

IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC01-1275

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PAUL ANTHONY BROWN,  
PETITIONER,

vs.

MICHAEL W. MOORE,  
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,  
RESPONDENT.

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PETITION FOR WRIT OF HABEAS CORPUS

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JOHN J. BONACCORSY  
1326 S. RIDGEWOOD AVENUE,  
SUITE 6  
DAYTONA BEACH, FL 32114  
(386) 253-7660  
FLA. BAR NO. 0371025  
ATTORNEY FOR PETITIONER

**PRELIMINARY STATEMENT**

Article 1, Sec. 13 of the Florida Constitution provides: “The writ of habeas corpus shall be grantable of right, freely and without cost.” These claims demonstrate that Mr. Brown was deprived of the right to a fair, reliable appellate proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional guarantees.

The proceedings in his case will be cited to as follows:

“R.” - record on appeal from initial trial court proceedings.

**JURISDICTION TO ENTERTAIN PETITION  
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla.R.App.P. 9.100(a); See Fla. Const. Art. I, Sec. 13. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Fla. Const. Art. V, Sec. 3(b)(9). The petition presents constitutional issues which directly concern the judgment of this court during the appellate process and the legality of Mr. Brown's sentence of death. Jurisdiction in this action lies in this court for the fundamental constitutional errors challenged herein arise in a capital case which this court heard and denied Mr. Brown's direct appeal.

**GROUND FOR HABEAS CORPUS RELIEF**

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

## **PROCEDURAL HISTORY**

An Indictment for First Degree Murder was returned against Petitioner and Scott Jason McGuire on April 6, 1993, by the Fall term Grand Jury for Volusia County, Florida (I R, 4). On August 5, 1996, Peyton Quarles was appointed to represent Petitioner(I R, 9). Trial counsel filed a Motion to Suppress statements of Petitioner on October 4, 1996 (I R, 40-41). An Information charging Petitioner with Armed Robbery with a Deadly Weapon and Armed Burglary of a Dwelling was filed by the state on October 8, 1996 for other crimes arising out of the murder of Roger Hensley(I R, 49). A hearing on the Motion to Suppress Petitioner's statements was held on October 10, 1996 (R, V. II, 31-97). The court denied Petitioner's Motion to Suppress finding that the confession was voluntary(R, V. II, 97). Guilt phase of the jury trial occurred on October 15 through October 18, 1996 (R, 465-1317). The jury returned a verdict of guilty of First Degree Premeditated Murder and First Degree Felony Murder against Petitioner on October 18, 1996 (I R, 77). The penalty phase of the jury trial occurred on October 23, 1996 (R, 1318-1457). Sentencing hearing occurred on November 7, 1996 (R, 1508-1520). The sentencing recommendation was by a vote of 12-0 to recommend the death penalty (I R, 83). Petitioner was sentenced to death by the Honorable R. Michael Hutcheson on November 7, 1996 (I R, 113-116). Petitioner filed a Notice of

Appeal on December 9, 1996 (I R, 132).

Petitioner's conviction and sentence of death was affirmed on appeal by the Florida Supreme Court. See Brown v. State, 721 So.2d 274 (Fla. 1998). Petition for Writ of Certiorari to the United States Supreme Court was denied. See Brown v. Florida, 119 S.Ct. 1582 (1999).

Petitioner filed a Motion for Postconviction Relief on November 3, 2000 (R-PC, V. IV, 457-481). A Motion for Leave to Amend was filed November 7, 2000 (R-PC, V. IV, 482-489). An Order denying Petitioner's Motion for Leave to Amend was entered November 29, 2000 (R-PC, V. IV, 490). Petitioner's Motion to Continue the evidentiary hearing and Order granting same was filed February 8, 2001 (R-PC, V. IV, 491-493). An Amended Motion for Postconviction Relief was filed February 12, 2001 (R-PC, V. IV, 494-581). Petitioner's Second Amended Motion for Postconviction Relief was filed April 26, 2001 (R-PC, V. V, 582-702). The evidentiary hearing was held on April 26 and 27, 2001 (R-PC, V. I-III, 1-420). The court orally denied relief on April 30, 2001 (R-PC, V. III, 421-455). The court entered a written Order denying Appellant's Second Amended Motion for Postconviction Relief on May 2, 2001 (R-PC, V. V, 726) Petitioner timely filed his Notice of Appeal of the order denying relief of the Second Amended Motion for Postconviction Relief on May 29, 2001 (R-PC, V. V, 728). Petitioner's Initial Brief

on his appeal of the trial court's denial of his Second Amended Motion For Postconviction Relief accompanies this Petition.

## CLAIM I

### **APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO APPEAL INFLAMMATORY COMMENTS AND STATEMENTS OF THE PROSECUTOR WHICH CONSTITUTED PROSECUTORIAL MISCONDUCT**

In this claim, Petitioner alleges that appellate counsel failed to appeal numerous comments of the prosecutor that were of personal opinion or belief; that mocked Petitioner's trial testimony and/or the defense and which were inflammatory comments or argument. These comments constituted prosecutorial misconduct. Trial counsel did not object to any of these improper comments or argument by the prosecutor (R, V, XI, 1237-1263). Petitioner contends he was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment, U.S. Constitution.

In order to evaluate claims of appellate counsel ineffectiveness, the court must determine: first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the

range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. See Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993).

Petitioner acknowledges that appellate counsel will not be deemed ineffective for failing to raise issues not preserved for appeal. See Robinson v. Moore, 25 Fla. L. Weekly, S647 (Fla. August 31, 2000). An exception may be made where appellate counsel fails to raise a claim which, although not preserved at trial, presents a fundamental error. See Roberts v. State, 568 So. 2d 1255 (Fla. 1990).

A fundamental error is defined as an error that “reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error” Robinson, 25 Fla. L. Weekly at S647-648, citing Kilgore v. State, 688 So. 2d 895 (Fla. 1997). Petitioner contends that appellate counsel failed to raise a claim which, although not preserved at trial, presents a fundamental error. That fundamental error occurred at trial during closing argument. Petitioner was denied his constitutional right to a fair trial.

A criminal trial is a neutral arena wherein both sides place evidence for the jury’s consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury’s view with personal opinion,

emotion, and non-record evidence. See Ruiz v. State, 743 So.2d 1 (Fla. 1999). In this case the prosecutor gave his personal opinion on the credibility of the defense and Petitioner's credibility as a witness, inflamed the jury's emotion or passion and argued non-record evidence.

The duty of prosecutors was addressed by this Court over sixty years ago:

... "that trials should be conducted coolly and fairly, without indulgence in abusive or inflammatory statements made in the presence of the jury by the prosecuting officer. That it must be realized that the most corrupt and hardened criminal is entitled to have the constitutional benefit of the same sort of a fair and impartial trial as has a first offender of previous good character."

Goddard v. State, 196 So. 596 (Fla. 1940). Petitioner contends that based upon all of the comments and statements made in closing argument in this case, the prosecutor believed that Petitioner should have entered a plea rather than waste everyone's time with a trial.

In this case, the prosecutor's comments in closing argument were improper because they were pejorative and disparaging. See Fullmer v. State, 790 So. 2d 480 (5th DCA 2001). Further, the prosecutor expressed his personal opinion in Petitioner's guilt. Fullmer, 790 So.2d at 481. Finally, the prosecutor commented on the legal effect of the evidence. Fullmer, 790 So.2d at 482.

Petitioner contends the unobjected to comments of the prosecutor were improper and constituted fundamental error. In determining whether fundamental error has occurred where improper comments are not objected to, the totality of the circumstances approach applies. See Scoggins v. State, 726 So. 2d 762 (Fla. 1999). Fundamental error is the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. See Caraballo, 762 So.2d 542 (Fla. 5th DCA 2000)citing McDonald v. State, 743 So.2d 501(Fla. 1999).

The prosecutor made several comments in closing argument which mocked Petitioner, his testimony or the defense.

One example of the prosecutor mocking Petitioner and/or his testimony, appealing to the jury's passion, sitting as a thirteenth juror, personal opinion on the credibility of Petitioner's testimony, and arguing non-record evidence occurred when the prosecutor said:

“there is one thing about his testimony that was particularly insulting, not only because it wasn't true —and that's the fact that Mr. Brown — and this is knowing — this is us knowing how Mr. Hensley died. Us knowing from the testimony the force of those stab wounds in his body, plunging 4 to 5 inches into his heart. I mean, those are ferocious, that's a ferocious, brutal, savage stabbing that goes into the body

so hard it causes blood to fly all over the walls. And knowing that Mr. Hensley is in that room alive and conscious, struggling for his life, moving from the bed and still being assaulted, stabbed not just in the chest numerous times but then being stabbed in the back, having his life, his blood, spilling from him onto everything, gasping for breath, falling down. His lungs filling with blood, gurgling, gasping for life. We hear all that, and we know how Mr. Brown murdered Mr. Hensley, and we have to sit here and hear Mr. Brown sit up there and tell us, I tried to comfort this man. I went down and asked him if he was okay.”

(R, V XI, 1258-1259). The prosecutor was mocking Petitioner and/or his trial testimony when the prosecutor said, “I tried to comfort this man. I went down and asked him if he was okay.” This was an attempt to disparage Petitioner’s testimony. Also, it was a successful attempt to inflame the jury’s passion.

Petitioner contends that the prosecutor made an improper argument similar to a thirteenth juror argument when he said, “this is us knowing how Mr. Hensley died. Us knowing from the testimony...” “we hear all that, and we know how Mr. Brown murdered Mr. Hensley, and we have to sit here and hear Mr. Brown sit up there and tell us ...” Petitioner contends it was almost as if the prosecutor was making an argument to his fellow jurors in the jury room rather than in court! Petitioner admits that the prosecutor did not ask the jury to consider him a “thirteenth juror” when it

retired to deliberate its verdict. These comments also inflamed the passion of the jury.

The prosecutor's comment that the victim was "gurgling" was not supported by the record. McGuire said the victim was struggling to breathe, gasping his last breath (R, V VIII, 871). Petitioner contends this was a thinly veiled attempt to argue that the victim choked to death on his own blood. The medical examiner did not testify that the victim choked to death on his own blood (R, V IX, 1057-1090). This comment was inflammatory and denied Petitioner a fair trial.

The prosecutor gave his personal opinion on the credibility of Petitioner's testimony when he said, "there is one thing about his testimony that was particularly insulting, not only because it wasn't true..." Petitioner contends this comment invaded the province of the jury.

The prosecutor was giving his personal opinion that Petitioner's testimony was insulting not only to him but also to the jury when he said, "there was one thing about his testimony that was particularly insulting..." It is inappropriate and prejudicial to make comments including arguing a witness' testimony insulted the jury's intelligence. See Ross v. State, 726 So. 2d 317 (Fla. 2d DCA 1998). Petitioner contends this comment along with the other comments detailed here deprived Petitioner of his right to a fair trial and constituted fundamental error.

These highly prejudicial, inflammatory and improper comments of the State constituted prosecutorial misconduct, invaded the province of the jury and, in one instance, was not supported by evidence. Petitioner argues the cumulative effect of the comments was so prejudicial as to constitute fundamental error.

The prosecutor mocked Petitioner in closing argument when he said:

“the defendant came to Daytona Beach on his so-called vacation.” When he was tired of his so-called vacation, he decided he wanted to go back to Tennessee.

(R, V XI, 1238). This is a statement mocking or ridiculing Petitioner because he testified that he came to Daytona Beach on vacation (R, V X, 1112 ). Petitioner argues this statement was nothing more than a veiled attempt by the State to say, “What is Petitioner’s idea of a vacation? It is to kill someone.” The jury understood the comment as such. It was also a veiled “bad person” argument by the State. This statement was highly prejudicial and constituted improper argument.

Next, the prosecutor made improper comments in closing argument when he argued to the jury:

“Now, tell me something. If Mr. McGuire is the man in control and Mr. McGuire is someone to be feared and scared of, and you feel that way about somebody, what do you think about leaving that persons — oh here we are, just committed a murder and oh, Mr. McGuire, I’m

leaving your license here, your identification card, here at the gas station the same day, the next day after we committed this murder, and lets get in the truck and head out of here. I think if someone is someone to be feared, they would not stand for that being done to them.”

(R, V XI, 1252-1253). Petitioner argues the prosecutor was again mocking Petitioner and/or his testimony. Petitioner contends the “oh here we are, just committed a murder ...” comment was pejorative and disparaging.

The prosecutor’s “now tell me something” comment was made as if he were a member of the jury. Petitioner admits that the prosecutor did not ask the jury to consider him a “thirteenth juror” when it retired to deliberate its verdict. See Hill v. State, 477 So. 2d 553 (Fla. 1985). Petitioner argues the prosecutor is not to align himself with the jurors through his comments and argument. A prosecutor’s job is to assist the jury in its factual determination. This constituted prosecutorial misconduct.

The prosecutor also gave his personal opinion on the credibility of the testimony when he said “I think if someone is to be feared, they would not stand for that being done to them.” This statement was improper and invaded the province of the jury whose duty is to determine the facts and the credibility of the witnesses.

Petitioner contends these statements contain a “golden rule” argument. That occurred when the prosecutor said, “If Mr. McGuire is the man in control and Mr. McGuire is someone to be feared and scared of, and you feel that way about somebody, what do you think about leaving that persons...” An improper golden rule argument occurred when during closing a prosecutor improperly suggested to the jury that if they placed themselves in the shoes of the defendant, they would not have stabbed the victim in reaction to the circumstances the defendant had faced. See Gomez v. State, 751 So.2d 630 (Fla. 3d DCA 1999). In this case, the prosecutor was asking the jury to place themselves in the shoes of Appellant and consider whether or not Appellant really feared McGuire. This comment along with the other comments detailed herein were prejudicial and denied Petitioner a fair trial.

The prosecutor made an improper personal opinion comment when he said:

“Essentially, I think that Mr. Brown’s testimony here before you is worth just about as much as Mr. Brown felt that Mr. Hensley’s life was worth back in November of 1992.”

(R, V XI, 1258). This was the personal opinion or belief of prosecutor concerning the credibility of Petitioner’s testimony at trial. Petitioner contends this is also a thinly veiled argument suggesting the jury give Petitioner the same consideration as he gave the victim. This statement invaded the province of the jury. This statement

along with the other statements detailed herein were prejudicial and denied Petitioner a fair trial.

Petitioner also argues this comment constitutes a personal attack on Petitioner or his character.

The prosecutor's next improper argument occurred when he said in closing that:

“I'm really not going to talk much about  
— and not at all — about the testimony of Mr.  
Brown here in court, because it's worthless.”

(R, V XI, 1258). This statement gives the prosecutor's personal opinion about the credibility of Petitioner's trial testimony. This statement invaded the province of the jury. Prosecutors may not directly or indirectly express their opinions as to the credibility of witnesses or the guilt of the defendant. See Martinez v. State, 761 So. 2d 1074 (Fla. 2000). Trial counsel did not object (R, V XI, 1258).

Another improper comment made in closing argument by the prosecutor occurred when he stated:

“Looking back on all the evidence, *I* think  
it's clear to see the plan was to kill Mr.  
Hensley when Mr. Hensley was met by Mr. Brown.”

(R, V XI, 1239). Petitioner contends this statement was the personal opinion of prosecutor that Petitioner formed the intent to commit premeditated first degree

murder or felony murder when he met the victim. This statement also invaded the province of the jury who was the fact-finder on intent or premeditation. Petitioner admits trial counsel did not object to this statement (R, V XI, 1239). Nevertheless, this statement was highly prejudicial and constituted improper argument.

The prosecutor gave his personal opinion or belief concerning the evidence when he said:

“And I think the end result is clear that Mr. Brown went in there with one purpose, and that was to murder Mr. Hensley, make sure he did not get out of that bedroom.”

(R, V XI, 1240). This is an improper statement of the personal opinion of prosecutor that Petitioner was guilty of murder. Martinez, 761 So. 2 at 1081.

Petitioner argues this was improper opinion or belief of the prosecutor concerning the evidence in the case. This statement invaded the province of the jury as fact-finder.

Another improper personal opinion comment of the prosecutor happened when he stated:

“I think it’s obviously clear here that Mr. Hensley didn’t consent to being stabbed to death for this gentleman to remain in his apartment and rummage through his belongings and steal his money and his truck keys.”

(R, V XI, 1246). Petitioner argues this improper statement invaded the province of the jury.

The prosecutor gave an improper personal opinion when he said in closing argument that:

“now, contrary to what defense would have you believe, I think Mr. McGuire or Mr. McGuire’s statement is important. It helps to explain things. It helps to corroborate.”

(R, V XI, 1249). Petitioner contends this statement invaded the province of the jury. It was the jury’s function to determine the weight of conflicting evidence, not the prosecutor.

Yet another improper personal opinion statement occurred when the prosecutor said:

“I think it’s important to look at what Mr. McGuire had to say. It tells *us* something about the relationship between Mr. Brown and Mr. McGuire.”

(R, V XI, 1249). Petitioner alleges this statement invaded the province of the jury. It is the jury’s function to determine what the testimony means. It is not the prosecutor’s function.

The prosecutor made an improper personal opinion statement when he said in closing:

“the defense would have you believe that if someone comes in here and has better eye contact with the jury, then that must mean that they’re the ones that are telling the truth. Well, if that’s all there was to it, then I don’t think there would be a need for trials or anything else.”

(R, V XI, 1249). Petitioner contends this statement invaded the province of the jury. Judging witness demeanor is the function of the jury. It is not the function of the prosecutor. The prosecutor’s personal opinion on whether the need for trials to occur is improper. Petitioner alleges this statement is close to the improper statement that they were only there because Petitioner had a right to a jury trial. State v. Bell, 723 So. 2d 896 (Fla. 2d DCA 1998).

Another example of the prosecutor giving his personal opinion in closing argument occurred when he stated

“when you look at Mr. McGuire’s testimony and compare it to what Mr. Brown has to say, I think what you’ve got here is a choice between; one, Mr. Brown would have you believe that Mr. McGuire is the mastermind or the architect of this big frame up.”

(R, V XI, 1250). This improper comment invaded the province of the jury. It is the personal opinion of the prosecutor on the credibility of the witnesses. Martinez, 761 So. 2d at 1081.

The prosecutor made an improper personal opinion comment when he said that:

“well I think what we really have — and I think if you look at everything, you’ll see that what you really have is Mr. McGuire is just one dumb sucker.”

(R, V XI, 1251). This comment invaded the province of the jury.

The prosecutor made an improper comment when he said:

“now, keep in mind these things I’m talking about when you consider whether you want to buy this stuff about Mr. Brown being scared of Mr. McGuire and under his control and all of this nonsense that you heard.”

(R, V XI, 1251). Petitioner alleges this comment concerned the prosecutor’s personal belief in the lack of credibility of Petitioner’s testimony and the defense.

The prosecutor expressed his opinion as to the credibility of the witness

(Petitioner) or the guilt of Petitioner. Martinez, 761 So.2d at 1081.

The prosecutor gave his personal opinion on the evidence when he said:

“Well, you heard the evidence. That neck wound — and I think the evidence clearly shows Mr. Brown did it.”

(R, V XI, 1255). Petitioner alleges this improper statement invaded the province of the jury. The prosecutor was giving his personal opinion as to the guilt of the

defendant. Martinez, 761 So. 2d at 1081.

Another improper comment by the prosecutor in closing argument occurred when he stated:

“there is really only one appropriate verdict and that is the top box guilty of both types of first-degree murder.”

(R, V. XI, 1262). This was personal opinion.

The prosecutor made an improper comment in closing that:

“I think it’s important to realize, and you’ll be instructed, that if you return a verdict of guilty to the charge, it should be for the highest offense that has been proved beyond a reasonable doubt.”

(R, V. XI, 1260-1261). This is an improper personal opinion of the prosecutor concerning jury instructions. This comment invaded the province of the jury.

Improper opinion was given by the prosecutor in closing argument when he stated:

“And once again, I don’t think much time needs to be spent on that because this is not a Manslaughter case. This is a premeditated, first-degree and first-degree felony murder case.”

(R, V. XI, 1262). Petitioner argues this improper statement concerned the prosecutor’s personal opinion concerning the guilt of Petitioner. Martinez, 761 So.

2d at 1080. This comment invaded the province of the jury. Finally, Petitioner contends this statement conveyed the impression that evidence not presented to the jury, but known to the prosecutor supports the charge against Petitioner. Martinez, 761 So. 2d at 1080.

The prosecutor made an improper character attack on Appellant when he stated in closing argument:

“some people take pride in their country, their church, whatever. But you can tell a lot about someone when you know what they are proud of. Mr. Brown expressed his pride and what he was proud of back on November 9, 1992, just days after he murdered Mr. Hensley, and Mr. Brown was proud to be a murderer.”

(R, V. XI, 1262). The rule in Florida relating to character evidence is that the character of a person accused of crime is not a fact issue, and the state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show his bad character... See Martinez, 761 So.2d at 1082. Petitioner argues that the prosecutor’s comment was an attempt to convince the jury to find Petitioner guilty because of bad character.

The prosecutor made an improper “send a message” argument in closing when he stated:

“I simply ask that you follow the law,

applying the evidence to the law, and announce through your verdict yes, that's right, Mr. Brown you are a murderer.”

(R, V. XI, 1263). Petitioner argues this was an improper “send a message” argument. It is not the duty or function of any jury to send a message to any defendant. It was improper for the prosecutor to ask the jury to send a message to Petitioner.

Petitioner admits this case is distinguishable from Freeman v. State, 761 So. 2d 1055 (Fla. 2000) where a prosecutor told the jury to use the case to send a message to the community. In Freeman , defense counsel had objected before the statement was made. Also, the judge overruled the objection and reminded the jury that arguments were not the law and he would instruct the jury on the law after closing arguments. Freeman, 761 So.2d at 1070. In this case, trial counsel did not object to the “send a message” comment and the court did not give a curative instruction (R, V XI, 1263). Freeman is further distinguishable because defense counsel continually objected during the prosecution’s closing arguments. Defense counsel in Freeman also moved for a mistrial at the conclusion of the prosecutor’s closing argument. Trial counsel did none of that in this case (R, V XI, 1263).

Trial counsel did not object to any of these improper comments or statements of the prosecutor (R, V XI, 1237-1263). Petitioner contends these

comments either individually or cumulatively denied him a fair trial. The unobjected to comments denied Petitioner a fair trial and constituted fundamental error.

Petitioner contends the deficiency as described herein concerns an issue which is error affecting the outcome, not simply harmless error. Freeman, 761 So. 2d 1055(Fla. 2000).

Petitioner contends he has shown 1)specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2)the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. See Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985)

## CLAIM II

### **APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO APPEAL THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS CONFESSIONS OR ADMISSIONS**

In this claim, Petitioner alleges appellate counsel failed to appeal the denial of his motion suppress confessions or admissions given to the Federal Bureau of Investigation after his arrest in Tennessee.

A hearing on Petitioner's motion to suppress confessions or admissions was

held by the trial court on October 10, 1996 (R, V II, 33-97). The court heard testimony from two FBI agents, Robert E. Childs and John M. Grant(R, V II, 37-75).

Childs testified that when Petitioner was arrested in November, 1992, Petitioner had been advised of his Miranda rights and he requested an attorney prior to making any statements (Id. at 38-40). Childs contacted Petitioner to process him before his initial appearance (Id. at 46). On the way to the FBI office, Petitioner said they would be putting him away for a long time and a lot of people would want to talk to him (Id at 48). Petitioner continued to talk (Id. at 49). While being fingerprinted, Petitioner made comments that lead Childs to believe Petitioner wanted to get something off his chest (Id. at 50). Petitioner sat across the table from Childs who had his file with bank robbery material in it (R, V II, 50). Petitioner saw a photograph and asked about it (Id. at 50). There was conversation about the photograph and Petitioner said it wasn't him (Id at 50-51). To clarify what Petitioner's intentions were, Childs asked "Do you want me to advise you of your rights?" (Id at 51). Petitioner said yes (Id at 51). Childs gave one form to Mr. Brown and Childs read the form (Id at 51). He asked Petitioner to sign the form and Petitioner said he didn't want to sign it, he doesn't sign anything (Id at 52). Brown then said he was ready to plead guilty right now, he didn't need an

attorney to tell the truth to the FBI (Id at 52-53). After denying robbing banks in Nashville, Brown said he murdered a white male in a motel room in Daytona Beach, Florida approximately November 4, 1992 (Id at 55).

Between the time Brown requested to see an attorney and the time he gave a statement, he had not seen or talked to an attorney (Id at 61).

John M. Grant also testified to being present during Brown's statement (Id at 69). Grant said Brown indicated he wanted to talk to them (Id at 69). Brown was asked to clarify his intentions, he was asked if he did want to talk with the agents and Brown indicated he did (Id at 70).

Once an accused asks for counsel, an accused may not be subjected to further interrogation until counsel has been made available to the accused, absent initiation of further communication with law enforcement officers by the accused. See Minnick v. Mississippi, 498 U.S. 146 (1990). Petitioner contends he did not initiate further communication with the FBI. They initiated communication with him. Grant testified at the suppression hearing Brown "was asked if he did want to talk with us" (R, V II, 70). Mr. Brown was taken to the FBI office for processing. He did not go there voluntarily. Mr. Brown had invoked his Miranda rights the day before. But, he had not been placed in contact with an attorney. Further, Mr. Brown had been given a shot of whiskey the day before as part of negotiations to

get him to surrender(R, V II, 75). Brown was conveniently placed at a table with his bank robbery file. This was an attempt to obtain a statement from Petitioner. The FBI was successful. Petitioner's statement was obtained in violation of his Fifth, Sixth, and Fourteenth Amendment rights.

When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. See Edwards v. Arizona, 451 U.S. 477 (1981). Further, where counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney. See Minnick v. Mississippi, 498 U.S. 146 (1990).

In denying Petitioner's motion to suppress confessions or admissions, the trial court found the FBI agents did not initiate the conversations. That Petitioner was voluntarily talking and voluntarily offering things (R, V II, 88). Mr. Brown contends the trial court erred. Further, Petitioner argues that appellate counsel was ineffective for failing to appeal this issue.



**CONCLUSION AN RELIEF SOUGHT**

For all the reasons discussed herein, Mr. Brown respectfully urges this Honorable Court to grant habeas relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to Judy Taylor-Rush, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 and by mail to Paul Anthony Brown, DC# V02093, F.S.P. Main Unit, P.O. Box 181, Starke, FL 32091 the 7th day of December, 2001.

\_\_\_\_\_  
JOHN J. BONACCORSY  
ATTORNEY FOR APPELLANT

**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in this brief is point proportionally spaced Courier New, 12pt.

\_\_\_\_\_  
JOHN J. BONACCORSY  
ATTORNEY FOR APPELLANT