

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-605

VICTOR TONY JONES,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Jones was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions, death sentence and other sentences, as well as the affirmance of those convictions and sentences, violated fundamental constitutional guarantees. Citations to the direct appeal record shall be as (R. page number). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, ' 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Jones requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered the judgments of convictions and sentences

under consideration. After a jury trial, Mr. Jones was found guilty of two counts of first-degree murder and related offenses. The jury recommended death, and the trial judge imposed two death sentences. On direct appeal, this Court affirmed Mr. Jones's convictions and sentences. Jones v. State, 652 So. 2d 346 (Fla.), cert. denied, 116 S. Ct. 202 (1995). On March 24, 1997, Mr. Jones filed an initial Rule 3.850 motion. Several amended motions were subsequently filed, and the trial court conducted an evidentiary hearing limited to certain issues. An order denying relief was entered, and Mr. Jones' appeal is currently pending before the Court. Jones v. State, No. SC01-734.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCES.

Mr. Jones had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeals to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Because the constitutional violations which occurred during Mr. Jones' trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Jones'] direct appeal[s]." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Jones' behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failures to present the meritorious issues discussed in this petition demonstrates that the representation of Mr. Jones involved "serious and substantial deficiencies." Fitzpatrick v.

Wainwright, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). In light of the serious reversible errors that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

A. TRIAL COUNSEL'S ACTUAL CONFLICT OF INTEREST AND MOTION TO WITHDRAW.

Between the guilt phase decision and the beginning of the penalty phase, a conflict arose between the defense counsel Art Koch and Mr. Jones. Defense counsel filed a motion on February 9, 1993, seeking leave of the court to withdraw as counsel for the defense.

That motion read:

The undersigned attorneys seek leave of this Court to withdraw as counsel for Defendant. In support of this motion the undersigned state that since the jury's guilt/innocence verdict was rendered, the Defendant has threatened his counsel with physical injury and death and has refused to communicate with counsel concerning the penalty phase proceedings in this case. Furthermore, given the nature and seriousness of the threats made against counsel, the interest of the Defendant and those of counsel are adverse and unreconcilable. Finally, given the circumstances that now exist, continued representation of the Defendant by present trial counsel would merely serve the purpose of

giving these proceedings the appearance, but not the substance, of due process and fairness. Wherefore, the undersigned moves the Court to permit their withdrawal for this cause.

(R. 346-47). At a hearing that same day, the serious nature of the breakdown of trust between Mr. Jones and counsel was clarified on the record:

THE DEFENDANT: Excuse me, Judge Sorondo, could I say something?

THE COURT: I think you should speak through your lawyer.

MR. KOCH: No, I don't want to speak to him at all.

THE DEFENDANT: That's the problem right here. Mr. Koch isn't communicating with me, so I can't find out what's happening, really going on.

MR. KOCH: I have filed a motion on this, this regard. I have no desire to speak to him. I will not speak to him and that is it.

THE COURT: Okay.

MR. KASTRENAKES: Mr. Koch has filed a motion this morning seeking leave to withdraw as counsel for the Defendant which --

THE COURT: Okay. Let me take a look at this, Mr. Jones and I will address your concerns.

(R. 2202). While the court looked over the motion, attorney Koch addressed the court about an incident that had occurred the preceding Thursday when he and Dr. Eisenstein had gone to visit Victor Jones at the jail (R. 2203). Attorney Koch advised the court that at the jail

"Victor Jones was not only verbally abusive, but on the threshold of violence, real violence" (R. 2203). He went on to say that he subsequently advised state expert Dr. Mutter, who was scheduled to interview Mr. Jones prior to the scheduled competency hearing, that in spite of Victor Jones's 6th amendment right to counsel, he, Koch, was not going to accompany Dr. Mutter to the jail and he further advised Dr. Mutter not to go (2204). Koch then made disparaging and unprofessional remarks in a diatribe directed at his client, Mr.

Jones:

MR. KOCH: ...Now, of course, Victor Jones wants to know what's going on. I am appointed to represent him. I don't need to take verbal abuse. I don't need to take the threats of physical abuse. If he wants to duke it out, fine, but I am not going to sit here and be sucker punched at the table sitting next to him during the course of these proceedings because now he wants to know what's going on. I will represent him, if I have to. I don't need to speak to him. I don't need to deal with him. I am going to suggest he be shackled during --

THE DEFENDANT: No, no, no.

MR. KOCH: -- during the penalty phase --

THE DEFENDANT: No.

MR. KOCH: Because actually based on what he said there is a real danger to Mr. Kastrenakes, to Mr. Behle and to myself and that is the situation we are in. That is the situation he has decided to create. I didn't vote him guilty. I didn't kill anyone. I didn't confess. I didn't put wallets in my pockets. I didn't do those sorts of things. He did. The jury has found him guilty and is so often

the case Defense Counsel is being blamed for the acts that the jury found beyond a reasonable doubt that Victor Jones committed. I didn't commit seven felonies. I didn't get out of prison November 27th and kill two people on December 19th, yet I am being blamed by him. That is the situation. So, if necessary I will continue to represent him, but I don't need to talk to him.

THE DEFENDANT: Excuse me, Your Honor.

MR. KOCH: I don't need to deal with him.

THE DEFENDANT: There is a reason why right now I don't want him to represent me. Okay. You heard what he just said. He just might as well say before he even started on my case that I am guilty. That is the way he felt about it. So, what reason would I need him to finish my case if he feels like I am guilty. You know I feel like that is part of the way that I got found guilty because of his attitude. That's right. I did. I was hostile towards him simply because of that reason. Right now because of what he is saying.

THE COURT: What he is saying the jury found you guilty.

THE DEFENDANT: Right. He mentioned other things too also like -- ah -- you know, automatically they are going to sentence you to the electric chair, you know, regardless of what happens.

THE COURT: I don't know that.

THE DEFENDANT: That's what Mr. Koch said, you know. So, you know, how did he expect me to take that, you know, like I want -- was supposed to be a little kid and take that.

(R. 2204-06). Koch then represented to the court that he had "said nothing that is not a matter of public record" (R. 2214). The

trial court exhibited concern about the obvious problems with communication between attorney and client, and inquired of defense counsel about whether he had met with the client before the trial (R. 2217). Koch replied, stating he had visited with Mr. Jones "countless times" and in response to the Court's inquiries about whether he had discussed the case, trial strategy and the weight of the evidence with his client, Koch said he had discussed "Everything" (R. 2217).

The response of the court was to subject Mr. Jones to a lengthy court lecture and examination that appears to have been intended to allow the court to rule against the defense motion to withdraw and to simultaneously undercut the pending defense claim that Mr. Jones was incompetent (R. 2218-37). Mr. Jones's confusion and uncertainty related to his disability is exhibited by some of his comments during the court's inquiry:

THE DEFENDANT: Yes, Judge Sorondo. I have no doubt about Mr. Koch coming to see me helping me prepare for the trial, but the problem was at the last minute during the trial all of a sudden they want to change their strategy. You know I didn't want it that way.

Just what this was -- um -- was in a different way concerning about me -- um -- why I would not take the stand.

It's hard for me to say because it's hard -- I really -- really it's hard for me to

remember anything. I get confused a lot of times. I just don't remember things, you know, so I couldn't really say that I remember, but you're probably right.

I don't know any thing about it (preparation for the penalty phase).

Um -- I's rather not answer. I will take your word for it, but I would rather not say.

Don't get me wrong. All I'm saying, okay, he's a good attorney, don't get me wrong, but since this is -- has happened, okay, but before this happened, okay, we had a strategy to go one way and then right before at the last minute it had to change. You know all pressure came on me, you know and it happened to me once before and I felt like something was wrong. You know, why should at the last minute all the pressure come on me.

But Mr. Koch knows also that I can't really -- it is hard for me to make decisions like that. I am confused a lot, so it is hard for me to do that.

No. I just told him (Mr. Koch), well, at the last minute I told him, don't come see me at jail any more. That's what I told him, you know, because he really, you know, pissed me off. What I did tell him was I -- I think he also helped set me up, you know, since all the way he had been planning and planning. It just didn't go that way at the last minute. I just let him know I'd be happy to let him know

verbally or if it's going to come out physically, I'd rather let him know verbally. I don't think I did anything wrong.

(R. 2218, 2219, 2220, 2221, 2222, 2223, 2225). Further evidence of an direct conflict between attorney and client is provided by Mr. Koch's response, in which he accuses his client of lying:

What you are hearing today from Victor Jones is not the basis upon which I filed the motion to withdraw. The reason is not -- the basis for which I filed the motion to withdraw is that Mr. Jones is not telling the truth with respect to many things that occurred. There is a witness to what occurred, who would substantiate everything I have said and more.

...Well, the reason I bring it up is the fact the State is standing here arguing how credible everything Victor Jones has said. You know, he doesn't want to fire his lawyer, he's perfectly happy with this, he doesn't want that. This is the same man they're trying to introduce seven convictions on. So, I simply bring it up so that it is clear that everything that Victor Jones has said today with respect to this particular problem may not necessarily be true, despite the fact that it is now convenient for the State to vouch for his credibility. That is the only reason I bring it up.

(R. 2232-33) (emphasis added). The comments by the trial court at the conclusion of this inquiry simply disregarded consideration of the direct conflict between attorney and client that was entwined with Mr. Jones disability related to his frontal lobe syndrome.

I feel, first of all, in my conversations with Mr. Jones, as the State pointed out during the course of the trial, Mr. Jones behaved respectfully toward me and he was quiet at his

table, occasionally leaning over to speak to Miss Rodriguez, occasionally leaning over to speak to the other fellow...On a couple of occasions I addressed him in reference to some issues I wanted to clarify and he responded articulately, he responded intelligently. In many instances he is yielding to your judgment. He has indicated to me that during the course of the two year period that he was satisfied with the time that you dedicated to him which is rare. In many cases involving your office there are often complaints about a lack of visitation. That is not the case here. Mr. Jones today is composed. He has addressed me intelligently and articulately. He has expressed some of his concerns and at the same time shown that he understands what is going on. He understands what is at stake. He knows what has happened. He doesn't like what has happened which is completely understandable. He finds himself in a very difficult position. He knows what is at stake to come. He knows the jury tomorrow will consider whether to recommend to me the sentence to him of life imprisonment or to death. He has an understanding of your skill as an attorney. He is not challenging your skill as an attorney. In fact, he has indicated you are a qualified attorney. I have no doubt that his explosion or his venting on that particular occasion when you were with Dr. Eisenstein was substantial...He is not asking me to -- he is not suggesting you are ineffective as the law contemplates that term. He obviously wants to know what is going on. I think if nothing else Mr. Jones has a better understanding of what's going on now insofar as why the doctors have been going to see him. Again, I am satisfied that he understands what is going on and what is at stake; having shown always the appropriate behavior in the courtroom, having showed it today. He is rational. He seems to have a rational understanding of what is going on. He addresses me respectfully with the deference of one who understands the relative position of the parties...

(R. 2233-36). The court then denied the motion to withdraw, citing a Third DCA case, Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985) from which he quoted language at 314, "as long as the trial court has a reasonable basis for believing that the attorney/client relation has not materially deteriorated to a point where counsel can no longer give effective aid in the fair representation of the defense the Court is justified in denying a motion to withdraw" (R. 2236-37).¹

At a subsequent hearing on February 12, 1993, trial counsel moved orally to renew his motions to withdraw as counsel and to have Mr. Jones shackled during the penalty phase (R. 2446). The trial court denied both motions (R. 2246).

Despite this issue virtually leaping off of the transcript, appellate counsel unreasonably failed to raise on appeal the trial court's denial of the motion to withdraw due to the actual conflict of interest which had arisen between Koch and Mr. Jones. The lower court also failed to appoint counsel for Mr. Jones with respect to the motion filed by Koch, because when Koch sought to withdraw, he was clearly acting against the interests of his client and Mr. Jones was essentially unrepresented during the proceedings addressing

¹The trial court's reliance on Sanborn is clearly misplaced. At issue in Sanborn was an attorney's motion to withdraw based on the attorney's allegation that the defendant had directed him to present evidence and argue facts which counsel knew to be false. The facts of Mr. Jones' case could not be more different.

Koch's motion to withdraw. Appellate counsel's fifty-five (55) page initial brief contained twenty-eight (28) pages of argument of which thirteen (13) pages were devoted to Argument III concerning fetal alcohol syndrome.² Nowhere in the argument section of the brief does appellate counsel raise the conflict of interest set up by trial counsel Koch's attempts to withdraw, his comments about Mr. Jones on

²An issue which this Court determine had not even been raised in the trial court. Jones, 652 So. 2d at 351-52. When considering whether Mr. Jones' appellate counsel rendered prejudicially deficient performance in failing to raise the issues contained in this petition, it is appropriate for the Court to consider the issues that were raised, in order to assess the reasonableness of appellate counsel's putative decision-making in determining what issues to raise. There can be no strategic reason for appellate counsel's decision to make a meritless argument regarding fetal alcohol syndrome while at the same time completely ignoring a patent conflict issue that is apparent on the record. Appellate counsel's independent research projects or interests should not influence the critical process of choosing what arguments to feature in a capital brief. Appellate counsel's obsessive focus on alcoholism and fetal alcohol syndrome in Mr. Jones's brief must be viewed in the context of deficient performance. Her biases are well documented in her own work product. See Nancy C. Ware, *The Alcoholic Client: Identification, Recommendation and (Maybe) Rehabilitation*, THE FLORIDA BAR JOURNAL, December 1999, at 44. Although this article was published some six years after Mr. Jones's December 1993 initial brief and June 1994 reply brief, the excerpts about fetal alcohol syndrome track the substance of the arguments found in the appellate briefs. Appellate counsel concluded and the briefs reflected her unsubstantiated personal opinion that "the trial court's rejection of nearly all of the defense arguments relative to mitigation was the result of his unshakable belief that a middle-class upbringing can make up for time spent in an alcohol-soaked womb." Reply Brief at 10. Her reliance on her personal views in choosing what issues to brief was not a strategic decision but rather objectively unreasonable performance which operated to the considerable prejudice of Mr. Jones, given the substantial claims that appellate counsel did not raise.

the record and Mr. Jones' attempts to remove Koch from the case.³

Had appellate counsel raised this issue on appeal, there is more than a reasonable probability that this Court would have granted relief. Strickland v. Washington, 466 U.S. 668 (1984). The lower court clearly erred in denying the motion to withdraw filed by defense counsel, as there was a unmistakable breakdown in the attorney-client relationship between counsel and Mr. Jones, and a concomitant breach of the duty of loyalty owed to Mr. Jones by

³Only a review of the penalty phase section of the Statement of the Facts of the initial brief provides any acknowledgement that the events memorialized supra ever occurred in Mr. Jones' case. Initial Brief at 13-23. Specifically, the initial brief recorded that "[trial] [c]ounsel argued that Mr. Jones was so hostile to counsel that he feared actual physical violence. While the court refused to let counsel withdraw, he agreed to have Mr. Jones evaluated..." Initial Brief at 13. The initial brief also notes that "lead counsel told the court that he wanted Mr. Jones to be shackled during the penalty proceedings because of threats of physical violence that he had made toward lead defense counsel and toward both prosecutors. That request was refused, the court commenting that Mr. Jones was rational, articulate, and understanding in his colloquies with the court. In fact, two days before the competency hearing, that Mr. Jones "certainly seems competent to me." Initial Brief at 13. The facts in initial brief also notes that on the day of Mr. Jones' competency hearing, the trial court "denied lead counsel's ore tenus motion to substitute other counsel," and further that "[c]o-counsel [Rosa Rodriguez] reported to the court that Mr. Jones had no confidence in lead counsel, and Mr. Jones himself advised the court that he could not communicate with co-counsel either, for which he blamed lead counsel." Initial Brief at 14. Finally, the facts reveal that during the trial Mr. Jones advised the court that trial counsel was planning to make him look like a monster and then requested new counsel, a request which the lower court denied. Initial Brief at 16-17. Thus, appellate counsel was not unaware of the facts which gave rise to the conflict of interest and the motion to withdraw, but rather, without a reasonable strategic decision, failed to raise the issue on appeal.

counsel. Due to the level of breach occurring, Mr. Koch was actually or constructively denied counsel, and prejudice is presumed. United States v. Cronin, 466 U.S. 648, 659-60 (1984). "[T]he duty of loyalty . . . [is] perhaps the most basic of counsel's duties." Id. at 692. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691-92. "[T]o compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." Brown v. Craven, 424 F. 2d 1166, 1170 (9th Cir. 1970).

When confronted with an issue of withdrawal due to a conflict between attorney and client, the inquiry is not simply whether trial counsel can competently represent the defendant in spite of the conflict, as the trial court essentially concluded, but rather the focus must be on the nature of the breakdown between counsel and client. See United States v. Adelo-Gonzalez, 268 F. 3d 772, 778 (9th Cir. 2001) ("The court's factual findings reflect this misplaced emphasis; it explicitly held in denying both motions that the appointed counsel was competent and fully prepared to provide the necessary quality of representation. There was too much emphasis on the appointed counsel's ability to provide adequate representation

and not enough attention to the status and quality of the attorney-client relationship"); United States v. Musa, 220 F. 3d 1096, 1102 (9th Cir. 2000) ("Even if a defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense"); United States v. D'Amore, 56 F. 3d 1202, 1206 (9th Cir. 1995), *overruled on other grounds by* United States v. Garrett, 179 F. 3d 1143, 1145 (9th Cir. 1999) ("[A] court may not deny a substitution motion simply because it thinks current counsel's representation is adequate"). Thus, when an attorney calls his client a liar and launches into an "open attack on his client's credibility," a "serious breach of trust and a significant breakdown in communication" ensues which "substantially interfered with the attorney-client relationship." Adelzo-Gonzalez, 268 F. 3d at 779. Accord Frazer v. United States, 18 F. 3d 778, 783 (9th Cir. 1994) (verbal assaults and "threatening and improper statements" against client rose to level of actual conflict of interest); United States v. Shorter, 54 F. 3d 1248, 1252-53 (7th Cir. 1995) ("When a defendant accuses his counsel of improper behavior and the counsel disputes his client's accusations, an actual conflict of interest results because any contention by counsel that defendant's allegations were not true would (and did) contradict his client"); Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) ("counsel's attacks on Clark's character and counsel's attempts to distance himself from his client could only

have hurt Clark's cause" warranting a finding of ineffective assistance of counsel).

The nature of the comments made by Koch against Mr. Jones unequivocally established his breach of the duty of loyalty owed to Mr. Jones. Koch directly accused his client of lying and threatening physical harm to himself, the prosecutor, and the mental health experts. Koch told the judge, who is the ultimate sentencer in the case, that "he" (Koch) did not go out and kill people soon after being paroled, but that "he" (Mr. Jones) did. He also repeated that he would not speak to or deal with Mr. Jones any longer, and that he would only represent him further if he "had to." To make matters even worse, Koch then recommended that his own client be shackled in front of the jury during the penalty phase.

Moreover, during the proceedings initiated due to Koch's motion to withdraw, Koch "virtually abandoned" Mr. Jones when Koch "took an adversary and antagonistic stance" toward his client, leaving Mr. Jones to fend for himself against the representations of his own attorney. Adelzo-Gonzalez, 268 F. 3d at 779. Thus, Koch's actions deprived Mr. Jones of the right to counsel during the motion to withdraw proceedings, which are certainly a critical stage. Mr. Jones was left to fend for himself, without the guiding hand of counsel, against his counsel's diatribe in front of the very judge who would later be the final sentencer. Koch's actions thus deprived

Mr. Jones of the right to counsel, and the right to the effective assistance of counsel. The trial court also failed to appoint counsel to represent Mr. Jones' interests during the proceedings initiated as a result of Koch's motion to withdraw.

The motion to withdraw and the exchanges noted above also represent the intersection of several different Rules of Professional Conduct and the overriding issue of the competency of Mr. Jones to communicate with counsel and to participate in his own trial. The Rules of Professional Conduct implicated include Rule 4-1.4 Communication, Rule 4-1.6 Confidentiality of Information, Rule 4-1.7 Conflict of Interest; General Rule, Rule 4-1.14 Client Under A Disability, and Rule 4-1.16 Declining or Terminating Representation. Mr. Jones was unable to consent to representation in a conflict situation because he was incompetent to do so. Koch's concerns about his own safety directly interfered with his duty of loyalty to Mr. Jones as contemplated by Florida Rule of Professional Conduct 4-1.7. Mr. Jones was, and is, a client under a disability, as per Rule 4-1.14. The Comment to Rule 4-1.14 notes that "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." The professional obligation of a lawyer in the position that Koch found himself, where "a client's ability to make adequately considered decisions in connection with the representation is impaired" is to attempt, as far

as is reasonably possible, to maintain a normal client-lawyer relationship with the client. See Florida Rule of Professional Conduct 4-1.14 Client Under A Disability.

It was a clear abuse of discretion for the trial court to deny defense counsel's motion to withdraw and to allow Mr. Jones to go unrepresented during this critical stage. Appellate counsel's failure to raise this issue on appeal constitutes ineffective assistance of counsel, and Mr. Jones is entitled to relief.

B. MOTIONS TO SUPPRESS.

Prior to trial, Mr. Jones filed motions to suppress physical evidence as well as certain statements (R. 197-99; 213-16). The physical evidence sought to be suppressed was set forth in Mr. Jones' motion:

1. This motion seeks to suppress as evidence the small black coin pouch, all keys, the cigarette lighters, \$238.67 in currency and coins seized from the Defendant by officers John Vance and/or Jorge Garcia while the Defendant was at the scene of the homicides and/or at Jackson Memorial Hospital.

2. Furthermore, this motion seeks to suppress as evidence all articles of clothing and all items seized from those articles of clothing.

3. Furthermore, this motion seeks to suppress as evidence all substances seized as a result of the so-called gunshot residue tests performed upon the hands of the Defendant. These latter seizures were made at Jackson Memorial Hospital by officers Garcia and/or Cadavid and/or technician Evans.

4. Furthermore, this motion seeks to suppress as evidence all samples of the Defendant's blood provided to the police by Jackson Memorial Hospital.

(R. 198). As to the statements sought to be suppressed, the motion detailed:

The specific statements sought to be suppressed are: that statement made on December 19, 1990, to police officer Jorge Garcia. The statement was made at or immediately adjacent to a business called the Nestor Engineering Corporation located at 148 NE 28th Street, Miami, Florida. The defendant also seeks to suppress that statement made on December 19, 1990, to police officer George Cadavid. This statement was made at or near the emergency room at Jackson Memorial Hospital. The Defendant also seeks to suppress that statement made on December 21, 1990, to police officers John Buhrmaster and/or Oscar Tejada. This statement was made at the neurosurgical intensive care unit at Jackson Memorial Hospital.

(R. 213).

Following a hearing (R. 80 *et. seq.*), the lower court ruled that as to the items seized from Mr. Jones at the scene of the crime, such items were admissible as the police had probable cause to take Mr. Jones into custody and the items were a product of the search incident to arrest (R. 436). As to the clothing that was seized, the trial court ruled that they were admissible because they were seized pursuant to hospital procedures (R. 437-38). As to the blood samples and hand swabs, the court also denied the motion to suppress without

explanation (R. 439). With respect to the statement made by Mr. Jones that "the old man shot me," the court denied the motion to suppress, concluding that it was not taken in violation of the constitution (R. 440). The court also ruled that the statement made by Mr. Jones "go fuck yourself" was made in response to officer Garcia's question "what do you mean the old man shot you" and denied the motion to suppress (Id.). The court also ruled that Mr. Jones' statement "the police shot me," made in response to the officer's question "who shot you" was also admissible because it was not an interrogation or an accusatory question (R. 441). The court denied the motion to suppress Mr. Jones' statement "that's my own fucking problem, not yours" because it was also not made in connection with an interrogation (R. 442). The court did rule that Mr. Jones' statements to the doctor that he did not want to talk to the police was not admissible (R. 442).⁴

Following the court's rulings, trial counsel filed a request for an evidentiary hearing and a motion for reconsideration, asserting:

1. On December 19, 1990 the Defendant was arrested by police officer Garcia.
2. An arrest affidavit was not written

⁴Trial counsel also filed several motions in limine concerning these suppression issues (R. 252-254). The denial of these motions were likewise not raised on appeal by Mr. Jones' appellate counsel, to Mr. Jones' substantial prejudice.

until December 21, 1990.

3. The Defendant was in custodial restraint between the dates of December 19 and December 21, 1990.

4. Neither the Clerk of the Court nor the department of corrections was notified or otherwise informed of the Defendant's arrest on December 19, 1990.

5. The Defendant's status as a patient at Jackson Memorial Hospital does not preclude the Clerk's Office of the department of corrections from constructively bringing the Defendant before a judicial officer pursuant to Rule 3.130, Florida Rules of Criminal Procedure.

6. The names of defendants confined to a hospital facility or otherwise unable to appear are placed on the calendar of the judicial officer conducting appearances under Rule 3.130.

7. The first appearance of these confined patients are held within twenty four (24) hours of arrest. At such time the public defender's office is conditionally appointed to represent the defendant.

8. Had the above procedure been followed, counsel for the Defendant would have been appointed within twenty four (24) hours of his arrest on December 19, 1990.

(R. 257-58). In a separate motion, the defense also requested reconsideration of the motion to suppress the statements of Mr. Jones on the following grounds:

Defendant, Victor Tony Jones, moves this Court to re-consider its previous ruling which denied Defendant's motion to suppress statements. As grounds in support of this

petition, the Defendant cites article 1, section 16 of the Florida Constitution; Donnie Demont Phillips v. State of Florida, 17 FLW S712 (Nov. 27, 1992), Traylor v. State, 596 So. 2d 957 (Fla. 1992), and Owen v. State, 596 So. 2d 985 (Fla. 1992).

Wherefore, Defendant moves the Court to conduct an evidentiary hearing in Defendant's motion to suppress statements and at the conclusion of that evidentiary hearing to reconsider its ruling in which it denied Defendant's motion.

(R. 259).

Appellate counsel failed to raise on appeal the lower court's denial of the motions to suppress both the physical evidence at issue, the various statements he contended should have been excluded on constitutional grounds, and the denial of the motions for reconsideration with requests for additional evidentiary hearings. The statements made by Mr. Jones, without the benefit of counsel, were inadmissible as his right to counsel had attached. Brewer v. Williams, 430 U.S. 387 (1977); Maine v. Moulton, 474 U.S. 159 (1985); McNeil v. Wisconsin, 501 U.S. 171 (1991); Traylor v. State, 596 So. 2d 957 (Fla. 1992); Phillips v. State, 612 So. 2d 557 (Fla. 1992); State v. Ruiz, 526 So. 2d 170 (Fla. 3d DCA 1998); State v. Lewis, 518 So. 2d 406 (Fla. 3d DCA 1988). Additionally, the physical evidence should have been suppressed. See People v. Jordan, 468 N.W.2d 294 (Ct. App. Mich. 1991). Appellate counsel's failure to raise this issue on appeal constitutes ineffective assistance of

counsel, as there is a reasonable probability of a different outcome on appeal had this issue been raised. Habeas relief is therefore warranted.

C. SUBSTITUTION OF MEDICAL EXAMINER.

Prior to trial, the State filed a motion for substitution of medical examiner, alleging:

1. Dr. Arthur Copeland conducted an autopsy on the bodies of Jack Nestor and Dolly Nestor, the victims in the above-captioned case in December, 1990.

2. Dr. Copeland has subsequently been transferred to a State beyond the jurisdiction of this Court to compel as a witness.

3. There are available associate medical examiners at the Dade County Medical Examiner's Office who can review Dr. Copeland's report, protocol, notes, and deposition and testify competently without the need to incur the expense of attempting to produce Dr. Copeland as a live trial witness.

4. The Medical Examiner's notes, protocol, and reports are business records prepared in the normal course of regularly conducted business activities. Florida Statute 90.803 (6).

5. Therefore those records are admissible as a business record exception.

6. Furthermore, the reports, protocol, and notes are also writings of a public office which set forth matters observed pursuant to duty imposed by law as to matters with which there is a duty to report. Florida Statute 406.11 and Florida Statute 90.803 (8).

7. Substitution of medical examiners is also provided for by case law. Montgomery v. Fogg, 4798 F. Supp. 363 (S.D. New York 1979).

(R. 200-01).

The defense objected to the State's motion:

2. Granting of this state's motion and allowing the relief sought in it would violate rights guaranteed to the Defendant under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and article I, sections 2, 9, 16 and 17 of the Florida Constitution.

3. The case cited in the state's motion, Montgomery v. Fogg, 479 F. Supp 363, stands for the proposition that the autopsy report may be admissible despite the absence of the medical examiner where there is no contention as to the cause of death.

4. Here, the state is seeking to substitute an associate medical examiner in lieu of the trial appearance and testimony of Dr. Copeland.

5. Furthermore, the Defendant submits that not every document and/or recitation contained in the death investigation file is admissible under Florida Statutes 90.803 (6) or 90.803 (8). Brevard County v. Jacks, 238 So. 2d 156 (4DCA 1970).

6. Furthermore, Florida Statutes 90.803 (6) and 90.803 (8) address the admissibility of ". . . memorandum, report, record, or data" in other words, tangible documents. These citations do not address the issues raised by the State's desire to substitute witnesses.

7. Furthermore, Dr. Copeland performed a death investigation, not merely an autopsy, this death investigation involved going to the scene. Consequently, some of his opinions are

based upon his personal observations. These are matters about which a "substitute" witness cannot properly testify.

(R. 203-04).

Following a hearing on the State's motion, the lower court granted the motion for substitution (R. 355-59). Prior to the State calling Dr. Joseph Davis, the substitute medical examiner, defense counsel renewed his objection to the substitution of Dr. Copeland by Dr. Davis (R. 1789).

The lower court erred in granting the State's motion to substitute medical examiners. The law is clear that a defendant has a right under the Sixth Amendment to confront witnesses against him. "There are few subjects, perhaps, on which [the Supreme] Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-05 (1965). Accord Douglas v. Alabama, 380 U.S. 415, 418-19 (1965). The continuing vitality of this right was recently reaffirmed in Lilly v. Virginia, 527 U.S. 116 (1999). By allowing a substitute medical examiner to parrot back the conclusions reached by another witness, Mr. Jones was denied his right to confront the actual witness who performed the autopsy and death investigation in his case. Unlike situations in which this issue has arisen before, see

Brennan v. State, 754 So. 2d 1 (Fla. 1999); Geralds v. State, 674 So. 2d 96 (Fla. 1996), Dr. Davis did not come to independent conclusions but rather parroted back conclusions reached by Dr. Copeland. Thus, the State was permitted to introduce patent hearsay through another witness, and Mr. Jones was never able to confront the medical examiner who actually performed the autopsies and arrived at conclusions based on the autopsies and independent death investigation. The trial court's granting of the substitute medical examiner violated Mr. Jones' right to confrontation and to due process of law. Dr. Copeland was clearly available, the State just did not want to go to the "expense" of bringing him to Florida. This predicate is insufficient to warrant substitution of the medical examiner. The State violated its duty to produce available witnesses whose statements are introduced through the testimony of other witnesses, Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable"), and the Sixth Amendment. Pointer, 380 U.S. at 406-07 ("A major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."). The purpose of the Sixth Amendment is "to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." Berger v.

California, 393 U.S. 314, 315 (1969). Although an "adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation," Douglas, 380 U.S. at 418, the Sixth Amendment contemplates that, absent compelling reasons to the contrary, "the `evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). Appellate counsel's failure to raise this preserved issue in Mr. Jones' direct appeal undermines confidence in the outcome of the appeal, and habeas relief is warranted.

D. CONSTITUTIONALITY OF PRIOR CONVICTIONS.

Trial counsel Koch filed motions to set aside Mr. Jones's prior Dade County convictions Nos. 89-47989, 87-9733A, 87-12591, & 87-23834, convictions that were under the alias Charles Thompson, that were later used as aggravating factors (R. 129-30, 160-61). Koch then litigated the constitutionality of Mr. Jones's plea colloquies during his prior convictions below, citing to Johnson v. Mississippi, 108 S. Ct. 1981 (1988), during a pre-trial hearing on November 25, 1992 (R. 421-34). Defense counsel argue:

[W]e are alleging, number one, the plea was not knowingly, understandingly and voluntarily made, that the Defendant did not understand the nature of the charge and the consequences of the plea. And number three, that there was no factual basis for the plea in any of these

cases. We are alleging each of these grounds with respect to each of the prior convictions.

(R. 425). After argument by the parties and a review of the Arrest Affidavits, provided by the State, the trial court denied Koch's motion on the merits and made the following ruling:

The Court feels that the lower court that took the pleas was satisfied that there was a factual basis for which the pleas could be taken and announced so in the transcript and that the pleas were, in fact, freely and voluntarily taken and followed all the rules of procedure necessary to ensure that the Defendant freely and voluntarily entered the pleas, understood the rights that he was giving up and that these pleas were not taken in violation of any of the Defendant's constitutional rights.

(R. 431, 432). The State commented on the record that the arrest affidavits should be made part of the record and "part of the Court's order and ruling or sent up as a matter of course" (R. 432). The lower court then made a finding that a review of the arrest warrants in the three cases established "a prima facie showing of guilt to the Defendant" (R. 434).

Trial counsel Koch failed to offer up any proof at the pre-trial hearing that Mr. Jones was unable to make a knowing, intelligent and voluntary waiver of his rights during the plea colloquy nor did he object (on the record) to the ruling of the court or file a motion for rehearing or an appeal.⁵ However, given the

⁵This allegation is more specifically alleged in Mr. Jones' Rule 3.850 appeal.

comments by the State about the order being "sent up" and the existence of a non-record portion bookended between comments by the lower court and concerns expressed by the State about the Johnson claim, counsel Koch may have believed the issue was preserved for appeal and it is impossible to know what was said off the record:

THE COURT: It will all be a part of the package because the motion in opposition for motion to set aside convictions has it attached to it. It will be part of the package. Hopefully it stays together with the motions to set aside the convictions. What else do we have besides the Motion to suppress?

(Thereupon, other matters were heard not related to this hearing, after which the following proceedings were had)

MR. LEHNER: Your Honor, if we can go back to what we are dealing with, I apologize. I don't want to beat a dead horse but I do want to make sure that the record is absolutely clear on the matter of these prior convictions and the factual bases.

My understanding is the Court has reviewed the transcripts and come to the conclusion that the prior judges were satisfied there was a factual basis. I think we need to go one step further and have this Court in an abundance of caution review the A-forms and itself make a determination that there was, in fact, a factual basis.

On the same chance, if an appellate court ever disagrees with this court and finds that the prior Courts didn't in fact do a proper inquiry, if this Court would make that inquiry, we would avert any problems.

(R. 432-433).

Although trial counsel Koch made an attempt below to litigate this issue, appellate counsel failed to raise this issue on appeal. Trial counsel did renew all pretrial motions at the conclusion of the guilt phase of Mr. Jones's trial (R. 2049). Appellate counsel's failure to raise this issue is inexplicable, as the issue was clearly preserved below. The failure by appellate counsel to raise this issue is also inexplicable due to the expansive claim in Mr. Jones' initial brief concerning the presence of fetal alcohol syndrome, a condition that appellate counsel linked directly to the prior violent felonies that trial counsel had litigated below unsuccessfully.

Despite repeated references to Mr. Jones's mother's alcoholism, and his own use of alcohol and drugs, little consideration was given by the court to the likelihood that Mr. Jones suffered from a well-documented congenital defect known as Fetal Alcohol Syndrome (FAS), or the less severe Fetal Alcohol Effect (FAE), and that FAS/FAE may have been a major contributor to Mr. Jones's prior commission of violent felonies (the basis for a finding of one of the aggravating circumstances), and to commission of the instant offense.

Initial Brief at 38. Thus, appellate counsel understood the importance of the issue regarding the validity of Mr. Jones' prior convictions, yet unreasonably failed to raise on appeal the lower court's summary denial of the motion filed by the defense to set aside the prior convictions on constitutional grounds. Appellate counsel's failure was unreasonable and deprived Mr. Jones of a reliable direct appeal. Habeas relief is warranted.

E. MOTION TO COMPEL PSYCHIATRIC EVALUATION OF WITNESS.

Defense counsel filed a motion to compel production of psychiatric report on State witness Nurse Roberto Lobo, who was charged with stalking and then allowed to enter a pretrial intervention program, or in the alternative for the trial court to issue an order for witness to submit to psychiatric examination (R. 211-212). During a subsequent hearing this was argued (R. 416). The state attorney stated he reviewed a three (3) page report in a division file on Lobo from a psychologist and stated that there was no Brady⁶ material. The State then offered the court a copy for *in camera* inspection (R. 417). The trial court agreed to do an *in camera* inspection and to seal the record for appellate purposes (R. 419). The court then denied the defense Motion to Compel as to the psychiatric evaluation of Roberto Lobo (R. 879). The failure by the trial court to allow defense counsel access to the records was not raised on direct appeal, and constituted ineffective assistance of counsel. See §90.603, Fla. Stat.

F. COMMENT ON SILENCE.

During the State's closing argument at the guilt phase, the prosecutor's argument crossed the line into commenting on Mr. Jones' decision not to testify:

⁶Brady v. Maryland, 373 U.S. 83 (1963).

The evidence is overwhelming. It points in one direction (indicating the Defendant) and Mr. Koch tries, as he may, has to jump aside and try to blame it on somebody else. Well, as you listen to his argument, which he is going to make to you concerning the evidence in this case, ask yourself, ask him, where's the evidence to support what you are saying? Is this just like your opening statements? Are you going to tell all these things and nothing be in here to support what you say? As yourself that when he is talking to you.

(R. 2073). At a sidebar, defense counsel objected to this argument and moved for a mistrial:

MR. KOCH: We move for a mistrial based on the comment made by the prosecutor that indirectly or by inference refers to the Defendant not testifying on his own behalf. Specifically, I don't remember specifically what the comment was, but it was addressed to the issue of where the Defendant was, was he working downstairs or someplace else, I don't remember because of the passage of time the particular quote, but the point that he was making was something that could only have been supplied by the Defendant testifying on his own behalf and explaining the issue raised by the prosecutor with that particular -- with that particular language. And on that basis we move for a mistrial and that comment violates rights guaranteed to the Defendant under the 5th, 6th, and 8th and 14th amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

(R. 2075). The trial court denied the mistrial motion, ruling that the prosecutor's comments were simply "directing the jury's attention to what evidence there is and what evidence there is not" (R. 2076).

The trial court erred in denying Mr. Jones' motion for

mistrial, as the prosecutor's argument was, if not explicit, then certain an inferential reference to Mr. Jones' exercise of his right to remain silent and to not testify. See Rodriguez v. State, 753 So. 2d 29 (Fla. 2000); State v. Marshall, 476 So. 2d 150 (Fla. 1985); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellate counsel's failure to raise this preserved issue on appeal constitutes ineffective assistance of counsel, and habeas relief is warranted.

G. CALDWELL ERROR.

Prior to trial, defense counsel filed a motion in limine to prohibit the State from minimizing the jurors' sense of responsibility in the sentencing process:

Specifically, the Defendant moves the Court to prohibit the State from lecturing the jury, in voir dire as well as argument, that their sentencing recommendation is not the final decision, that their sentencing recommendation is reviewable, that their recommendation is merely advisory and in any other manner minimize the jury's role and diminish its sense of responsibility with respect to its sentencing function.

The Defendant submits such trivialization of the jury's function violates the Defendant's rights guaranteed by the eighth and fourteenth Amendments to the United States Constitution; article I, section 2, 9, 17, and 17 of the Florida Constitution and the United States Supreme Court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985).

(R. 114). The motion was denied, and the jury was subsequently and

repeatedly informed that its role was merely "advisory." (see e.g. R. 472-73, 435, 2511, 2766, 2769, 2770, 2771). This diminution of the jury's sense of responsibility violated the sixth, eighth, and fourteenth amendments. Caldwell v. Mississippi, 472 U.S. 320 (1985); Apprendi v. New Jersey, 530 U.S. 466 (2000).

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Caldwell; Hitchcock v. Dugger, 481 U.S. 393 (1987); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert denied, 109 S.Ct. 1353 (1989). Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So. 2d 1125 (Fla. 1989). In Mann, a capital habeas corpus petitioner was awarded relief when he presented a claim involving prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility. Mr. Jones is entitled to the same relief. A contrary result would result in a totally arbitrary imposition of the death penalty in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972). Appellate counsel's failure to raise this issue on appeal undermines confidence in the outcome of Mr. Jones' direct appeal, and thus habeas relief is warranted.

CLAIM II

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

Pursuant to State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), the statutory aggravating circumstances enumerated in Florida Statute 921.141 have been held to define the elements of a capital crime. Thus, under the Sixth and Fourteenth Amendments, the aggravating circumstances must be alleged in the indictment. See Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000). As in Apprendi, in Mr. Jones' case, the aggravating sentencing factors came into play only after he was found guilty, and increased the statutory maximum penalty, based upon the guilty verdict, from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance.

In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. Fla. Stat. §921.141 (1),(2) (1981). See Walton v. Arizona, 497 U.S. 639, 648 (1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense, as this Court determined in Dixon. Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi,

530 U.S. at 494-95. This did not occur in Mr. Jones' case.

Mr. Jones acknowledges that this Court has held that Apprendi has not impacted Florida's sentencing scheme and has not overruled Walton. Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) ("[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either"). See also Brown v. Moore, 26 Fla. L. Weekly S742 (Fla. Nov. 1, 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001). However, on January 11, 2002, the Supreme Court granted *certiorari* review in Arizona v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S.Ct. 865 (2002). In Ring, the Court is going to decide whether Walton should be overruled in light of Apprendi. The Supreme Court has also granted a stay of execution to Florida death row inmates Amos King and Linroy Bottoson, who have presented to the Court the issue of Apprendi's impact on Florida. King v. State, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804 (U.S. Jan. 23, 2002); Bottoson v. State, 2002 WL 122169 (Fla. Jan. 31, 2002), stay granted, 2002 WL 181142 (U.S. Feb. 5, 2002). Thus, Mr. Jones presents this claim at this time for preservation purposes, and submits that relief is warranted.

CONCLUSION

For all of the reasons discussed herein, Mr. Jones respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on March 14, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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