejudiced. In Harvey v. Dugger, this Court

evaluated the cumulative effect of trial counsel's error:

A number of Harvey's other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of Strickland v. Washington. However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel.

656 So. 2d 1253, 1257 (Fla. 1995). See also Strickland v. Washington, 466 U.S. 668 (1984)(effect of counsel's errors evaluated cumulatively).

The State argues that the claim that trial counsel was ineffective for failing to object to improper State argument is procedurally barred because it could have been raised on direct appeal. Ineffective assistance of counsel claims cannot be

raised on direct appeal and are appropriate during post-conviction. In addition, the failure to object to improper prejudicial comments constitutes a failure to preserve them for direct appeal. Because this is a claim of ineffective assistance of counsel, it is properly raised in Mr. Thompson's Rule 3.850 motion and is not an attempt to relitigate issues that could have been raised on direct appeal.

Trial counsel failed to object when the State Attorney told the jury: "If I asked all of you to imagine the most horrible kind of death that you could imagine, Sally Ivestor suffered."

(R. 1602). The State both admits and defends this error:  
The prosecutor should have asked the jury to "consider" as opposed to "imagine" the victim's suffering, which would have been perfectly appropriate as the State had alleged and had the burden of proving the HAC aggravating factor.

(Answer Brief at 60). The State Attorney must prove the aggravating factors through evidence, not by presenting his own opinion that a crime is "the most horrible" and by encouraging the jury to "imagine" the victim's suffering. The State similarly attempts to minimize the effect of the State Attorney's improper comments that the case is "horrible" and "the worst case" as "fair comments on the evidence." (Answer Brief at 61). These are not comments on evidence but expressions of personal opinion that are completely inappropriate at a capital trial. The fact that the State was seeking the heinous, atrocious or

cruel aggravating factor does not give the State Attorney license to make inflammatory comments. Aggravating factors must be proved beyond a reasonable doubt by the evidence not by the State's opinionated commentary. Trial counsel abdicated his role as Mr. Thompson's defender when he failure to object.

The State similarly defends the State Attorney's attacks on Mr. Thompson as comments on the evidence. The State Attorney personally attacked Mr. Thompson, calling him "a retarded bump-on-a-log" and accused him of "fooling 13 good Americans" when he testified at his co-defendant's trial (R. 3082-84). This unopposed attack on Mr. Thompson continued:

He's an anti-social personality, mean, bad, evil. That's all he is. He does what he wants, when he wants, how he wants, and he just don't care, just don't care.

(R. 3071). The State Attorney also lied to the jury that Mr. Thompson is "of average intelligence" despite the evidence to the contrary (R. 3072). The State Attorney also mocked the mitigation evidence as "minuscule, meaningless things." (R. 3087).

The State again attempts to minimize the State Attorney's misconduct:

The Appellant next complains of the prosecutor having called the Defendant "retarded", "bump-on-a-log," and allegedly urged the jury to use Defendant's prior testimony as non-statutory aggravation. Again, **the prosecutor's comments were in accordance with the mitigation testimony presented at the resentencing.**

(Answer Brief at 62)(emphasis added). The State cannot possibly believe that a expert psychiatrist's testimony about a person's mental retardation justifies a prosecutor referring to a defendant as "a retarded bump-on-a-log." Further, there is no testimony, expert or otherwise, that Mr. Thompson is a "bump-on-a-log." The State's attempt to minimize the effect of the State Attorney's personal attack on Mr. Thompson is without merit. In Ruiz v. State, 24 Fla. L. Weekly S157 (Fla. April 1, 1999), this Court reversed the defendant's conviction and sentence based on the cumulative effect of improper State Attorney arguments. In that case, the prosecutor expressed personal opinion on the merits of the case and personally attacked the defendant by comparing him to Pinocchio, and this Court found that the prosecutor "cross[ed] the line of acceptable advocacy by a wide margin." See also United States v. Garza, 608 So. 2d 659, 662 (5th Cir. 1979)(the role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying the evidence . . . he may not express his personal opinion on the merits of the case or the credibility of witnesses).

Mr. Thompson's counsel was also ineffective when she committed Hitchcock error by telling the jury that the all-inclusive mitigating circumstance had been limited by caselaw to a few enumerated examples (R. 3102-07). Mr. Thompson's case was already remanded by this Court due to Hitchcock error that



rendered his death sentence unconstitutional. The effect is the same when the error is committed by defense counsel because the jury is misled about its role in sentencing and the available evidence that could support a life sentence. Mr. Thompson's Eighth Amendment rights were violated because his sentencing proceeding did not comport with the requirements established by the Supreme Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio. In Lockett, the Court explained:

[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. 586, 604 (1978). The defense presented substantial nonstatutory mitigation in this case but then misinformed the jury about the effect of this evidence and its ability to consider it in support of a life sentence. Trial counsel's errors on this point were compounded by her concession that the State had proved three aggravating factors, which effectively relieved the State of its burden of proving the aggravating circumstances beyond a reasonable doubt, and her failure to object to the State Attorney's characterization of the mitigation evidence as "minuscule, meaningless things."

The State misunderstands Mr. Thompson's claim that his counsel was ineffective for failing to ensure that his rights

under Ake v. Oklahoma, 470 U.S. 68 (1985), were protected. The State responds that "the Defendant herein not only had the assistance of a psychiatrist (Dr. Stillman), but the assistance of two other psychologists (Drs. Carbonell and Marina), in addition to a neurologist, all of whom testified on his behalf." (Answer Brief at 79-80). Ake requires an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edward, 488 F.2d 1154, 1163 (5th Cir. 1974). See also United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So. 2d 734 (1986).

The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and their own organic or mental disturbance, and a patient's self-report is thus suspect. Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So. 2d at 737).

Mr. Thompson's counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 470 U.S. at 83. When counsel is aware that his client has a mental health problem, reasonably effective representation requires that the client's background be

investigated and that a mental health examination be conducted by a confidential defense expert. When counsel fails to fulfill these duties, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding as to guilt and sentencing. Although counsel sought the assistance of mental health experts in this case, information which was needed in order to render a professionally competent evaluation was not investigated and provided to those experts. As a result, Mr. Thompson's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 470 U.S. at 81 (emphasis added). The fact that Mr. Thompson was evaluated does not defeat this claim.

The State misrepresents Mr. Thompson's claim regarding the failure to object to jury instructions regarding expert testimony. The jury was told that "an expert's opinion is only reliable when given on a subject about which you believe him to be an expert." (R. 3321-22)(emphasis added). A witness's qualification to testify as an expert is an issue to be decided by the court and is not to be reconsidered by the jury. Ramirez v. State, 651 So. 2d 1164, 1167 (Fla. 1995). The State relies on this Court's opinions in Wournos v. State, 644 So. 2d 1000, 1010 (Fla. 1994), and Walls v. State, 641 So. 2d 381, 386 (Fla. 1994), to argue that the instructions given to Mr. Thompson's jury were

correct:

In Ramirez, this Court reiterated the trial court's gate-keeping function, in initially assessing and ruling on the admissibility of an expert's opinion testimony in light of the latter's qualifications. However, contrary to the Appellant's claim, this Court then held that, after the initial determination of admissibility by the trial judge, "it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject."

(Answer Brief at 73)(citing Wournos and Walls). Wournos and Walls do not support the State's argument. This Court in Wournos held that the State's cross-examination of a mental health expert regarding whether the defendant suffered from antisocial personality disorder or had a borderline personality disorder was proper because "the defense experts' vision of psychological science may include the fine distinctions they drew, but the law does not necessarily require the same conclusion." Id. at 1010. This Court explained that "qualified experts certainly should be permitted to testify on the question, but the finder of fact is not necessarily required to accept the testimony." Id. This Court's disposition of the issue in Walls was similar: "Certain kinds of opinion testimony clearly are admissible -- and especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted." 641 So. 2d at 390.

Mr. Thompson is not challenging that part of the instructions which told the jury that "you may believe or

disbelieve all or any part of an expert's testimony." (R. 3122).

However, the State fails to address the objectionable and improper part of the instructions which permitted the jury to revisit the issue whether a particular witness is qualified to testify as an expert. In fact, the State relies on Charles Erhardt's Florida Evidence for the following proposition which directly supports Mr. Thompson's claim: "Whether a witness is qualified as an expert is a preliminary question of fact which must be determined by the trial judge prior to the admission of the expert's opinion." (Answer Brief at 73-74). This is exactly the point argued by Mr. Thompson. The instructions given to Mr. Thompson's jury allowed the jury to reconsider the witnesses' qualifications and to reject their opinions with no legal basis to do so. Mr. Thompson was prejudiced by his counsel's failure to object to this instruction because expert testimony was the key source of mitigation evidence.

Mr. Thompson was prejudiced by the cumulative effect of his trial counsel's errors. The jury recommended a death sentence by the narrowest possible margin -- 7 to 5. If one more juror had voted for life, the trial court could not have overridden the recommendation in light of the mitigation in this case, including mental health and an abusive childhood. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Mr. Thompson is entitled to relief.

#### **CONCLUSION**

On the basis of the arugments presented herein and those presented in Mr. Thompson's Initial Brief, Mr. Thompson urges that this Honorable Court set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 20, 1999.

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