

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1511

KONSTANTINOS X. FOTOPOULOS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Fotopoulos' Amended Motion for Postconviction Relief. The motion was brought pursuant to Fla.R.Crim.P. 3.850. The following symbols will be used to designate references to the record in this appeal: "R."– Record on Direct Appeal to this Court; "P.R." – Record on first 3.850 Appeal to this Court Case No. 77,016; "R.R." – Record as to the Amended Motion for Postconviction Relief filed subsequent. All other citations will be self-explanatory or will otherwise be explained.

TABLE OF CONTENTS

PRELIMINARY STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

TABLE OF AMENDMENT, STATUTES & RULES x

STATEMENT OF THE CASE 1

PROCEDURAL HISTORY 7

SUMMARY OF ARGUMENT 12

STATEMENT OF THE FACTS 13

ARGUMENT I

THE COURT ERRED IN FINDING THE CLAIMS MADE IN THE
AMENDED MOTION AS BARRED. 26

ARGUMENT II

MR. FOTOPOULOS WAS DENIED EFFECTIVE ASSISTANCE
OF COUNSEL AT THE GUILT AND INNOCENCE AND
PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE
SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED
STATES CONSTITUTION AND THEREFORE NOT BARRED 28

A. Counsel failed to effectively request a necessary
continuance, investigate impeachment materials and
object to the admission of evidence. 36

B.	Trial counsel was ineffective for failing to seek to suppress and object to the admission of the .38 special pistol.	45
C.	Counsel’s performance was ineffective during the suppression hearing.	47
D.	Trial counsel was ineffective during the voir dire examination in that he failed to object to the State’s mischaracterization of the relevant facts with reference to the excusing of black jurors.	52
E.	Cumulative errors alleged herein denied Mr. Fotopoulos his fundamental rights to a fair trial and due process.	58

ARGUMENT III

THE FACT THAT DEIDRE HUNT RECEIVED A LIFE SENTENCE IS NEWLY DISCOVERED EVIDENCE JUSTIFYING A NEW TRIAL OR A NEW SENTENCING HEARING.	61
--	----

CONCLUSION	70
------------------	----

CERTIFICATE OF SERVICE	71
------------------------------	----

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>Amos v. State</u> , 618 So.2d 157, 163 (Fla. 1993)	46
<u>Atkins v. Attorney General</u> , 932 F.2d 1430 (11 th Cir. 1991)	30
<u>Baker v. State</u> , 336 So.2d 364 (Fla. 1976)	62
<u>Barclay v. Florida</u> , 463 U.S. 939, 952-954 (1983)	33
<u>Barefoot v. Estelle</u> , 463 U.S. 880, 913-914 (1983)	35
<u>Batson v. Kentucky</u> , 476 U.S. 79 (1986)	32
<u>Berger v. United States</u> , 295 U.S. 78 (1935)	68
<u>Blackshear v. State</u> , 521 So.2d 1083, 1084 (Fla. 1988)	52
<u>Blanco v. Singletary</u> , 662 Co.2d 435 (Fla. 1995)	60
<u>Breedlove v. Singleterry</u> , 595 So.2d 8 (Fla. 1992)	26
<u>Brown v. State</u> , 733 So.2d 1128 (Fla. 4 th DCA 1999)	57
<u>Bryant v. Scott</u> , 28 F.3d 411 (5 th Cir 1994)	30
<u>Bullington v. Missouri</u> , 451 U.S. 430 (1981)	33
<u>Cammarano v. State</u> , 602 So.2d 1369 (Fla. 5 th DCA 1992)	62
<u>Campbell v. State</u> , 679 So.2d 720 (Fla. 1996)	46
<u>Chambers v. Armontrout</u> , 907 F.2d 825 (8 th Cir.) cert. denied, 498 U.S. 950 (1990)	30, 31

<u>Chapman v. California</u> , 386 U.S. 18 (1967)	59
<u>Correll v. Duggar</u> , 558 So.2d 422 (Fla. 1990)	26
<u>Davis v. Zant</u> , 36 F3d 1536 (11 Cir. 1994)	68
<u>Derden v. McNeel</u> , 938 F.2d 605 (5 th Cir. 1991)	60
<u>Dowthitt v. Johsons</u> , 230 F.3d 733 (5 th Cir. 2000)	34
<u>Dunsizer v. State</u> , 746 So.2d 1093, 1094 (Fla. 2 nd DCA 1999)	47
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	67
<u>Foster v. State</u> , 2000 Fla. LEXIS 1755; 25 Fla. L. Weekly S667 (Fla. Sept. 7, 2000)	66
<u>Fotopoulos v. State</u> , 608 So.2d 784 (Fla. 1992)	5, 9
<u>Freeman v. Class</u> , 95 F.3d 639 (6 th Cir. 1986)	32
<u>Gafford v. State</u> , 387 So.2d 333, 337 (Fla. 1980)	66
<u>Garron v. State</u> , 528 So.2d 353 (Fla. 1988)	68
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963)	35
<u>Gore v. State</u> , 719 So. 2d 1197 (Fla. 1998)	33, 46, 47, 68
<u>Green v. Georgia</u> , 442 U.S. 95 (1979)	44
<u>Harris by and through Ramseyer v. Wood</u> , 64 F.3d 1432 (9 th Cir. 1995)	59
<u>Harris v. Reed</u> , 894 F.2d 871 (7 th Cir. 1990)	31
<u>Heath v. Jones</u> , 941 F.2d 1126 (11 th Cir. 1991)	58

<u>Hernandez v. Johnson</u> , 213 F.3d 243, 249 (5th Cir. 2000)	34
<u>Herrick v. State</u> , 590 So.2d 1190 (Fla. 2 nd DCA 1991)	62
<u>Hildwin v. Dugger</u> , 654 So.2d 107, 109 (Fla. 1995)	62
<u>Hunt v. State</u> , 613 So.2d 893 (Fla. 1992)	65
<u>Javor v. United States</u> , 724 F.2d 831, 834 (9 th Cir. 1984)	35
<u>Jones v. State</u> , 569 So.2d 1234 (Fla. 1990)	58
<u>Jones v. State</u> , 591 So.2d 911 (Fla. 1991)	61
<u>Jurek v. Texas</u> , 428 U.S. 262, 276 (1976)	36
<u>Keen v. State</u> , 775 So.2d 263 (Fla. 2000)	66
<u>Kimmelman v. Morrison</u> , 477 U.S. 365 (1986)	29
<u>Kishel v. State</u> , 287 So.2d 414 (Fla. 4 th DCA 1974)	52
<u>Kyles v. Whitley</u> , 115 S. Ct. 1555 (1995)	60
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	66
<u>Mack v. Blodgett</u> , 970 F.2d 614 (9 th Cir. 1992), cert. denied. U.S. 951 (1993) . 59	
<u>Magwood v. Smith</u> , 791 F.2d 1438 (11 th Cir. 1986)	67
<u>McMann v. Richardson</u> , 397 U.S. 759, 771 (1970)	28
<u>Mecks v. State</u> , 382 So.2d 673 (Fla. 1980)	27
<u>Medina v. State</u> , 573 So.2d 293 (Fla. 1990)	26
<u>Michelin North American, Inc. v. Lovette</u> , 731 So.2d 736 (4 th DCA 1999)	58

<u>Mofett v. Kolb</u> , 930 F.2d 1156 (7 th Cir. 1991)	31
<u>Nixon v. Newsom</u> , 888 F.2d 112 (11 th Cir. 1989)	31
<u>Nowitzke v. State</u> , 572 So.2d 1346 (Fla. 1990)	59
<u>Osborne v. Shillinger</u> , 861 F.2d 612 (10 th Cir. 1988)	29
<u>Overstreet v. State</u> , 712 So.2d 1174, 1177 (Fla. 3d DCA 1998)	57, 58
<u>Paty v. State</u> , 276 So.2d 195, 196 (Fla. 4 th DCA 1973)	48
<u>Powell v. Alabama</u> , 287 U.S. 45, 71-72 (1932)	35
<u>Preston v. State</u> , 564 So.2d 120 (Fla. 1990)	61
<u>Raulerson v. State</u> , 437 So.2d 1105 (Fla. 1983)	27
<u>Ray v. State</u> , 403 So.2d 956 (Fla. 1981)	58
<u>Ray v. State</u> , 755 So.2d 604 (Fla. 2000)	66
<u>Richardson v. State</u> , 546 So.2d 1037 (Fla. 1989)	61
<u>Rose v. State</u> , 675 So.2d 567 (Fla. 1996)	45
<u>Sanders v. Ratelle</u> , 21 F.3d 11, 1446 (9 th Cir. 1994)	30
<u>Silva v. State</u> , 344 So.2d 559, 564 (Fla. 1977)	52
<u>Sims v. Livesay</u> , 970 F.2d 1575 (6 th Cir. 1992)	30
<u>Smith v. Groose</u> , 205 F.3d 1045 (8 th Cir. 2000)	44
<u>Smith v. Wainwright</u> , 741 F.2d 1248 (11 th Cir. 1984)	45
<u>State v. Blakely</u> , 230 So.2d 698, 700 (Fla. 2 nd DCA, 1970)	52

<u>State v. Deguilio</u> , 491 So.2d 1129 (Fla. 1986)	58
<u>State v. Gonzalez-Valle</u> , 385 So.2d 681, 682 (Fla. 3 rd DCA, 1980)	52
<u>State v. Gunsby</u> , 670 So.2d 920 (Fla. 1996)	60
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	33, 34, 35, 57, 59
<u>Taylor v. State</u> , 640 So.2d 1127 (Fla. 1 st DCA 1994)	58
<u>Teffeteller v. State</u> , 439 So.2d 840 (Fla. 1983)	68
<u>Thomas v. Lockhart</u> , 738 F.2d 304 (8 th Cir. 1984)	29
<u>Tomlin v. Myers</u> , 30 F.3d 1235 (9 th Cir. 1994)	30
<u>Tosh v. Lockhart</u> , 879 F.2d 412 (8 th Cir. 1989)	30
<u>United State v. Basinski</u> , 226 F.3d 829 (7 th Cir. 2000)	49
<u>United States v. Cannon</u> , 88 F.3d 1495 (8 th Cir. 1996)	69
<u>United States v. Cronic</u> , 466 U.S. 648, 654 (1984)	28
<u>United States v. Karo</u> , 468 U.S. 705, 725 (1984)	49
<u>United States v. Matlock</u> , 415 U.S. 161, 171 (1974)	49
<u>United States v. Mitchell</u> , 1 F.3d 235 (4 th Cir. 1993)	64
<u>United States v. Salerno</u> , 937 F.2d 797 (2 nd Cir. 1991)	44
<u>United States v. Wolf</u> , 787 F.2d 1094 (7 th Cir. 1986)	32
<u>Urquhart v. State</u> , 211 So.2d 79, 85 (Fla. 2 nd DCA 1968)	52

Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989) cert. denied, 500 U.S. 954
(1991) 32

White v. State, 754 So.2d 78 (Fla. 3rd DCA 2000) 57

Williams v. Washington, 59 F.3d 673 (7th Cir. 1995) 29

TABLE OF AMENDMENTS, STATUTES & RULES

	<u>Page</u>
<u>United States Constitutional Amendments</u>	
Fourth Amendment	49
Fifth Amendment	28
Sixth Amendment	28, 29, 33
Eighth Amendment	28, 58, 60
Fourteenth Amendment	28, 58, 60
Florida Rule of Criminal Procedure 3.850	9, 10, 26, 27, 42, 50, 60
Florida Statute §777.011	8
Florida Statute §777.04	8
Florida Statute §782.04	8
Florida Statute §782.94	8

STATEMENT OF THE CASE

The Appellant, Konstantinos X. Fotopoulos, was indicted and charged with two counts of first degree murder, one count of conspiracy to commit first degree murder, two counts of solicitation to commit first degree murder, two counts of attempted first degree murder, and one count of burglary of a dwelling while armed. Specifically, the Indictment charged the Appellant with: Count I, on or about October 20, 1989, the Appellant and Deidre Hunt committed premeditated first degree murder of Mark Ramsey; Count II, on or about November 4, 1989, the Appellant and Deidre Hunt committed the premeditated first degree murder of Bryan Chase. (R. 3394); Count III, on or about October 1, 1989, through and including November 4, 1989, the Appellant, Hunt, Teja James, and Lori Henderson conspired to commit first degree murder of Lisa Fotopoulos (R. 3395); Count V, on or between October 31, 1989, and November 1, 1989, the Appellant, Hunt and Henderson solicited Teja James to commit first degree murder of Lisa Fotopoulos. (R. 3397).

The Appellant, Hunt, Henderson and James were also charged by Information in Case No. 90-6668 with attempted first degree murder of Lisa Fotopoulos on November 1, 1989. (R. 3400). In Case No. 90-1995, the Appellant along with others, was charged with on or about November 4, 1989, burglary of a

dwelling while armed. (R. 3398); Count II, the Appellant, Hunt, and Bryan Chase were charged with attempted first degree murder of Lisa Fotopoulos on or about November 4, 1989. (R. 3398); and in Count III, the Appellant and Hunt were charged with soliciting Bryan Chase to commit first degree murder of Lisa Fotopoulos on or about November 1, through November 4, 1989. (R. 3399).

On January 9, 1991, the Appellant appeared before the Honorable S. James Foxman, Circuit Court Judge with retained counsel, Tom Mott. Mr. Mott requested the court to permit him to withdraw, and to have the Appellant declared indigent and counsel appointed. (R. 3992). During this hearing, the State over the Appellant's objections conducted extensive cross-examination of the Appellant's financial status. (R. 3995-4028). The trial court ultimately declared the Appellant indigent, (R. 3466), and appointed Carmen F. Corrente, Esquire, to represent him. (R. 3467).

Various pre-trial motions were filed and heard on June 4-5, 1990, August 10, 1990, August 31, 1990 and October 5, 1990. Included was a Motion for Severance of Offenses, wherein the Appellant sought to sever Count I of the Indictment, the first degree murder of Kevin Ramsey, from the remaining charges, including Count II of the Indictment, the first degree murder of Bryan Chase. (R. 3794-3796). This Motion was originally heard on June 4, 1990. (R. 2867). The State gave a lengthy

proffer as to the anticipated testimony in support of keeping the charges together. (R. 2874-81). The Appellant disputed the proffer maintaining there was an insufficient connection between the murders of Mr. Ramsey and Mr. Chase. (R. 2882-2884). Based upon the proffer by counsel, the Motion to Sever Offenses was denied. (R. 2885). Thereafter, the Appellant filed a renewed Motion for Severance, (R. 3842-43), and an amended Motion for Severance. (R. 3916-18). These motions were also denied. (R. 3206, 3892).

Jury selection began on October 1, 1990, in Putnam County pursuant to the trial court granting Appellant's Motion for Change of Venue. (R. 3783-3786, 3835-3836). During voir dire, the Appellant objected to the State using peremptory challenges in a racially discriminatory matter. (R. 229, 434). The objections were overruled. (R. 230-231, 435-436).

At the conclusion of the State's case, the Appellant moved for a judgment of acquittal. (R. 2021-2027). The motion was denied. (R. 2027). The Appellant renewed his motion at the closed of all evidence. (R. 2479, 2480, 2569, 2570). Again, the motions were denied. (R. 2480, 2570).

The jury returned verdicts of guilty as to all offenses as charged on October 25, 1990. (R. 2817-2819). The Appellant was adjudicated guilty of all offenses. (R. 2821). The penalty phase commenced on October 29, 1990 with the jury

recommending the death penalty as to Count I, (Kevin Ramsey), by a vote of eight to four. As to Count II, (Bryan Chase), the jury also recommended death by a vote of eight to four. (R. 3332).

On October 29, 1990, the trial court conducted a sentencing hearing. The trial court entered a written order sentencing the Appellant to death for the Ramsey murder (R. 3390-91, 3936-39) and for the Case murder. (R. 3391-92, 3940-3944). As to the Ramsey sentence, the trial court found three statutory aggravating circumstances: 1) the Appellant was previously convicted of another capital felony or felony involving the use of threat or violence to the person; 2) capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and 3) capital felony was a homicide and committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. (R. 3936-3937). The trial court found no statutory mitigating circumstances, but found five non-statutory mitigating factors: 1) the Appellant was a good son; 2) the Appellant came from a good family; 3) the Appellant was hard working; 4) the Appellant had good manners and a good sense of humor; 5) the Appellant did complete his education through the masters level. (R. 3938-3939). As to the case murder in addition to the three aggravators found and noted above, the court also found the capital felony was committed while the Appellant was engaged or was an accomplice in the

commission or an attempt to commit a burglary and the capital felony was committed for pecuniary gain. (R. 3940-3941). The trial court did not find that any statutory mitigating factors and found the same non-statutory mitigating factors as found in the Ramsey case. (R. 3942-3943). As to the remaining convictions, the trial court sentenced the Appellant to concurrent life sentences. (R. 3390).

The Appellant's Motion for New Trial was denied. (R. 3961-3963). A timely Notice of Appeal was filed. (R. 3970). Thereafter, a Stipulation for Substitution of Appellate Counsel was filed wherein Douglas N. Duncan and Philip G. Butler, Jr., were attorneys of record for the Appellant.

The Florida Supreme Court affirmed the convictions and sentence in Fotopoulos v. State, 608 So.2d 784 (Fla. 1992). A timely Motion to Vacate the Judgment and Sentence of Death was filed on February 28, 1995. (P.R. 0002). On August 9, 1996, the Defendant filed a pro-se Motion to Vacate the Judgment and Sentence. (P.R. 174). This motion was effectively adopted and refiled by counsel on September 11, 1996. (P.R. 503).

Thereafter, the trial court entered an order of continuance on September 16, 1996 at the request of counsel and gave him 15 days to file an amended motion to vacate. (P.R. 501-502). On September 27, 1996 counsel filed an amended motion

to vacate. (P.R. 792).

A Huff hearing was held on March 31, 1997 and counsel for the Appellant and the State were given an opportunity to argue the issue of whether an evidentiary hearing should be granted on any claims. The trial court's order denying an evidentiary hearing on all claims was issued on May 16, 1997. (P.R. Vol. 8 page 47). A Notice of Appeal was filed. Attorney Craig Stephen Boda represented the Appellant until filing a motion to withdraw on May 5, 1998. On July 16, 1998, this Court entered an order appointing CCRC-Middle Region and requiring Appellant's Initial Brief by November 18, 1998. On August 17, 1998, counsel filed a Notice of Appearance. On October 2, 1998, counsel filed a Motion to Relinquish Jurisdiction and Toll Time due to public records requests. On November 16, 1998, counsel learned that the motions were denied.

On November 18, 1998, the initial brief of the Defendant, represented by Amy Settlemyre, was filed with this Honorable Court. The State, represented by Kenneth S. Nunnelley, filed an Answer Brief of Appellee on January 21, 1999. The Reply Brief of Appellant, represented by Amy Settlemyre, was filed on March 29, 1999. Following oral argument, this Honorable Court entered an order on August 25, 1999 finding Claims I, IV, V, IX, XII and XV procedurally barred and Claim III facially insufficient. (R.R. V. V, 585). This Honorable Court further found that the

Circuit Court shall hold a Huff hearing on the Appellant's Amended Motion and proceed to an evidentiary hearing. (R.R. V. V, 586). The Appellant, represented by Julius Aulisio, filed his Amended Motion with the 7th Judicial Circuit in and for Volusia County on November 29, 1999. (R.R. V. V, 708-780). The State, represented by Sean Daly, filed their Response to the Defendant's Motion on January 3, 2000. (R.R. V. V, 781-784). After hearing was held March 6 through 8, 2000 on Defendant's Amended Motion, in an Order signed June 15, 2000, the Honorable Judge Hammond (R.R. V. VIII, 1042-1056) denied all relief for Defendant. (R.R. V. VIII, 1060-1061). A Notice of Appearance was mailed by George E. Tragos on behalf of the Defendant on December 27, 2000. That this Court entered an Order allowing Mr. Tragos to substitute as counsel on January 5, 2001. A Motion for an Extension of Time to File Brief was mailed by the Appellant on January 31, 2001.

PROCEDURAL HISTORY

2. The Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida, entered the judgments and sentences at issue in this appeal;

3. On the 6th day of December, 1989, at the hour of 5:50 p.m. the fall

term grand jury of the Seventh Judicial Circuit, in and for Volusia County, Florida, indicted the Defendant for the following offenses:

- d. First Degree Murder; alleged as a violation of Section 782.04, Florida Statutes;
- e. First Degree Murder; alleged as a violation of Sections 782.94 and 777.011 Florida Statutes;
- f. Conspiracy to Commit First Degree Murder; alleged as a violation of Sections 777.04 and 782.04 Florida Statutes;
- g. Attempted First Degree Murder; alleged as a violation of Section 782.04 and 777.04 Florida Statutes;
- h. Solicitation to Commit First Degree Murder; alleged as a violation of Sections 777.04 and 782.04 Florida Statutes;

3. The Defendant entered a plea of not guilty as to all charges and requested a trial by jury thereon;

4. Between the dates of October 2, 1990 and October 25, 1990, a trial was held before the Honorable S. James Foxman, Circuit Judge, Seventh Judicial Circuit, in and for Volusia County, Florida, in Palatka, Putnam County, Florida;

5. On the 25th day of October, 1990, the jury found the Defendant, Konstantinos X. Fotopoulos, guilty on all counts (R. 2821);

6. On the 29th day of October, 1990, a penalty phase proceeding was held to determine the appropriate penalty in the Defendant's case. By an eight to four vote, the jury recommended that the Defendant be sentenced to death (R.

3332);

7. The trial court sentenced the Defendant to death on the 1st day of November, 1990 (R. 3390-91, 3936-39) (R. 3391-92, 3940-44);

8. The Defendant appealed his conviction and death sentence;

9. On the 15th day of October, 1992, the Supreme Court of the State of Florida affirmed the conviction and death sentence per curium without dissent. Fotopoulos v. State, supra. Rehearing was denied on December 24, 1992;

10. The Defendant then filed a Petition for Writ of Certiorari in the United States Supreme Court, October term, 1992;

11. The United States Supreme Court denied certiorari on the 17th day of May, 1993;

12. Based on the date of the certiorari denial, and pursuant to the express provisions of Rule 3.850, Florida Rules of Criminal Procedure, the Defendant filed a Motion to Vacate this result on February 28, 1995 (P.R. 002);

13. The Defendant filed a Motion to amend his Rule 3.850 Motion on May 17, 1995, which was denied by Circuit Judge Foxman;

14. The Defendant filed a Motion to disqualify Judge Foxman on January 18, 1996, which was granted on January 19, 1996 and this case was reassigned to Judge Kim C. Hammond of Flagler County;

15. A Huff hearing was scheduled for September 11, 1996 and was continued;

16. The Defendant filed an amended Rule 3.850 Motion and a Huff hearing was held on March 31, 1997;

17. On May 16, 1997, an Order was issued denying all relief (P.R. V. VIII, 47).

18. The Defendant sought and received permission to file a belated appeal on September 1997, and on November 18, 1998, the Defendant filed his initial brief in the Florida Supreme Court;

19. Following briefing by the parties and oral argument, this Honorable Court, in an Order dated August 25, 1999, found that the Defendant's Counts I, IV, V, IX, XII and XV were procedurally barred and that Count III was facially insufficient (R.R. V. V, 585);

20. This Honorable Court further found that the Circuit Court shall hold a Huff hearing on the Defendant's Amended Motion and proceed to an evidentiary hearing (R.R. V. V, 586);

21. The Defendant, represented by Julius Aulisio, filed his amended Motion to Vacate Judgments with the Seventh Judicial Circuit, in and for Volusia County on November 29, 1999 (R.R. V. V, 708-780);

22. The state, represented by Sean Daly, filed its Response to the Defendant's Amended Motion on January 2, 2000 (R.R. V. VI, 781-784);

23. After a hearing on the Defendant's Amended Motion was held before the Honorable Kim C. Hammond on March 6-8, 2000; an Order signed on June 15, 2000, the Honorable Kim C. Hammond denied all relief for the Defendant (R.R. V. VIII, 1042-1056);

24. A timely Notice of Appeal was filed by the Defendant on July 14, 2000 (R.R. V. VIII, 1060-1061);

25. This appeal to the Florida Supreme Court follows from the denial.

SUMMARY OF ARGUMENT

The lower court erred in denying Mr. Fotopoulos' Amended Motion. The files, records and testimony show that Mr. Fotopoulos is entitled to relief. The court erred in finding that Mr. Fotopoulos' issues were either barred or not proven. A new trial or re-sentencing should be granted in this matter because Mr. Fotopoulos was ineffectively represented by trial counsel, and newly discovered evidence would have probably effected the verdict and sentencing.

Ineffective assistance of counsel cannot be barred even though that ineffective assistance is exhibited by errors which could have been raised on direct appeal. Counsel's failure to recognize those errors, object to those errors, as well as his failure to investigate the case, present witnesses, move for a continuance, move to suppress evidence, all are manifestations of his ineffective representation. These issues are raised as errors by trial counsel not as errors by the trial court.

The second issue involving the newly discovered evidence was impossible to discovery during the course of the trial. The fact that Deidre Hunt received a life sentence taken with the arguments of the prosecutor involving her credibility, plus the attacks on Mr. Fotopoulos as being a Greek terrorist, had an effect on the heart of the defense. Whether Miss Hunt was dominated or whether she did these crimes on her own, was key in this trial.

STATEMENT OF THE FACTS

Those facts necessary for consideration of the issues raised herein on appeal will be discussed:

Sergeant Larry Lewis of the Daytona Police Department testified that on November 7, 1989, he and other officers went to an area known as the Strickland Shooting Range in Volusia County pursuant to information they had obtained from Mr. Teja James about a homicide. (R. 575). They were unable to locate a body. (R. 573-574). Later that same day, Deidra Hunt took Lewis and other law enforcement officers back out to the shooting range. With Hunt's assistance, a badly decomposed body was discovered. It was estimated that the body had been left for a number of weeks. (R. 584). The remains were later stipulated to have three bullet wounds to the chest. (R. 594). It appeared to the officers that he had been tied up at one point. (R. 594). He was wearing a Harley Davidson tee shirt. (R. 594).

Dr. Arthur J. Botting, District Medical Examiner in and for Volusia County, testified without objection as an expert in forensic pathology that on November 8, 1989, he performed the autopsy on Mr. Ramsey. (R. 627-28). During the autopsy, the doctor recovered two small caliber bullets from the trunk (chest) area, and a third from the cranial cavity. (R. 629). The three bullets had "the appearance of

.22 caliber bullets.” (R. 639). Dr. Botting testified that the .22 caliber shot to the skull was the fatal wound, (R. 673), and this shot would have rendered Ramsey brain dead and immediately unconscious. Within a reasonable degree of medical certainty, Dr. Botting opined that the cause of Mr. Ramsey’s death was multiple (four) gunshot wounds to the chest and head. (R. 673). Subsequent to his initial autopsy, Dr. Botting viewed a videotape of the Ramsey shooting. Based upon this viewing, he concluded there was an additional gunshot wound to the chest area. (R. 629). Also, subsequent to his initial autopsy, Dr. Botting was asked whether there was a possibility of a second gunshot wound present in the skull, and in particular whether such wound was caused by a high velocity type of ammunition. (R. 640). Dr. Botting was shown Mr. Ramsey’s skull which had been cleaned up, and reconstructed. (R. 640). He also consulted with Dr. Peter Lipkovich, Medical Examiner for Duvall County, Florida. (R. 640). In re-examining the skull, Dr. Botting concluded that there was a second gunshot wound to the skull which was consistent with a high powered weapon such as an AK-47 using military full metal jacketed round ammunition. (R. 642, 643-644). This second examination was conducted on July 31, 1990. (R. 672).

Marjean Powell, the fiancé of Mr. Ramsey, testified that she last saw him on October 20, 1989, at which time he was dressed in a Harley Davidson tee shirt. (R.

683). She saw Ramsey with Mr. Fotopoulos, and later saw him talking to Deidre Hunt. (R. 684). Ms. Powell acknowledged that a trespass warning had been issued at Mr. Fotopoulos' request prohibiting Mr. Ramsey from being at Fotopoulos' business establishment. (R. 688).

Deidre Hunt testified that she arrived in Daytona Beach in July, 1989. She obtained a job as a bartender at Mr. Fotopoulos' business, Top Shots, and developed a relationship with Mr. Fotopoulos. Over objection, Hunt was permitted to testify that Mr. Fotopoulos had threatened her with a pistol, thrown a knife at her (R. 728), slapped her, (R. 747), bound her hands with a coat hanger, and burned her breast with a cigarette. (R. 750). Additionally, Hunt was allowed to testify that Mr. Fotopoulos claimed to be an Israeli terrorist assassin, (R. 756) that he had killed many people, (R. 756), that he was a member of a Hunter and Killer Club comprised of paid assassins to kill people, (R. 757), and was employed by the CIA. (R. 758).

Hunt testified that in mid to late October, 1989, she was asked by Mr. Fotopoulos to look for Mr. Ramsey. (R. 774). Hunt, Ramsey and Mr. Fotopoulos went out to the Strickland Rifle Range. Hunt had not been told what was to happen (R. 775). After arriving at the rifle range, according to Hunt, Mr. Fotopoulos told her she was going to have to shoot Ramsey or she would die.

(R. 777). Hunt testified that she felt she had no choice but to shoot Ramsey. (R. 778-780). After Ramsey was tied to a tree and told he was being initiated into a club, (R. 781-782), Hunt testified that she shot Ramsey three times in the chest, and then walked up to him and shot him once in the temple. (R. 783-784). She further claimed that Mr. Fotopoulos subsequently shot Ramsey once in the head with his AK-47. (R. 785-787). Hunt testified that Mr. Fotopoulos videotaped the shooting. (R. 783). According to Hunt, Mr. Fotopoulos told her that “if she ever tried to run” that the videotape would be turned over to the police. (R. 791).

Hunt claimed the next time she saw Mr. Fotopoulos he told her she would have to kill his wife and if she did not cooperate, he would turn over the Ramsey shooting videotape to the police. (R. 792-793). Later, Hunt claimed Mr. Fotopoulos brought up a plan where Hunt would hire someone else to kill Lisa Fotopoulos (R. 794) for the \$700,000.00 insurance money (R. 794-795). Hunt approached Michael Cox and offered him \$10,000.00 to kill Lisa Fotopoulos. Cox was to make it look like a robbery at Mrs. Fotopoulos’ business. (R. 796-797). Hunt next approached J.R. Newman to kill Mrs. Fotopoulos. Like Cox, this plan never materialized. (R. 802-803). Hunt testified she then approached Teja James, the boyfriend of her best friend Lori Henderson. (R. 805). The plan was for Mr. James to stab Mrs. Fotopoulos at a nightclub on Halloween night. (R. 812-814).

This plan failed (R. 817) and then Hunt, Henderson and James located a .22 semi-automatic gun. (R. 818-819). James was to shoot Mrs. Fotopoulos at work and make it look like a robbery. (R. 822). On November 1, 1989, James went to Mrs. Fotopoulos' business where his attempt to kill Mrs. Fotopoulos failed. (R. 825). Hunt testified that Bryan Chase was next approached. He agreed to kill Mrs. Fotopoulos for \$5,000.00 (R. 828). Hunt gave Chase the same silver .22 semi-automatic pistol that Mr. James had located, which would jam after the first fired shot. (R. 833). Hunt testified she heard from Mr. Fotopoulos from the hospital that his wife had been shot, was alive and that he shot Chase. (R. 894-895). Hunt testified that eventually she went to the police voluntarily with her story. (R. 901). Hunt testified that she plead guilty to first degree murder of Kevin Ramsey and Bryan Chase. (R. 1066). She was sentenced to death. (R. 1076). She acknowledged that she had previously refused to give a statement to Mr. Fotopoulos' lawyer and only a few days prior to her testifying had given a deposition. (R. 1077).

Detective William Adamy of the Daytona Beach Police Department testified that on November 22, 1989, he conducted a search at the Fotopoulos family residence yielding a brown bag which contained a videotape later identified as a videotape of Hunt killing Kevin Ramsey. Also contained on the videotape was an

unknown voice. (R. 1209-1213). In the barbecue pit area was a black vinyl bag containing an AK-47 and a .22 caliber pistol, along with bullets and other paraphernalia. (R. 1310-1315).

Carry Rathman, firearms expert with the Florida Department of Law Enforcement, testified that the three fired bullets recovered from Mr. Ramsey's body during the autopsy were fired from the recovered .22 caliber pistol. He also matched an expended AK-47 shell casing discovered in Mr. Fotopoulos' car with the AK-47 weapon. (R. 1931, 1934, 1939).

Ed Ross, Secret Service Video Operations, testified as an expert in the field of video reproduction, editing, authentication and lighting. (R. 1224-1228). Mr. Ross testified that the tape found by Detective Adamy was an original with no editing. (R. 1232).

Joseph Gallagher, State Attorney's Office investigator, testified that he prepared a voice identification line-up utilizing the unknown voice from the Ramsey murder tape with voices of seven other Greek men volunteers. (R. 1381). This voice line-up was presented to Lisa Fotopoulos, Dino Paspalakis, Tony Calderoni and Holly Ayscue, who all identified Fotopoulos as the unknown voice on the Ramsey tape. (R. 1397-1400). The voice line-up was also presented to Wendy Ayscue and two Daytona Beach Police Officers who had contact with Mr.

Fotopoulos because his business was located in the area where the officers patrolled. (R. 1402-1403). The officers and Ayscue were unable to make an identification, (R. 1411, 1412). The voice identifications were all done after Mr. Fotopoulos' arrest. (R. 1414).

Anthony Holbrook, retired professor of communications, was permitted, over objection, to testify as an expert in the field of speaker identifications. (R. 1432). He testified in comparing a known voice exemplar of Mr. Fotopoulos with the unknown voice was Mr. Fotopoulos. (R. 1463).

Teja James, testified that Deidre Hunt told him she and Mr. Fotopoulos had taken Ramsey out to the Strickland Firing Range where she shot Ramsey. (R. 1740). Hunt told James she shot Ramsey because "he was complaining all the time he was hungry." (R. 1740). Hunt also told James that Ramsey was killed because he was trying to blackmail Mr. Fotopoulos. (R. 1741). James stated on cross-examination that Deidre Hunt never told him that Mr. Fotopoulos had threatened or forced her to shoot Ramsey. (R. 1772). Mr. James testified that he was present when Hunt asked Mr. Fotopoulos why he had videotaped her murdering Ramsey. Mr. Fotopoulos allegedly replied that it was his insurance policy, to keep Hunt's mouth shut from going around telling everyone about his business. (R. 1820).

James Calderoni testified he worked at Mr. Fotopoulos' business and that he

tried to get Mr. Fotopoulos to end his relationship with Deidre Hunt. He told Mr. Fotopoulos that Hunt “had quite a bit” on him, in that Mr. Fotopoulos had sex with her, paid her bills, put her up in an apartment, etc. Mr. Fotopoulos allegedly responded that Hunt could never blackmail him because he had a videotape of her killing someone. (R. 1860).

On November 4, 1989, police officers were dispatched to the Fotopoulos family residence located at 2505 North Halifax Drive, Daytona Beach, Florida in reference to a break in and shots fired. (R. 1254). A statement was taken from Mr. Fotopoulos advising he was asleep, heard a gunshot, and saw a silhouette standing next to the bed. He picked up his gun and fired five shots at the silhouette. When he got out of bed the assailant moved, so he shot again. (R. 1283). After the officers entered the residence, they located Mrs. Fotopoulos lying in bed, shot once in the head, but alert and conscious. (R. 1137, 1144). The man on the floor still had a small silver automatic .22 caliber pistol in his hand. (R. 1140). Inside the person’s wallet was an Ohio driver’s license identifying him as Bryan Chase. (R. 1149-1150). It was stipulated that the individual was Bryan Chase. (R. 1190).

Dr. Botting was recalled by the State and testified that he performed the autopsy of Mr. Chase. He testified that the cause of death was multiple gunshot

wounds. (R. 1831).

The defense presented the testimony of Ken Pfarr, U.S. Secret Service Agent (R. 2238), who testified he had been requested to conduct a voice identification exam of Mr. Fotopoulos' voice with the unknown voice on the Ramsey tape. (R. 2250). His opinion was there were sufficient dissimilarities so that he was unable to draw a positive conclusion whose voice was on the tape. (R. 2255).

Mr. Fotopoulos testified in his own defense. Immediately prior to testifying, defense counsel advised the court that he was unclear of Mr. Fotopoulos' prior record, and requested a copy of his record. (R. 2264).

Mr. Fotopoulos testified that he was thirty-one years old. He was introduced to Deidre Hunt by Mr. Calderoni at his pool hall and thereafter, they developed a relationship where he gave her money, a place to live and clothes. He admitted to having sexual relations with her. (R. 2266, 2268). He testified that he loaned his partner's video camera to Hunt, as she said he had a surprise for him. (R. 2279-2280). He denied hiring anyone to kill his wife. (R. 2343). He admitted to shooting Chase, but denied that it was the result of his knowing that Chase was coming to his home to shoot his wife. (R. 2344). He denied being present when Ramsey was shot and killed. (R. 2357). He advised that Hunt gave him a tape, but

he had never looked at it. He stated he did not have a video camera to view it. (R. 2356-2357). He denied being a terrorist, (R. 2348), but admitted he had buried weapons because some were illegal. (R. 2374).

On cross-examination, the following exchange took place between Mr. Fotopoulos, and the State Attorney, Mr. Tanner:

MR. TANNER: Mr. Fotopoulos, not counting this case, anything connected with charges that you are here for, have you ever previously been convicted of a felonious offense?

MR. FOTOPOULOS: I believe it is a felonious offense I was at one time convicted of six (6) counts.

MR. CORRENTE: That's all he has to say, your Honor if I may.

THE COURT: Yes, I don't think you should interfere with him when he is responding to counsel. You may proceed.

MR. TANNER: Is that all you want to say?

MR. FOTOPOULOS: I just want to mention it was nonviolent.

MR. TANNER: Six prior felonies?

MR. FOTOPOULOS: Yes sir, one incident that was compounded

MR. TANNER: Well, that is not really correct, is it, it's not just one incident?

MR. FOTOPOULOS: It was done at one time, just like these charges are all piled up.

MR. TANNER: Isn't it true though that you plead guilty to six

different felonies covering a period over several years?

MR. FOTOPOULOS: No, all the incidents happened within a year and a couple of months, I believe. The Indictment was covering a few years, Mr. Tanner. It was not an Indictment, I plead guilty because I have done it. (R. 2359-2460).

Thereafter, the jury was excused and the State argued that Mr. Fotopoulos had “opened the door” to questions concerning the exact nature of his prior convictions. (R. 2361). Defense counsel responded that he had not represented him on his federal cases, and even if Mr. Fotopoulos was incorrect about the dates of his convictions, that information could be corrected without going into the nature of the crimes. (R. 2362-2363).

The trial court held, “I think once he goes beyond admitting to being convicted of a felony and how many times, the door is open.” The State thereafter questioned Mr. Fotopoulos repeatedly about his federal counterfeiting charges. (R. 2366, 2387-88, 2390, 2413, 2417, 2434, 2448, 2467).

The court also ruled that since in direct examination he admitted burying illegal weapons, that also opened the door to the State’s questioning of buried counterfeit money and grenades. (R. 2366-2370). The State cross-examination included questions about homemade hand grenades. (R. 2416); affairs with other women, (R. 2391); photographs of nude women, women Mr. Fotopoulos dated

prior to his marriage as well as prior to the events involved in the instant case. (R. 2391-2392). Reference was also made to automatic weapons (R. 743, 2414), Uzi machine guns (R. 588-589, 1721, 1875), and illegal silencers (R. 1121, 1875).

Finally, the State Attorney asked: “you participate in this trial, don’t you, you help your lawyer?” . . . “and you tell him when you want questions asked?”, . . . “you have met with your attorney. . .” (R. 2470-2474). Thereafter, the State Attorney proceeded to ask Mr. Fotopoulos why he had not asked his lawyer to ask certain questions of particular witnesses. (R. 2470-2475). Mr. Fotopoulos was further asked to comment on the testimony of several State witnesses. (R. 2418, 2420, 2422, 2441, 2417).

During closing argument, the State made twelve references to the counterfeiting activity of Mr. Fotopoulos. (R. 2637-8, 2650, 2651, 2663, 2681, 2682). Additionally, repeated references to automatic weapons, silencers and grenades were made. (R. 2643, 2681).

The State called two witnesses during the penalty phase. Teja James testified that he had had conversations with his friend, Kevin Ramsey, who told him that he knew things about the Appellant, and he was going to blackmail him (R. 3232-3233). Lori Henderson testified that Kevin Ramsey told her he was going to blackmail the Appellant for money and get his job back at Top Shots. (R. 3241).

Mr. Fotopoulos called three witnesses. Lydia Kouracos testified that she had known Mr. Fotopoulos for approximately four and a half years. (R. 3249). She described him as being very helpful, and a caring individual. (R. 3251). Peter Kouracos testified that he trusted Mr. Fotopoulos, and would work with him again. (R. 3269). James Constant testified that he considered Mr. Fotopoulos like a brother. If he had a sister, he wouldn't mind him marrying her. He also testified that he would willingly and gladly open his home up to Mr. Fotopoulos. (R. 3273-3277).

The trial court admitted Mr. Fotopoulos' high school diploma, B.A. diploma, his master's degree, a letter from a pastor, a letter from a mayor in Greece and pictures of him growing up. (R. 3290, 3293).

ARGUMENT I

THE COURT ERRED IN FINDING THE CLAIMS MADE IN THE AMENDED MOTION AS BARRED.

The ruling of the trial court shows that it did not properly assess the claims in the amended motion. It is true that postconviction relief does not authorize relief based on grounds which could or should have been raised at trial or on direct appeal of the judgment and sentence. Florida Rules of Criminal Procedure 3.850 cannot be used as a substitute for an appeal. Correll v. Duggar, 558 So.2d 422 (Fla. 1990); Medina v. State, 573 So.2d 293 (Fla. 1990). However, one of the clear justifications for a Rule 3.850 motion is the ineffective assistance of counsel. Breedlove v. Singleterry, 595 So.2d 8 (Fla. 1992).

It should be noted that although the court's order refers to Claim Number IV as barred because it refers to prosecutorial misconduct, such an allegation is not being made within this appeal. (R.R. V. I, 1047). Further, the court's order references Claim V which speaks of shifting the burden in a jury instruction which is also not being raised within this appeal. (R.R. V. I, 1047). The same with Claim VI, Claim VII, Claim VIII, Claim IX, Claim X, Claim XI and XII as alleged in the order. (R.R. V. I, 1047-1051). However, the order does say that the

cumulative error argument is also procedurally barred with which we disagree. (R.R. V. I, 1051).

The court then goes on to state at the conclusion that all remaining claims are procedurally barred. (R.R. V. I, 1056).

As previously stated ineffective assistance of counsel is a proper basis for a motion under the Criminal Rules of Procedure 3.850. Newly discovered evidence is a proper allegation for a motion under Florida Rules of Criminal Procedure 3.850. And therefore the court's criticize of raising these matters as a guise to attempt a second appeal is unfounded. Raulerson v. State, 437 So.2d 1105 (Fla. 1983) and Mecks v. State, 382 So.2d 673 (Fla. 1980).

ARGUMENT II

MR. FOTOPOLOUS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND INNOCENCE AND PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THEREFORE NOT BARRED.

INTRODUCTION

Defense counsel's ineffective assistance deprived Mr. Fotopoulos of his right to a reliable adversarial testing during voir dire, pre-trial motions and hearings, and at the guilt and penalty phases of his capital trial. This ineffective assistance compounded the prosecutorial misconduct which also violated Mr. Fotopoulos' rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments of the Florida Constitution. As a result, confidence in the reliability of the jury's verdict of guilty is undermined.

The United States Supreme Court in McMann v. Richardson, 397 U.S. 759, 771 (1970) established ineffective assistance of counsel as a clear Sixth Amendment Constitutional Right. Again in 1984 the United States Supreme Court and United States v. Cronin, 466 U.S. 648, 654 (1984) reiterated the logical

connection between the existence of a constitutional right to effective assistance of counsel in the text of the Sixth Amendment. There can be little doubt that ineffective assistance of counsel is one of the most common appeal grounds asserted by convicted defendants.

In Kimmelman v. Morrison, 477 U.S. 365 (1986) the Supreme Court held that the Strickland performance standard had not been met for defense counsel failed to do any pre-trial investigation and as a result failed to discover before trial that the state possessed critical evidence which counsel could have timely moved to suppress a trial. The Kimmelman court also stated that even though the attorney had performed well in cross examination and in other areas of the trial, this did not cure his failure to investigate.

Numerous courts have found that a defense attorney's failure to investigate were grounds for ineffective assistance and reversible error. Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984), Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988). In Williams v. Washington, 59 F.3d 673 (7th Cir. 1995) counsel's overwhelming failure to investigate facts which would have helped him defend his client, constituted ineffective assistance. The court went on to say that counsel's deficient performance prejudiced the defendant because it "produced a trial significantly different than the one that she should have received."

Courts have found ineffective assistance when counsel failed to locate or interview a witness. Sanders v. Ratelle, 21 F.3d 11, 1446 (9th Cir. 1994). In that case, the court stated “refusal even to listen to critical information from a key exculpatory witness regarding the basis of his client’s most important defense, cannot be deemed a permissible strategy.” In Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989), the defendant was denied effective assistance when his attorney failed to take steps to produce a necessary witness at trial. An evidentiary hearing was held and the other witnesses testified which led the 8th Circuit to the conclusion that it was unreasonable for counsel to fail to locate these witnesses or to request a continuance in order to procure them. See Chambers v. Armontrout, 907 F.2d 825 (8th Cir.) *cert. denied*, 498 U.S. 950 (1990). Failure to interview alibi witnesses has also been found to be ineffective assistance. Bryant v. Scott, 28 F.3d 411 (5th Cir 1994). The 6th Circuit in Sims v. Livesay, 970 F.2d 1575 (6th Cir.1992) found ineffective assistance of counsel for the attorney’s failure to investigate a piece of evidence that would have corroborated the defendant’s version of the events.

In Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), the 11th Circuit found that the defendant received ineffective assistance of counsel when his attorney failed to object to the admission of a finger print card, which contained reference to a prior arrest of the defendant. In Tomlin v. Myers, 30 F.3d 1235 (9th

Cir. 1994), the 9th Circuit found ineffective assistance of counsel when the attorney failed to challenge the evidence. Failure to call witnesses repeatedly was been found to result in ineffective assistance of counsel. Harris v. Reed, 894 F.2d 871 (7th Cir. 1990), Chambers v. Armontrout, supra. In Chambers v. Armontrout, supra, the court concluded that it “cannot say what would have happened at the second trial had Jones testified.” He was able to conclude that “we are not confident in the verdict.” The fact that the jury might have convicted the defendant of a lesser charge and not sentence him to death warranted a finding of ineffective assistance of counsel. In Nixon v. Newsom, 888 F.2d 112 (11th Cir. 1989), the court held that the defendant in the murder trial received ineffective assistance because the attorney failed to impeach the victim’s wife with that witness’s testimony from an earlier trial. The court stated, “because the witness’s testimony was crucial, we conclude that professionally competent counsel would have had at hand the transcript or the relevant excerpts and would have been sufficiently prepared to locate a relevant testimony in the previous trial.” Page 116. In Mofett v. Kolb, 930 F.2d 1156 (7th Cir. 1991), the court found the trial attorney gave ineffective assistance when he failed to introduce the prior statements of a witness.

Counsel’s failure to object to the actions of the prosecutor has repeatedly

been found to be ineffective assistance. In Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989) *cert. denied*, 500 U.S. 954 (1991). Defense counsel failed to challenge the prosecution's use of peremptory challenges to remove all white persons from a jury. See Batson v. Kentucky, 476 U.S. 79 (1986). Counsel's failure to object to improper cross examination has been found to be ineffective assistance. In United States v. Wolf, 787 F.2d 1094 (7th Cir. 1986), failure to object to the prosecuting attorney's repeated references to the defendant's silence after receiving Miranda warnings was found to be deficient. The implication came from the prosecution comparing a co-defendant who opted to work with the police and testify against the defendant in exchange for dropping the charges against him. The court believed that those comparisons were designed by the prosecution to imply the defendant remained silent in contrast to the co-defendant, because he had something to hide. Freeman v. Class, 95 F.3d 639 (6th Cir. 1986).

This Court has held that numerous claims of the Defendant are procedurally barred and thus instructed the Defendant not to reargue those claims. The Defendant acknowledges this Court's instructions and notes that some procedurally barred claims are included under this heading for the purpose of demonstrating the enormous quantity of errors and to allow this Honorable Court to consider their cumulative effect and the lack of "fundamental fairness"

surrounding this case. Gore v. State, 719 So. 2d 1197 (Fla. 1998). According to Gore, in a death case, “both the prosecutor and the court are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects.” Gore, 719 So.2d at 1202.

Before discussing the well-established two-prong test of Strickland v. Washington, 466 U.S. 668 (1984), it is important to note that the Strickland Court found Florida’s capital sentencing proceedings are so adversarial in nature that they are not distinguishable from an ordinary trial because an attorney’s role is the same in each; “to ensure that the adversarial testing process works to produce a just result...” Strickland, U.S. 466 at 686-687. See Barclay v. Florida, 463 U.S. 939, 952-954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981). Thus, any discussion regarding the trial counsel’s role in the trial of the Defendant would be applicable to the sentencing phase as well.

In the Defendant’s case, a just result was not reached. In both the guilt and sentencing phases of the Defendant’s trial, the Defendant had a person standing next to him who happened to be a lawyer, but that does not mean that the Defendant had the benefit of counsel. The right to counsel found in the Sixth Amendment is the right to effective counsel. Strickland, U.S. 466 at 686.

THE STRICKLAND TWO-PRONG TEST

The merits of an ineffective assistance of counsel claim are governed by the well-established rule of Strickland v. Washington, *supra*. The Defendant must establish both prongs of the Strickland test in order to prevail. First, he "must show that counsel's performance was deficient." *Id.* at 687. Dowthitt v. Johsons, 230 F.3d 733 (5th Cir. 2000). Deficient performance is normally established by showing "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688; Hernandez v. Johnson, 213 F.3d 243, 249 (5th Cir. 2000).

Each of the numerous failures articulated in this brief and in previous pleadings on the part of trial counsel clearly show trial counsel's representation of the Defendant in this case fell far below representation which could be considered reasonable.

To prove the second prong, a defendant "must show that the deficient performance prejudiced . . . [his] defense." *Id.* Dowthitt. However, Justice Brennan in his dissent in Strickland, stated that "[C]ounsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice." See Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984) Strickland, 466 U.S. at 703-704.

The Defendant asks this court to again consider Justice Brennan's dissent in Strickland, in which he stated that the Supreme Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." He quotes Justice Marshall:

This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, Gideon v. Wainwright, 372 U.S. 335 (1963), it recognized that right in capital cases, Powell v. Alabama, 287 U.S. 45, 71-72 (1932). **Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.** (Cites omitted) (emphasis added)

Strickland, 466 U.S. at 704-705.

Clearly even if this Court finds the Defendant does not deserve a new trial, this Court should find that death is not the appropriate punishment in this case.

Justice Brennan again quoted Justice Marshall,

Because of [the] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' Ibid. Barefoot v. Estelle, 463 U.S. 880, 913-914 (1983) (dissenting opinion). Strickland, 466 U.S. at 705.

Although speaking of the sentencing phase of a capital case, this advice is no less critical in the guilt phase of a capital case, "[what] is essential is that the jury

have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Clearly the jury did not hear all the relevant information necessary to decide the Defendant's case due to trial counsel's ineffectiveness and the Defendant was prejudiced by this failure.

A. Counsel failed to effectively request a necessary continuance, investigate impeachment materials and object to the admission of evidence.

This section involves a multiplicity of errors and omissions by trial counsel. The first being trial counsel's failure to use Deidre Hunt's sentencing hearing and the evidence developed therein, impeachment witnesses and fact witnesses, during the trial and penalty phases of Mr. Fotopoulos' trial. Incorporated herein is Argument II in that trial counsel failed to object to the improper comments and questions of the prosecutor quoted therein.

During Deidre Hunt's sentencing several issues were raised which contradict the state's rendition of the facts in Mr. Fotopoulos' case. (R.R. V. VII, 805-921). The state during the trial produced multiple pieces of evidence to show that Mr. Fotopoulos dominated Deidre Hunt. (R. 221-222, 730-733, 735, 748, 839, 840, 2734-2738). However, in Ms. Hunt's sentencing the state presented the following from the State of Florida v. Deidre Michelle Hunt which have been included in this

record:

1. Mr. Damore argued that Deidre Hunt committed the murders because “you just don’t know how it feels to take someone’s head by the hair and blow his brains out”, “I love power and I love money and I’m going to get both of those”, not because she was dominated by Mr. Fotopoulos. (R.R. V. VII, 813-814).

2. Mr. Damore argued that the evidence would not establish Deidre Hunt was in any way acting under coercion or duress in the killing of Mark Kevin Ramsey and she could not prove that Mr. Fotopoulos threatened her with an AK-47. The state would introduce evidence that Deidre Hunt lied when she said that Mr. Fotopoulos pointed an AK-47 at her and screamed at her, forcing her to kill Mark Ramsey. Hunt lied so that the state would not be able to prove premeditated murder. (R.R. V. VII, 815-817).

3. Mr. Damore argued that the state’s evidence would establish that Hunt was not acting under Mr. Fotopoulos’ substantial domination, duress, or control because she modified and enhanced his plans. (R.R. V. VII, 818).

4. Officer Evans testified that Deidre Hunt dominated Lori Henderson. Mr. Damore argues that Hunt was under no coercion or duress when three (3) police officers came to her house and Hunt’s behavior established that she was strong willed. (R.R. V. VII, 819-822).

5. Hunt initially failed to tell the police that Mr. Fotopoulos threatened her. Hunt attempted to physically dominate Lori Henderson. When talking to the police, Hunt attempted to portray herself as a victim. (R.R. V. VII, 823-825).

6. Jack Brown testified that the person doing the videotaping of the Ramsey murder held the camera and the light in separate hands. (R.R. V. VII, 826-827).

7. Joseph Gallagher testified that Deidre Hunt lied in her previous statement that Mr. Fotopoulos pointed the gun at her to force her to kill Ramsey. Hunt lied because she did not want the state to prove premeditation. (R.R. V. VII, 828-831).

8. Mr. Gallagher, the State Attorney investigator on the Hunt/Fotopoulos case, stated that he did not believe Hunt's story that Mr. Fotopoulos was pointing a gun at Hunt. (R.R. V. VII, 832).

9. Newman Lee Taylor testified that Hunt said that she enjoyed killing and killing for power and money. (R.R. V. VII, 833).

10. Joseph Gallagher testified that Hunt stated that Mr. Fotopoulos did not threaten her with a gun when she killed Kevin Ramsey. (R.R. V. VII, 836).

11. Gallagher testified that no evidence exists to prove that Hunt shot Ramsey with an AK-47 or that the person who videotaped the murder shot Ramsey with the AK-47. (R.R. V. VII, 837).

12. Mr. Daly during the sentencing phase stated that Mr. Fotopoulos did not point the gun at Hunt and force her to shoot Ramsey. Hunt shot Ramsey on her own free will. Daly argued that Mr. Fotopoulos did not dominate Hunt and she lies to get herself out of trouble. (R.R. V. VII, 838-842).

13. During the state's closing argument, the state indicated that Hunt was not suffering under Mr. Fotopoulos' domination. (R.R. V. VII, 843).

14. Ms. Hunt's attorney states that they are hopeful that the state will relent from their position and will not seek the death penalty. (R.R. V. VII, 848).

15. Mr. Damore states that it would be physically impossible for Mr. Fotopoulos to have an AK-47 trained on Deidre Hunt. (R.R. V. VII, 853).

16. Mr. Damore indicates that Deidre Hunt's final shot to Kevin Ramsey's head was fatal. (R.R. V. VII, 854).

17. At Deidre Hunt's motion to withdraw plea hearing, Mr. Corrente indicates that the state is trying to put a squeeze play on Deidre Hunt to get her to testify against Mr. Fotopoulos by moving her sentencing ahead of Mr. Fotopoulos'. (R.R. V. VII, 856).

18. Mr. Corrente objects to Deidre Hunt's penalty phase going before his trial on Mr. Fotopoulos. The state says that they are not trying to put a squeeze

play on Ms. Hunt but are only seeking justice. (R.R. V. VII, 857-859).

19. Mr. Daly indicates that Deidre Hunt aided in the killing for her own monetary gain. Deidre Hunt intended to kill, her plan was to be with Mr. Fotopoulos and have his money. She was his partner. (R.R. V. VII, 861-862).

20. Mr. Fotopoulos did not hold the AK-47 on Deidre Hunt because he was holding the camera and the light. Daly said that Deidre Hunt lied about Mr. Fotopoulos holding the gun on her and that that was part of Deidre Hunt's plan all along. (R.R. V. VII, 863-865).

21. Mr. Damore said that Deidre Hunt chose what her actions would be. (R.R. V. VII, 868-869).

22. Judge Foxman found that Deidre Hunt was not acting under extreme duress or substantial domination of Mr. Fotopoulos. (R.R. V. VII, 878).

23. During forensic psychiatrist Robert H. Davis' testimony, he stated the following "Well, I feel that she was self-contained. I don't feel that she was an individual who could be unduly coerced into anything, particularly. She seemed well-founded in her concepts." (R.R. Exhibit #2, 1040).

Question: ...any signs that Deidre was acting under any threats or fear at the time of killing of Mark Kevin Ramsey? (R.R. Exhibit #2, 1042).

Answer: She did not appear so on the film, sir. (R.R. Exhibit #2, 1042).

Question: From your interview, did you arrive at any conclusion as to the motivating factors behind Deidre Hunt, if there was one? What was she driven by, if anything? (R.R. Exhibit #2, 1043).

Answer: Money, power. (R.R. Exhibit #2, 1043).

Question: Did Deidre Hunt have the ability, if she had chosen not to kill Kevin Ramsey or lead Bryan Chase to his death and have him shoot Lisa Fotopoulos, say no? (R.R. Exhibit #2, 1069).

Answer: She could have, yes, sir. (R.R. Exhibit #2, 1069).

24. Another psychiatrist Umesh Mhatre, M.D. testified to the following:

Question: I ask you, sir, whether or not you believe that Deidre Hunt was acting under the substantial domination of another individual, based upon your examination of her and your viewing of the videotape? (R.R. Exhibit #3, 1076).

Answer: No, sir, I do not. (R.R. Exhibit #3, 1076).

Question: Would you describe to the court what you base your opinion on? (R.R. Exhibit #3, 1077).

Answer: Well, basically, because the videotaping itself speaks for itself. She was extremely calm, collect, had absolutely no anxiety, and very defined body language of the hand on the left side, appeared to be very versed in using the gun, the other person was putting the light on her face, in a very arrogant manner using some profanity, she said “don’t shine that shit on my face, turn it away,” or something to that effect. (R.R. Exhibit #3, 1077).

25. In Dr. Levine’s report to Peter Niles he states David Damore

“entertained the possibility of a life sentence.” (R.R. V. VII, 901-902).

Officer Richard P. Gillman of the Manchester, New Hampshire Police Department during his testimony at the evidentiary hearing on the 3.850 stated the following: (R.R. V. III, 364)

Question: So she was a leader. (R.R. V. III, 364).

Answer: In my opinion. (R.R. V. III, 364).

He further went on to testify about a false report that Ms. Hunt made where she was allegedly kidnapped by two people and brought to New York who molested and raped her. There were so many inconsistencies in the report that they put her on a polygraph and she failed. Afterwards, she admitted that she lied. (R.R. V. III, 370). Further, Officer Gillman stated that he spoke to Attorney Damore about this. (R.R. V. III, 371). He was never subpoenaed to testify. (R.R. V. III, 371). Further, trial counsel never spoke to Officer Gillman. (R.R. V. III, 375).

Holly Brooke Pringle testified at the evidentiary hearing about Deidre Hunt carrying a gun (R.R. V. III, 379) and threatening her with it. Further, she testified that Deidre Hunt was not afraid of Kosta Fotopoulos (R.R. V. III, 380) and that Kosta Fotopoulos never carried a gun. (R.R. V. III, 378-380).

Another witness the trial counsel failed to present was John Boisvert. Mr. Boisvert would have testified that he never kidnapped Deidre Hunt, never hit or

kicked Deidre Hunt, never took all of her money, never beat her. Hr further would testify that she was not easily dominated or frightened. He was never contacted by Mr. Fotopoulos' trial attorney. (R. 200-204). This would have directly contradicted Deidre Hunt's testimony about how she had lived with Boisvert for two weeks when she first arrived in Daytona and he dominated and abused her. (R. 695-702).

Bridget Ann Ricco testified at the evidentiary hearing and stated that Deidre Hunt routinely carried a weapon, a knife. (R.R. V. II, 209). Further, she recounted a cold blooded shooting where Ms. Hunt asked a lady for a light and then shot her. (R.R. V. II, 210). She testified that Ms. Hunt show no remorse and shot the lady four times. (R.R. V. II, 210). Ms. Hunt then went and got seven people to write statements implicating Ms. Ricco. (R.R. V. II, 212). But it turned out that the victim testified that Ms. Ricco was not the one that shot her because the victim said she was not the one that shot her. (R.R. V. II, 213). Further, Ms. Ricco went on to tell of an incident in Boston, Massachusetts, where Ms. Hunt ordered Todd Newman to kill another person which he did. (R.R. V. II, 213).

Further, Ms. Ricco would testify that "Miss Hunt was a leader and not a follower." (R.R. V. II 214).

The jury is at least entitled to know that the government at one time believed, and stated that its proof established something different from what it currently claims. Competence in the system cannot be affirmed if any party is free wholly without explanation to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of facts.” United States v. Salerno, 937 F.2d 797 (2nd Cir. 1991).

See also Green v. Georgia, 442 U.S. 95 (1979) and Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000).

Counsel ineffectively failed to move for a continuance when the state used Mr. Fotopoulos’ indigency proceeding testimony to impeach his testimony and for not obtaining a copy of the testimony (R. V. XVIII, 3273-74). Counsel was patently unprepared to advise Mr. Fotopoulos regarding his testimony because counsel did not represent Mr. Fotopoulos during the indigency proceeding and counsel never obtained or read a transcript of Mr. Fotopoulos’ indigency proceeding.

Defense counsel had a duty to investigate beyond reliance on discovery demands, motions and depositions. This ineffective assistance has been shown because that was not done; the defense relied on what the state disclosed and went no further. The witnesses who testified at the evidentiary hearing, as well as the other matters disclosed, clearly show that defense counsel failed in his duty. Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), subsequent history 799 F.2d 1442

(11th Cir. 1986). When there is little or no investigation, the court can consider the omission as a substantial oversight instead of a trial strategy or tactic. Rose v. State, 675 So.2d 567 (Fla. 1996).

B. Trial counsel was ineffective for failing to seek to suppress and object to the admission of the .38 special pistol.

Trial counsel ineffectiveness stems from the fact that he failed to seek the suppression of the weapon, counsel failed to object to the admission of the weapon and counsel failed to object to prosecutor's comments with regard to the weapon.

In his opening statement, the prosecutor said the following:

...and there will be a .38 caliber Charter Arms revolver found buried in the woods in an ammo can near the John Anderson Parkway near High Bridge Road in Daytona Beach.

The significance of that item will be revealed to you as the evidence proceeds, and the State will establish clearly through that evidence that this particular weapon was considered by the conspirators to be an untraceable gun, a gun which would be used – if it could be found – by Kosta Fotopoulos to murder his wife, Lisa.

This weapon had its serial numbers obliterated and this weapon was offered by the conspirators to others to be used to kill Lisa Fotopoulos as an expendable weapon, which much as you will hear testimony in this case that this expendable weapon was much like the

expendable human beings that Kosta Fotopoulos would throw away and murder and use in his plot to kill his wife.

(R. V. III, 519).

In his closing statement, the prosecutor emphasized and made it one of the features of his closing argument, this .38 special and stated the following:

...ladies and gentlemen, tell them, tell us, tell someone what a collector of guns needs an untraceable gun for...you don't go out in the woods and sneak up on on those rabbits or deer with guns with no serial numbers on them. Every one of us know what this gun was meant for...

...this was the gun intended for Michael Cox [Matthew Chumbley], the untraceable weapon

(R.V. XIV, 2662).

The facts presented to the jury with reference to this gun was by Ms. Hunt when she stated it was an untraceable weapon (R.V. IX, 1710) and she said she would dig it up. (R.V. IX, 1711). Nothing was presented which would tie this weapon into any of the crimes alleged against Mr. Fotopoulos.

In considering a reversal, a court must look to the totality of the improper questions and comments by the prosecutor during his cross-examination and during closing argument. See, e.g., Campbell v. State, 679 So.2d 720 (Fla. 1996); Amos v. State, 618 So.2d 157, 163 (Fla. 1993).

Gore v. State, supra. Here the effect of the improper comments by the prosecutor are obvious, that the prosecutor was trying to portray the defendant as a terrorist

just for owning an untraceable gun.

It is clearly improper to argue facts not in evidence. Dunsizer v. State, 746 So.2d 1093, 1094 (Fla. 2nd DCA 1999) (concurring opinion). Here the prosecutor used the irrelevant gun to insinuate facts and inflame the jury and trial counsel failed to object.

Again, the prosecutor used improper methods in an attempt to produce a wrongful conviction and trial counsel failed to object. Gore v. State, supra. All information regarding the .38 special should be considered a foul blow and trial counsel did nothing to prevent the jury from hearing about it.

C. Counsel's performance was ineffective during the suppression hearing.

During the suppression hearing with reference to the evidence found in Mary Paspalakis'/Mr. Fotopoulos' home (Halifax house), trial counsel presented no witnesses of any kind nor did he present any evidence. (R.V. XVII, 3089). Trial counsel without presenting any evidence or witnesses made the following statement in order to attempt to influence the judge to believe his client had

standing to object "We feel he was a resident in that household. He was there with his wife and that was his home at the time he was arrested." (R.V. XVI, 3006).

The state, in its argument, asserted that Mr. Fotopoulos abandoned his belongings when he was arrested and held in jail. (R.V. XVII, 3098-99).

“[W]hether there had been an abandonment is primarily a factual determination to be made upon all of the relevant circumstances existing at the time.” Paty v. State, 276 So.2d 195, 196 (Fla. 4th DCA 1973).

Detective Adamy on November 22, 1989 conducted a search of the Halifax house and found a brown bag which contained a videotape later identified as the videotape of Hunt killing Kevin Ramsey. On the videotape was an unknown voice (R. 1209-1213). A further search revealed in the barbeque pit a black vinyl bag containing an AK-47, a .22 caliber pistol, along with bullets and other paraphernalia were discovered. (R. 1310-1315). No evidence was presented regarding Mr. Fotopoulos’ expectation of privacy in these bags which were discovered during a search consented to by the Paspalakis family.

Trial counsel presented no evidence regarding Mr. Fotopoulos’ expectation of privacy in his bags which were discovered during the alleged consent search. (R.V. XVII, 3089, 3090, 3099). “A homeowner’s consent to search of a home may not be effective consent to a search of a closed object inside the house.” United States v. Karo, 468 U.S. 705, 725 (1984). “Common authority ... rests ... on mutual use of the property by persons generally having joint access or control

for most purposes,” United States v. Matlock, 415 U.S. 161, 171 (1974). A defendant who entrusted a locked briefcase to a friend did not abandon his expectation of privacy in that case and, therefore, agents who opened the case, without a warrant based on the friend’s consent, violated the Fourth Amendment. United State v. Basinski, 226 F.3d 839 (7th Cir. 2000).

So what evidence is there that he intended to maintain control over these bags and he intended to exercise his rights of privacy? Lisa Fotopoulos testified that she watched Mr. Fotopoulos bury a bag beneath the barbeque. (R.V. XVII, 3053). Could there be any greater indication that he wished to keep the contents of the bag private? “The homeowner who permits entry into his home of such a container effectively surrenders a segment of the privacy of his home to the privacy of the owner of the container...the homeowner lacks the power to give effective consent to the search of the closed container.” Karo, 468 U.S. at 726. The black bag buried in the barbeque pit was sealed and had a rope on top of it. Again, indicating the intent of the owner to keep the contents private and secure. (R.V. XVII, 3033, 3042).

Effective counsel would have discovered that the brown bag found in the garage belonged to Mr. Fotopoulos and not to his grandfather-in-law. (R.V. XVII,

3014). Officer Adamy stated that he stood on a ladder lying on its side so that he could see the bag. (R.V. VII, 1209-1210).

Allegedly, Mary Paspalakis told her son to tell Kosta to gather his belongings and to leave from the house. She does not wish to see him any longer. (R. 3011). Dino Paspalakis told Mr. Fotopoulos to get out of the house pursuant to his mother's instructions. (R. 3027, 3028). There is no doubt that the Defendant was to reside in the residence at Halifax until such time as he and his wife found a suitable place to live. (R. 3019). Aside from presenting no evidence, counsel also presented no case law to support his motion to suppress. (R.V. XVII, 3089, 3093).

What developed at this latest hearing on Mr. Fotopoulos' 3.850 motion highlights the ineffective assistance he received from his trial counsel. Key to that was the testimony of the witness Angelo Katsouleas. Mr. Katsouleas testified to the following

Mr. Fotopoulos and I back in the early '80's, it was sometime around 1981 I believe I was a sophomore in college - we went to a Sears outlet at the Fox Valley Shopping Center in Aurora, Illinois and purchased two bags, identical bags, one for him, one for me, that looked exactly like this one. (R.R. V. I, 91)

Thereafter, Mr. Katsouleas was asked by Mr. Fotopoulos to go and get his belongings from his residence, the Halifax house. Mr. Katsouleas went to that

house and rang the doorbell. Mr. Paspalakis refused to give him those belongings saying that he was following police orders. (R.R. V. I, 96). Mr. Katsouleas went on to be cross-examined and continued to testify that those bags were purchased by him and it was identical to the bags seized by the police at the Halifax house.

Detective Adamy also testified at this latest hearing. Detective Adamy testified that the bag was found in the barbeque pit area and it was closed. (R.R. V. II, 182-184). He further testified that he did not get permission to look into the bag from Mr. Fotopoulos. (R.R. V. II, 184). The Detective further testified that he knew that the Defendant had buried something in the back yard and the only thing found there was the bag. (R.R. V. II, 191). Mr. Fotopoulos also testified at that hearing that the bag found at the Halifax house was the same one purchased by he and Mr. Katsouleas while they were students at the Aurora Community College. Mr. Fotopoulos also testified that the bag found in the barbeque pit was his bag. (R.R. V. IV, 485). Mr. Fotopoulos further explained that his trial counsel never explained to him that he could testify at the motion to suppress hearing and further trial counsel never explained that if the items were suppressed they could never be used at trial nor could his statements be used at trial. (R.R. V. IV, 506).

The issue of standing played a large role in the court's decision. Kishel v.

State, 287 So.2d 414 (Fla. 4th DCA 1974) states

if a defendant is legally on the premises which are being searched he has standing to attack that search as a member of the family who own the building. Even if a defendant rents a room in a home but has free access to the entire house he is a lawful occupant and has standing to challenge the illegal seizure of property in the residence.

Urquhart v. State, 211 So.2d 79, 85 (Fla. 2nd DCA 1968). There is no indication of abandonment. There is no indication of the Defendant's intent to abandon. The fact that he made an effort to retrieve his property indicates he did not in fact abandon this property. Further, several courts have held that a wife cannot waive for the husband his constitutional rights to lawful search and seizure. Silva v. State, 344 So.2d 559, 564 (Fla. 1977), State v. Blakely, 230 So.2d 698, 700 (Fla. 2nd DCA, 1970) and State v. Gonzalez-Valle, 385 So.2d 681, 682 (Fla. 3rd DCA, 1980).

D. Trial counsel was ineffective during voir dire examination in that he failed to object to the State's mischaracterization of the relevant facts with reference to the excusing of black jurors.

A prosecutor may not attempt to utilize a peremptory challenge in a criminal case to exclude from a jury panel cognizable racial groups. Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988). The State used two peremptory challenges to exclude black prospective jurors from the jury. They were Mrs. Bostic and Mrs. Gordon. When the State excludes Mrs. Bostic, it was after she responded to a

State inquiry as to whether or not she or anyone she knew had been formally charged with a crime. (R.V. II, 230) .

A. Yes, I have a son, he's a juvenile. He's away in Jacksonville in a home.

Q. Was he placed there by the Juvenile Court?

A. Yes.

Q. Would that have been Judge Lee from here?

A. Yes. Right.

Q. How long ago was that, ma'am.

A. He's been there – he's not quite been there ninety days.

Q. Do you feel he was treated fairly by the juvenile system?

A. Oh, yes. Yes.

Q. Now, the State Attorney's office handles the prosecution of the juvenile matters.

Now, do you feel the State Attorney's office was fair about it?

A. Oh, yes.

Q. Any quarrel with anybody about the way your son was handled?

A. Oh, no. I think they did an excellent job under the circumstances.

(R.V. I, 67). Trial counsel objected, and the court asked the state to provide an explanation (R.V. II, 230). The state gave the following reasons for the challenge:

Mrs. Bostic has a son who has been involved in the criminal justice system, the juvenile portion in my office since 1987. She has indicated this child has been involved in at least two (2) commitments by the State Attorney's Office and he has been charged with at least two (2) felonies and as many as seven (7) or eight (8) other related offenses and we feel her extensive exposure to the impact of dealing with the State Attorney's Office where we have prosecuted her son almost continuously over the period of the last two (2) years leads us to feel that it would be difficult for her to maintain impartiality and it may even cut the other way ...

(R.V. II, 230). A careful reading of the explanation compared to Mrs. Bostic's answers clearly shows that the state misrepresented the issue in order to find a non-racial cause to excuse Mrs. Bostic. Mrs. Bostic only referred to her son being placed in a home in Jacksonville with reference to the juvenile court. (R.V. I, 67). Counsel ineffectiveness comes from the fact that he did not object to the state's incorrect and misleading paraphrasing of Mrs. Bostic's answers by the state. (R.V. II, 230).

Another black juror, Mrs. Gordon, was also struck by a state peremptory challenge. Trial counsel objected and the court made inquiry. (R.V. III, 435). The prosecutor said the following in his attempt to justify the striking of Mrs. Gordon:

She gave an answer that she was categorically, unequivocally opposed to the death penalty. That alone would be sufficient for me to peremptorily excuse her regardless of her race. I would have the same reservation about her ability to force that personal holding that she has from her ability to vote as to guilt or innocence. In addition, when she answered, she indicated that yes, if she found him guilty that would

mean the death penalty or something to that effect, which causes me even greater concern because she by her answer does not seem to understand that a verdict of guilty would not necessarily carry the death penalty and you would have a recommendation so that makes her even more reluctant to.

(R.V. III, 435). Mrs. Gordon actually stated the following:

Mrs. Gordon: I am not for the death penalty, but I feel like..can I say the way that I feel?

The Court: Absolutely.

Mrs. Gordon: I feel like a person that takes another person's life, he should be punished and in a way that he could be reminded of that crime that he committed and not take his life, because he soon forgot what he did, but I believe he should be reminded each and every day of his crime and punished accordingly.

The Court: **Are there any circumstances under which you could vote to recommend a death penalty?**

Mrs. Gordon: **Well, if he is found guilty.**

The Court: Would you also consider recommending a life sentence?

Mrs. Gordon: Yes.

The Court: **I want to be careful not to be putting words in your mouth. Could you consider both possible penalties depending upon the circumstances?**

Mrs. Gordon: **Yes.**

The Court: You don't like that death penalty, right?

Mrs. Gordon: No. I am not for it.

The Court: Is that concern about the death penalty going to interfere with your fairly determining guilty or innocence?

Mrs. Gordon: **No.**

Mr. Tanner: Mrs. Gordon, let me ask you about that in a little bit more detail. You indicated that you were opposed to the death penalty; is that correct?

Mrs. Gordon: Yes.

Mr. Tanner: With that opposition is that opposition so firm and so absolute that you would never vote for the death penalty in any case?

Mrs. Gordon: **No.**

Mr. Tanner: Are you saying even though generally you oppose the death penalty there may be some cases that you would in fact consider and even vote for the death penalty?

Mrs. Gordon: **Yes.**

(R.V. II, 387-88). Again, counsel for Mr. Fotopoulos failed to object to the state's inaccurate and misleading rendition of Mrs. Gordon's statements. (R.V. III, 435). Once trial counsel objects to seemingly racial challenges, the burden then shifts to the state to demonstrate by clear and reasonable specifically racially neutral explanation for the peremptory challenge. Overstreet v. State, 712 So.2d 1174, 1177 (Fla. 3d DCA 1998).

Trial counsel's failure to object and require the state to provide the judge

with accurate renditions of the facts and answers of the jurors is a violation of Strickland, supra.

Recent case law in Florida shows that a challenge which is upheld due to improper characterization of the juror responses in voir dire, as is the defendant's case, can be grounds for reversal under clearly erroneous standard. Brown v. State, 733 So.2d 1128 (Fla. 4th DCA 1999); White v. State, 754 So.2d 78 (Fla. 3rd DCA 2000). In Brown, the prosecution mischaracterized one of the juror's responses which influenced the trial court to have an inaccurate recollection of the juror's views and then the court stated that "we have no trouble concluding that allowing the state to strike Holmes [that juror] was clearly erroneous..." Brown, 733 So.2d at 1130. [T]he trial court erred as a result of not having accurate recollection of the juror's answers when counsel exercising the strike misrepresented the [juror's] answers. Although the Brown court had other reasons for reversing, including that the court found the prosecutor described a confidential informant in such a way as to suggest that the defendant in that case was involved in more crimes than for which he was on trial, and on remand the prosecutor was directed not to make any references to criminal or drug organizations. This is clearly similar to what happened to the defendant as he was referred to as a terrorist which clearly inflamed and prejudiced the jury suggesting that he had been involved

in more crimes than that for which he was on trial.

In Overstreet and Lovette, the improper juror challenges were the only reason for reversal. Lovette was a \$30,000,000.00 verdict and Overstreet was the appeal of a robbery conviction. The Brown court quoted Overstreet. The court in Overstreet stated the trial court should have the reporter's notes re-read before ruling. Overstreet, supra. Michelin North American, Inc. v. Lovette, 731 So.2d 736 (4th DCA 1999).

E. Cumulative errors alleged herein denied Mr. Fotopoulos his fundamental rights to a fair trial and due process.

The effect of all these deficiencies on the part of trial counsel when taken as a whole denied Mr. Fotopoulos a fair trial to which he is entitled under the Eighth and Fourteenth Amendments. Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). Under Florida Case Law, these cumulative errors denied Mr. Fotopoulos his fundamental rights to a fair trial and due process. State v. Deguilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994). In Jones v. State, 569 So.2d 1234 (Fla. 1990), a capital sentence was vacated and remanded because of "cumulative errors effecting the penalty phase." At 1235. In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for the new trial. The burden at

this point shifts to the state to prove beyond a reasonable doubt that the individual and cumulative errors did not effect the verdict or the sentence. Chapman v. California, 386 U.S. 18 (1967) .

This has sometimes been referred to as “Cumulative-Prejudice” in that counsel’s constitutionally deficient actions, viewed together, give rise to a finding of prejudice. Strickland’s, supra. analysis is based on the fundamental fairness of the proceeding and the seriousness of the numerous errors.

We do not hesitate to conclude that there is a reasonable probability that absent the deficiencies, the outcome of the trial might well have been different. Indeed, the plethora and gravity of counsel’s deficiencies rendered the proceedings fundamentally unfair. Strickland, 466 U.S. at 1438-39.

In Mack v. Blodgett, 970 F.2d 614 (9th Cir. 1992), *cert. denied*. U.S. 951 (1993), the court found that the cumulative effect of counsel’s errors at the penalty phase of a murder defendant’s trial amounted to prejudice the defendant. See Harris by and through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995).

Trial counsel’s performance was deficient and ineffective and resulted in severe prejudice to the defendant. His utter failure to use Deidre Hunt’s sentencing hearing and the evidence developed therein during the trial and penalty phases, his failure to move for a continuance, his failure to use the multiple inconsistencies in the sentencing of Deidre Hunt as well as impeachment witnesses and fact witnesses

that were available along with his failure to move to suppress the .38 special pistol, his failure to object to the state's mischaracterization of juror's testimony, his failure to present Mr. Fotopoulos' standing issue at the suppression hearing, individually each amounts to ineffective assistance of counsel and is certainly its cumulative prejudice cannot be ignored.

All of the errors that occurred at Mr. Fotopoulos' trial, cumulatively establish that Mr. Fotopoulos did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See State v. Gunsby, 670 So.2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary, 662 So.2d 435 (Fla. 1995). The sheer number and types of errors involved in Mr. Fotopoulos' trial due to counsel's prejudicially deficient performance, **when considered as a whole**, resulted in an unreliable conviction and sentence. Gunsby. See also Kyles v. Whitley, 115 S. Ct. 1555 (1995).

ARGUMENT III

THE FACT THAT DEIDRE HUNT RECEIVED A LIFE SENTENCE IS NEWLY DISCOVERED EVIDENCE JUSTIFYING A NEW TRIAL OR A NEW SENTENCING HEARING AND THEREFORE NOT BARRED.

A prisoner seeking to vacate a judgment on the ground of newly discovered evidence unknown to the court, the defendant, or the defendant's counsel at the time of trial or direct appeal is required to bring this to the court's attention pursuant to Criminal Procedural Rule 3.850. Richardson v. State, 546 So.2d 1037 (Fla. 1989). The fact that Deidre Hunt received a life sentence satisfies the materiality prong of newly discovered evidence. It probably would have prevented the entry of a judgment against the defendant or the death sentence which the defendant received.

We hold that hence forth, in order to provide relief, the newly discovered evidence must be of such a nature that it would probably produce an acquittal at trial. The same standard would be applicable if the issue were whether a life or death sentence should have been imposed. Jones v. State, 591 So.2d 911 (Fla. 1991)

Preston v. State, 564 So.2d 120 (Fla. 1990). In order to prevail on a claim of ineffective assistance of counsel in the penalty phase of a capital case the defendant must demonstrate that he or she would have probably received a life sentence but

for counsel's errors. See Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995).

It is not unheard of that evidence which comes to light or which was not in existence during the trial, but came into existence after the trial, have the effect of newly discovered evidence. A detailed confession by a third party subsequent to conviction can be newly discovered evidence or a key prosecution witness subsequent to conviction recants his testimony can be the subject of a new trial as newly discovered evidence. Baker v. State, 336 So.2d 364 (Fla. 1976); Cammarano v. State, 602 So.2d 1369 (Fla. 5th DCA 1992); Herrick v. State, 590 So.2d 1190 (Fla. 2nd DCA 1991).

The prosecutor in closing argument told the jury that Ms. Hunt was sentenced to death.

He suggested that Deidre Hunt, who is awaiting penalty of death in Florida's electric chair, has come before you because she has been made a deal. (R.V. XIV, 2636).

Further, during questioning of Ms. Hunt and going through a litany of convictions, he made sure the jury knew so that his closing argument would have the effect of indicating that she had been sentenced for all of these cases. The state asked Ms. Hunt the following:

Q. You have already pled guilty to conspiring with Konstantinos X. Fotopoulos, Teja Thornston Jessie James, also known as Teja James

and Yvonne Lori Henderson, to conspiring with those other three people to commit first degree murder of Lisa Fotopoulos, have you not?

A. Yes I have.

Q. And you have already pled guilty to the attempted first degree murder of Lisa Fotopoulos at the Joyland and have you not?

A. Yes I have.

Q. You have already pled guilty to soliciting the commission of first degree murder of Lisa Fotopoulos by Teja James, have you not?

A. Yes I have.

Q. You have already pled to the burglary of Mrs. Fotopoulos' home, Mary Paspalakis, by the now dead Bryan Chase, have you not?

A. Yes I have.

Q. Have you already pled guilty to the attempted first degree murder of Lisa Fotopoulos when Bryan Chase shot her, have you not?

A. Pled guilty to what?

Q. The attempted first degree murder of Lisa Fotopoulos at the time that Bryan Chase shot her in the head?

A. Yes I have.

Q. Have you already pled guilty to soliciting first degree murder by Bryan Chase of Lisa Fotopoulos, have you not?

A. Yes I have.

Q. This questions requires only yes or no. Have you been sentenced

in each of those cases?

A. Yes I have.

(R.V. VI, 1067-68). Trial counsel ineffectively failed to object to these questions.

The prosecutor emphasized the error by stating

“...He suggests that Deidre Hunt, who is awaiting penalty of death in Florida’s electric chair has come before you because she’s been made a deal.”

(R.V. XIV, 2636). Trial counsel ineffectively did not object to this. In United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993), a reversal was required when a prosecutor had mentioned that a defendant’s brother had already been convicted for the same conspiracy as the defendant. It is obvious that the intent was for the prosecutor to place in the minds of the jury that if Ms. Hunt had been sentenced to die for her participation, it would be an injustice for Mr. Fotopoulos not to be sentenced to die.

Deidre Hunt’s testimony during the evidentiary hearing is most telling. She explained that Peter Niles, her former attorney, had threatened her with the death penalty. “He said if I did not plea then I would get the death penalty absolutely, if I didn’t go along with what they were doing.” (R.R. V. I, 62). She further went on to explain her state of mind. “There was another personal reason why I entered my plea, but if I didn’t think that I was going to get a life sentence, I would not have

entered it.” (R.R. V. I, 62). She then went on to testify that her death sentence was vacated by the Supreme Court and she was eventually given a life sentence in 1998. Therefore, there was no way that the jury, Mr. Fotopoulos or his attorney in Mr. Fotopoulos’ case would have known that. (R.R. V. I, 64). Ms. Hunt further testified that Assistant State Attorney Damore had told her that they would not completely fight for the death penalty and that was her understanding at the time she entered her plea. (R.R. V. I, 69). Then immediately prior to the trial in Mr. Fotopoulos’ case, she received the death penalty. (R.R. V. I, 70).

The Florida Supreme Court vacated Mr. Fotopoulos’ co-defendant’s death sentences in Hunt v. State, 613 So.2d 893 (Fla. 1992). Upon remand and without objection from the state, the court allowed Hunt to withdraw her plea and proceed to trial. The jury returned verdicts of guilty as charged on all counts, including the two first degree murders of which Mr. Fotopoulos was also convicted. Ms. Hunt proceeded to penalty phase without a jury, where the court sentenced Hunt to two life sentences. This occurred after the Florida Supreme Court affirmed Mr. Fotopoulos’ conviction and sentence, and was thus unavailable for the Supreme Court’s consideration. Hunt was sentenced on May 7, 1998, and her motion for new trial was denied on June 26, 1998.

Considering the state of mind of the jury in a death case and considering the

state attorney's emphasis on Deidre Hunt being the minor player and totally dominated by Mr. Fotopoulos, how can we say anything other than that this evidence probably would have prevented a judgment against defendant. See Argument II A. Her credibility was key to the state's case. It was certainly key to the issuance of a death penalty. How could the minor player, the dominated player receive the death penalty and not the dominator and key player? Foster v. State, 2000 Fla. LEXIS 1755; 25 Fla. L. Weekly S667 (Fla. Sept. 7, 2000) agreeing with this court in Gafford v. State, 387 So.2d 333, 337 (Fla. 1980) that the sentence of an accomplice may indeed affect the imposition of a death sentence upon a defendant. Hunt was videotaped killing one of the victims. She could not possibly be seen as less culpable and yet her death sentence was later turned into a life sentence. Disparate treatment of another principal is a reasonable basis for a life recommendation. Keen v. State, 775 So.2d 263 (Fla. 2000) and Ray v. State, 755 So.2d 604 (Fla. 2000). Refusal to consider disparate treatment or proportionality as a mitigating factor in this case where the defendant who received the life sentence (Hunt) was a willing participant, if not the instigator, in the Ramsey killing and hiring Chase to kill Lisa Fotopoulos would violate Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). See

also Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986).

If this set of circumstances is allowed to proliferate in our judicial system it would provide the prosecutors with an indispensable tool. First, they get a death sentence against a co-conspirator or accomplice who during their sentencing they characterize as not dominable and strong-willed. Then they come back and try the other co-defendant or co-conspirator and they portray the individual who received the death sentence as the minor player totally dominated by the individual on trial thereby necessitating a death sentence and a conviction, because as humans we try to be fair as I am sure the jury would. The individual who originally received the death sentence then comes back and receives a life sentence. That valuable tool used, that death sentence, is now a nullity for everyone except the second co-conspirator who is convicted and sits on death row. If the death sentence is no longer valid for Deidre Hunt, then that should invalidate its use against Mr. Fotopoulos. The only way to invalidate its use is to send this matter back for a new trial or a new sentencing phase.

During closing argument the prosecutor further added

Deidre Hunt is much like a person who has had a bullet put to her chest and is lying there bleeding to death and knowing that she is about to go down to the count, points that accusing finger to the person that put her where she is. No deals with Deidre Hunt. Deidre Hunt will have to deal with that with her life and her maker will deal

with that but the fact that she told the truth at a later time. (R. 5, XIV 2684).

While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike ‘foul blows.’ See Berger v. United States, 295 U.S. 78 (1935). As the United States Supreme Court observed over sixty years ago, ‘It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.’ Id. Gore v. State, *supra*. In Davis v. Zant, 36 F3d 1536 (11 Cir. 1994), the court dealt with the impropriety of the prosecutor’s remarks and the issue of fundamental fairness:

...it is fundamental tenant of the Law, that attorneys may not make material misstatements of fact in summation...

Thus, the Prosecutor intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction... The misrepresentations were calculated to undermine the credibility of Davis and the whole the defense hinged upon the jury’s credibility determination.

When you look at this argument and the prosecutor’s intent in light of Garron v. State, 528 So.2d 353 (Fla. 1988) and Teffeteller v. State, 439 So.2d 840 (Fla. 1983), you can see that what we have here goes beyond advocacy but it designed like a time line pointing to the death penalty for Mr. Fotopoulos. The prosecutor reminded the jury that Mr. Fotopoulos is Greek and referred to him as a

terrorist. (R. 5 III 539, 5 IV 2664, 2681). Even in the opening argument Mr. Fotopoulos was referred to as a terrorist. (R. V. III 539). As the court stated in United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996), “the prosecutor gave the jury an improper and convenient hook in which to hang their verdict.” And, of course, the trial counsel did not object to these either.

Again and again, the prosecutor emphasizes Deidre Hunt and death. Deidre Hunt is dying. Deidre Hunt knows she is dying and is making a death bed confession. What possible justification is there for the prosecutor pursuing this course of action. How can we not let a jury now know the truth. If we allow the death sentence to be carried out against Mr. Fotopoulos, it will be done based on a false pretense perpetrated by the State Attorney’s Office in his trial without his lawyer lifting a finger.

CONCLUSION

On the basis of the arguments presented herein, and on the basis of what was submitted to the trial court in the Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing, Appellant respectfully submits that he is entitled to relief from his unconstitutional convictions and sentences, including death, to an evidentiary hearing, and any other such relief as the court may deem just and proper including a new trial or new sentencing phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief, which was generated in Times New Roman, 14 point font, has been furnished by United State Mail, first class postage prepaid, to all counsel of record this 14 day of March, 2001.

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