IN THE SUPREME COURT OF FLORIDA

CASE NO. 99-67

JOHN B. VINING

Appellant

v.

STATE OF FLORIDA

Appellee

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT FOR ORANGE COUNTY,
STATE OF FLORIDA

APPELLANT'S CORRECTED INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Vining's motion for postconviction relief after a limited evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The type size and style in this brief is 12 pt. New Courier.

The following symbols will be used to designate references to the record:

"R." -- record on direct appeal;

"PC-R."-- record on 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Vining has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Freeman, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Ninth Judicial Circuit in Orange County, Florida entered the judgments of convictions and sentences under consideration. Mr. Vining was charged by Indictment on Case No. CR89-2395 with first-degree murder and armed robbery on June 5, 1989 (R.2196-97). Mr. Vining was represented by Orange County Public Defenders, Patricia Cashman and Kelly Sims.

On July 6, 1989, the Clerk of Court for the Ninth Judicial Circuit filed Mr. Vining's Request for Disposition of Indictment under the Interstate Agreement on Detainers (R. 1689, 2200-04). On January 4, 1990, Mr. Vining filed a Motion to Discharge Based on Interstate Agreement on Detainers because the State of Florida failed to bring him to trial within 180 days of his Request for Disposition of Detainers and/or within 120 days of the date Mr. Vining arrived in Florida (R. 2328-30). The State sought an extension of time in which to try Mr. Vining (R. 2333, 2341). The Court denied Mr. Vining's Motion to Discharge on January 16, 1990 (R. 1661-1721, 2343-46), and granted the State's Motion for Extension of Time in which to try Mr. Vining on January 22, 1990 (R. 20). That same day, voir dire began.

Trial started on January 22, 1990. Judge Joseph P. Baker presided over the trial. This was his first and only death penalty case (PC-R. 123).

On February 1, 1990, a jury convicted Mr. Vining of both counts (R. 1653). The penalty phase took place a month later on

March 7-8, 1990. The jury recommended death by a vote of eleven to one. By special verdicts, the jury found that the crime was committed while Mr. Vining was under a sentence of imprisonment; that Mr. Vining had previously been convicted of a violent felony; that the crime was committed while Mr. Vining was engaged in a robbery; and that the murder was cold, calculated and premeditated (R. 2613-14). The court sentenced Mr. Vining to death on April 9, 1990 (R. 2188-91, 2630-37).

A timely appeal was taken to this Court. This Court deliberated almost three (3) years before issuing its opinion affirming Mr. Vining's convictions and sentence of death. Vining v. State, 637 So. 2d 921 (Fla. 1994). This Court struck the cold, calculated and premeditated aggravating factor. Mr. Vining filed a petition for certiorari in the United States Supreme Court, which was denied. Vining v. Florida, 115 S. Ct. 589 (1994).

Pursuant to Rule 3.851, Mr. Vining's Motion for Postconviction Relief was due one year from the denial of his writ of certiorari, or on November 28, 1995. This Court granted an extension of time for the filing of Mr. Vining's postconviction motion up to and including March 26, 1996. Mr. Vining filed a motion for postconviction relief on March 26, 1996 (PC-R. 715-736). An amended motion for postconviction relief was filed on December 23, 1996 (PC-R. 1598-1715). Judge Theotis Bronson presided over the postconviction proceedings after Judge Baker disqualified himself (PC-R. 812-22).

Mr. Vining filed a Motion to Strike State's Response and to Deny State's Motion as Timely Filed when the State's Answer was filed out of time. The State's Answer was striken on June 25, 1997, but the hearing court allowed the State to participate in oral arguments (PC-R. 1962-63).

A Huff hearing was held on June 20, 1997 (PC-R. 1-130). The hearing court determined that an evidentiary hearing was necessary, but only on one full claim and a portion of two others. Judge Bronson granted a hearing on Claim VI - Brady v. Maryland claim; and portions of Claim IX and X only as to allegations of counsel's failure to object to the trial judge's consideration of extra-record material not presented in open court; and the trial judge's independent investigation (PC-R.1970-71). The remainder of Mr. Vining's claims were summarily denied.

An evidentiary hearing was held on April 21-22, 1999 (PC-R. 170-506). Mr. Vining's postconviction motion was denied on November 2, 1999 (PC-R. 2481-2509). Notice of Appeal was filed on November 29, 1999 (PC-R. 2513). This appeal is timely made.

Statement of Facts

On December 8, 1987, surveyors discovered the partially decomposed body of a woman lying fully-clothed in a remote grassy area in Apopka, Florida (R. 933-34). It was determined through dental records that the body was that of Georgia Caruso, owner of a fingernail salon. As a side business, Ms. Caruso sold

wholesale diamonds out of her salon (R. 908-917). Caruso had been shot two times in the head (R. 973-75). The medical examiner testified that unconsciousness occurred immediately and she did not regain consciousness prior to her death (R. 992). There were no other injuries.

The medical examiner testified that the death may have occurred sometime in the three weeks before her body was discovered. There were no signs of a struggle (R. 970-72, 993-94). Caruso's jewelry, purse and shoes were not found (R. 967).

Joann Ward worked for Caruso as a nail technician at Nail Expressions. Ward testified that Caruso sold jewelry on consignment by advertising in the newspaper (R. 999-1004). Ward testified that a man came to the shop on November 13, 1987 in response to the ad and talked to Caruso for fifteen minutes about jewelry (R. 1009-14). The man returned to the nail shop a few days later on November 16, 1987 and again met with Caruso for fifteen minutes. This time, Caruso introduced the man as "George Williams, a man interested in jewelry I have to sell." (R. 1014-16). Williams returned to the shop again on November 19, 1987, talked to Caruso for fifteen minutes and left (R. 1016).

When Ward returned after lunch on November 19,1987, Caruso asked her to accompany her to meet with Mr. Williams because he wanted to purchase some jewelry but first wanted to have it appraised (R. 1019). Ward usually carried a pistol in her purse (R. 1020-23). Williams arrived driving an older black Cadillac. Caruso left her pistol under the front seat of Ward's car before

walking with Williams to the Winter Park Gem Lab. Ward did not accompany them to the appraisers (R. 1026-32).

Ellen Zaffis and Kevin Donner at the Winter Park Gem Lab had done appraisals for Caruso (R. 1073, 1151). Zaffis talked with Caruso while Donner performed the appraisal of a 6.03 carat, pear-shaped diamond mounted in a ring, and a round 3.5 carat diamond also mounted. Both were appraised at $60,000 (R. 1077-80,1155-56).

After the appraisal, Caruso and Williams returned to Ward's car. Caruso then told Ward that Williams had decided to buy the stones and that they were going to the bank to put the money in a safe deposit box (R. 1027-31). Ward returned to the nail salon alone (R. 1033-34). Caruso was wearing a two-piece black dress, black shoes, black earrings, a gold Rolex watch, an anniversary ring, a solitaire engagement ring, and the six carat pear-shaped diamond ring. She carried a black purse (R. 1018; 1074-75). She was not seen or heard from again.

During the investigation of the case, the police had no clues as to who committed the crime. The police obtained written statements from four witnesses, Ward, Donner, Zaffis and Denise Vietti. Not being satisfied with their vague descriptions of Williams, the police decided to hypnotize the witnesses (R. 1738). Lt. Watson, a police officer, testified that he hypnotized only Vietti and the rest of the witnesses were only given a "relax and recall" session (R. 1731-33, 1739-40).

At a hearing on a Motion to Exclude Hypnotically-Tainted Evidence, Lt. Watson testified that the difference between hypnotizing a witness and relax and recall was "the intent, as far as I'm concerned, and what I am trying to do with the person." (R. 1732-34). He said he used a Chevault's pendulum to bring his subjects under on all witnesses except Zaffis.

Kevin Donner stated that he had been hypnotized, but realized after discussing the subject with his therapist that he had not (R. 1124-25). Ellen Zaffis, Donner's roommate and business partner, testified that she gave an initial statement to police but approximately a month later, after being subjected to a "relax and recall" session with Lt. Watson, said she was able to assist with a composite sketch (R. 1769).

Denise Vietta did not testify, either at the trial or at the hearing on the Motion to Exclude because she had been "hypnotized." Joann Ward testified that she gave a taped statement before the hypnosis session and denied being hypnotized (R. 1741-45). Judge Baker denied the Motion to Exclude Hypnotically-Tainted Evidence finding that the witnesses had not been hypnotized based on Stokes v. State, 548 So. 2d 188 (Fla. 1989). (R. 1780-83). Judge Baker explained that his perception of what constitutes hypnosis was tempered by his own research into psychiatry, including self-hypnosis, which was the subject of an article he was preparing for publication (R. 135-41).

Trial counsel objected to the presentation of these witnesses at trial, but failed to cross-examine the witnesses on

the fact that they had been hypnotized to enhance their recall (R. 1083-85). The jury never knew the witnesses identifying Mr. Vining in court, two years after the crime was committed, had been “relaxed and recalled” or “hypnotized.”

The police did not begin investigating Mr. Vining in connection with this case until two years after the crime was committed. They found Mr. Vining in prison in Georgia an unrelated crime, but they learned that Georgia had an inmate who used an inhaler for an asthma condition. The police put together a photopak including Mr. Vining’s picture in the line-up and showed it to their hypnosis/relaxation enhanced witnesses. With varying degrees of certainty, Zaffis and Ward selected Mr. Vining’s picture. In court, Donner, Zaffis and Ward each identified Mr. Vining unequivocally. (R. 1039-46, 1066-71, 1086-90, 1100-02, 1156-57).

The State presented phone records purporting to show that the number Ms. Caruso had in her personal notebook for George Williams was one digit off from the phone number of Vining’s son’s house (R. 1036-38, 1062-65).

The State presented the testimony of Joe Taylor, another amateur diamond seller, who stated that he had received a phone call from a man named “Billy Byrd” who wanted to buy diamonds. Mr. Byrd described as 5'8" tall with gray hair, 56 or 57 years old with glasses (R. 1178). Taylor was suspicious when the man refused to give a return phone number and wanted to look at all the jewelry he had (R. 1179). Taylor did not meet the man

because he thought he was being “set up.” (R. 1172-73, 1180-82).

The State also presented testimony that Mr. Vining had been driving his mother’s 1978 Cadillac in November 1987. The car was found burned in a rock pit in Marion County in December, 1987 (R. 1344, 1350).

The State also presented a convoluted and tortured story about a common yellow 1.13 carat diamond that was sold by Mr. Vining on November 19, 1987 for approximately $600.00(R. 1222-27). The diamond was recut to eliminate a large flaw and sold as a ring to Michael Merola (R. 1230). Detective Nazarchuk retrieved the diamond from the Merolas and showed the diamond to John and Elizabeth Slade, the owners of Columbia Jewelers. Two years later and without the benefit of mapping the diamond, they identified the diamond as being one they consigned to Mark Ryan on November 17, 1987 (R. 1193, 1196-99, 1212-15). The Slades remember the diamond because it was a “rare, green diamond with an identifying feature inside the top of the stone.” (R. 1193-95, 1204-05, 1208-15).

Ryan testified that he obtained the 1.13 carat diamond from the Slades and gave it to Caruso on November 17, 1987 for her to sell (R. 1218-19). No expert testimony was offered to distinguish between the common yellow diamond sold by Mr. Vining for $600 and the extremely valuable green-tinged diamond consigned to Mark Ryan, which had a much higher value that the diamond sold by Mr. Vining. This diamond was not among the ones examined by Zaffis and Donner when Ms. Caruso came in the Winter

Park Gem Lab with George Williams. This circumstantial evidence was the only evidence that was used to sentence Mr. Vining to death.

SUMMARY OF ARGUMENT

1. The State withheld material exculpatory evidence that would have provided significant impeachment evidence to rebut the State's case. Undisclosed police notes show that the victim carried no loose stones. This rebutted the state's theory that the diamond sold by Mr. Vining was the motive diamond. Police notes also show that the descriptions of the suspect seen with Georgia Caruso changed several times depending on whether the statements were taken before or after the "relax and recall" sessions by the Sheriff's Department hypnotist. Ms. Ward saw detectives eight times before making an identification and then only after a "relax and recall" session. The State argued in closing that defendant's car was burned to hide evidence. But, the State withheld the FBI report that proved that no hair or fiber from the victim existed in the car. The State withheld the exculpatory FBI report that showed the fibers did not match the car. Both defense attorneys testified this information was exculpatory and material and would have been valuable to its case. This testimony was unrebutted by the State. Relief was proper.

2. Mr. Vining was denied his right to a fair and

impartial tribunal during his capital guilt and penalty phases. Defense counsel's unreasonable failure to object to the trial judge's consideration of extra-record information and seek recusal was ineffective assistance of counsel under Gardner v. Florida, 430 U.S. 349 (1977), and Porter v. State, 400 So.2d 5 (Fla. 1987). The trial court abused its discretion when it failed to grant a new trial.

3. The hearing court erred in summarily denying the ineffective assistance of counsel at guilt phase claim as procedurally barred despite sharing some of the same facts regarding Judge Baker's consideration of extra-record information that a hearing was granted on. The court also erred in denying postconviction counsel access to a public record, State's exhibit 16, to map the motive diamond. Had he been granted access and a hearing on this claim, Mr. Vining would have presented expert testimony that the diamond that is State's exhibit 16 could not have been the same diamond consigned to the victim prior to her death. The files and records do not conclusively show that Mr. Vining was not entitled to relief. The hearing court failed to attach any portions of the records that show why Mr. Vining is not entitled to a hearing.

4. Mr. Vining was denied an adversarial testing during the penalty phase of his capital trial. The hearing court erred in failing to grant an evidentiary hearing on this entire claim

because the files and records do not conclusively establish that Mr. Vining is entitled to no relief.

5. The hearing court erred in summarily denying Mr. Vining's claims of ineffective assistance of counsel for trial counsel's failure to object to constitutional error.

6. Florida Rule of Criminal Procedure 3.851 is unconstitutional on its face and as applied to the facts of Mr. Vining's case.

7. Florida's death penalty statute is unconstitutional.

8. Mr. Vining is innocent of the death penalty.

9. Florida rules that prohibit juror interviews is unconstitutional and unfair.

10. Mr. Vining was denied a full direct appeal review because the appellate record in his case was incomplete.

11. Mr. Vining's absence during critical stages of the proceedings was constitutional error and counsel was ineffective for failing to ensure his presence.

12. Prosecutorial misconduct rendered Mr. Vining's trial fundamentally unfair and introduced improper collateral crimes into the jury's consideration.

13. Mr. Vining was denied access to public records that other defendants similarly situated have been provided.

14. The hearing court erred in analyzing each claim separately instead of considering the cumulative effect that all of these errors had on Mr. Vining's jury.

ARGUMENT I

THE HEARING COURT FAILED TO PROPERLY CONSIDER EVIDENCE THAT PROVES MR. VINING'S INNOCENCE SUCH AS MATERIAL AND EXCULPATORY EVIDENCE WITHHELD BY THE STATE.

The State withheld key exculpatory materials from the defense. This was proven at the evidentiary hearing. Police notes not provided to the defense show that nail technician, Joanne Ward told the police that the victim did not have any "loose stones" with her on November 18, 1987. This was contrary to the testimony of Mark Ryan and Kevin Donner. This evidence eliminated the alleged motive for the crime. The State argued that Mr. Vining robbed Ms. Caruso of a loose 1.13 carat green-tinged diamond. Yet, defense counsel had nothing to rebut this allegation. This was important exculpatory impeachment evidence.

Police notes also not disclosed to the defense provide impeachment evidence against Joann Ward. According to Detective Nazarchuk's notes, Joann Ward's version of the time of day that the victim disappeared was inconsistent with all other versions of the day's events that were given to police. This inconsistency would have been used by trial counsel to question the accuracy and memory of Ms. Ward on the day the victim disappeared.

Police notes not disclosed to the defense proved Mr. Donner was not paying attention to the victim and George Williams because he was appraising the diamonds. These notes show that Donner's identification of Mr. Vining as a suspect was

impeachable because of his inattention and his brief encounter with "George Williams." Defense counsel could have used these notes to impeach Donner's testimony that it was a "very memorable conversation."

Mr. Vining also was not provided with police notes from December 17, 1987 regarding witnesses Joann Ward, Ellen Zaffis and Kevin Donner concerning their descriptions of the man seen with Ms. Caruso. These notes impeached the consistency of the identifications of Mr. Vining by Zaffis, Ward and Donner before and after their hypnosis sessions with police.

The State also withheld an FBI analysis of a car fiber found on the victim's blouse. This analysis showed the fiber did not match any hair or fiber relating to Mr. Vining. The FBI report was never disclosed to the defense. A complete copy of the victim's notebook in which she recorded her jewelry sales and contacts also was never provided to the defense until it was entered into evidence by the State at trial. No police notes were disclosed from an interview between Mr. Donner and Captain Hunter of the Winter Park Police Department, even though Detectives Nazarchuk and Gay testified that they had "everything" from the Winter Park Police Department. These notes which Donner referred to in his deposition were never turned over to the defense.

The "withheld" evidence was "material" to motive and

identification, and should have been provided to defense counsel. These Brady violations have been proven. The only issue is the extent of the prejudice suffered by Mr. Vining.

The hearing court agreed that the Brady material had been withheld by the State, but the court held was not material and found no prejudice to Mr. Vining's case (PC-R. 2488). The hearing court is wrong.

The hearing court used the wrong analysis and failed to consider the impact of this withheld information on the jury. The jury never heard information that was obviously exculpatory to Mr. Vining. At the evidentiary hearing, Mr. Vining proved that the prosecutors failed to disclose exculpatory evidence that was material and could have been used to impeach the key state's witnesses who testified about the motive diamond and the description and identifications of Mr. Vining.

The testimony of Ward, Zaffis, and Donner, was critical to the state's case. Had their testimony and identifications not been so critical, the State would not have gone to such lengths to hypnotize/relax the witnesses to get more incriminating information.

These witnesses testified that they saw Mr. Vining with the victim on the day she disappeared (R. 1044, 1087, 1156). Each witness testified at trial that he had seen and identified photos of Mr. Vining before trial. What the jury did not know was that

each witness had been hypnotized or was placed under "relax and recall," a form of hypnosis. After the hypnosis sessions, the witnesses worked with a sketch artist to construct a composite sketch of the man they believed was with the victim on the day she disappeared.[1]

Any evidence that would have led to impeachment evidence against these witnesses was critical because these were the **only** witnesses to identify Mr. Vining in court and were the **only** witnesses who could link the loose motive diamond to Mr. Vining. Without this critical evidence, the state's already tenuous circumstantial case would crumble. The defense attorneys agreed:

> Q: In your estimation, who were the critical state's witnesses in this case?
>
> MR. SIMS: Well, I cannot tell you names. I've not looked at a file on this case since 1990.

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[1]Mr. Vining was not given an evidentiary hearing on guilt phase ineffective assistance of counsel where he alleged that trial counsel failed to adequately impeach Ward with Detective Payne's deposition where he said,"I know that she said that she had seen him before, but as far as, you know, being able to positively identify him, no, she could not do that." Payne Deposition at page 17. Notes of Detective Nazarchuk indicated that Ward was "uncertain and unable to make a positive identification" on February 15, 1989. Police Department notes dated June 5, 1989 also indicate "Ward does not identify Vining." However, at trial, Ward identified Mr. Vining and denied ever being uncertain about her identification (R. 1045-46). Nazarchuk's notes also indicated that Ward's description of the man she saw with Caruso differed from her trial testimony. At trial, Ward testified that the man had a "long face, kind of loose skin right here in the neck area." (R. 1010). Nazarchuk's notes reveal no mention of a "long face" and Ward's earlier inability to describe the man's "chin area."

I do know that there were these relax and refreshed eyewitnesses that were critical, I believe two in a jewelry store where Georgia had been earlier and where this Mr. Williams had been. So they were eyewitnesses that had been, I think, refreshed.

There was circumstantial evidence in the way of the Cadillac that had burned and phone calls and the selling of a diamond some days after the death of Georgia.

Q: So would any evidence that impeached the credibility of these particular witnesses have been important for you to get?

MR. SIMS: Absolutely.

Q: And would you have considered that exculpatory evidence that was beneficial to your defense and at least would have assisted in your impeachment of the state's case?

MR. SIMS: Anything that didn't - - anything that said I'm not sure I thought was so important in this case because we had an eyewitness who in my mind wasn't a very good eyewitness anyway because of the way they had gotten that information up. And specifically with respect to the gentleman who had been examining the diamond on that day and I think I did the cross of that individual.

(PC-R. 48-49).

The State knew that the credibility of these witnesses was vital. The State withheld Detectives Gay and Nazarchuk's handwritten notes that contained exculpatory impeachment evidence. This was a clear violation of Brady v. Maryland, 373 U.S. 83 (1963). These notes were material and, as the defense attorneys testified to at the evidentiary hearing, would have been used at trial.

More importantly, the notes reflected that the victim was

not carrying "loose" or unmounted diamonds on the day she supposedly disappeared. If this were true, then the motive diamond was not in the victim's possession. No loose diamonds. No motive.

Due to the State's actions, Mr. Vining was denied the opportunity to examine Joann Ward about her observations because the state did not disclose this exculpatory information. Instead, Ward testified at trial that the victim did have loose stones. Trial counsel remembered:

> Q: Do you recall what the significance of that [diamond evidence] was?
>
> MR. SIMS: Well, shortly after the disappearance of Ms. Caruso, a diamond was sold by Mr. Vining. And although no one had ever done an actual diagram of the diamond that I believe Georgia was selling on behalf of this diamond shop down on Park Avenue, Columbia Jewelers, nobody had actually done a diagram per se but somebody was looking at that diamond saying, well, it seems very similar. They couldn't say it was exact is my understanding, my belief, my remembrance. And that was a loose stone.
>
> And I remember that - - that that stone from Columbia Jewelers was a, I thought a pretty devastating link in a chain. But I never thought that they really proved that was the same diamond.
>
> Q: All right. So any evidence that you had that showed that Ms. Ward,[sic] in fact, did not possess any loose diamonds on the day she disappeared?
>
> MR. SIMS: ....I never had any evidence that Ms. Caruso didn't have any loose diamonds on the day in question.
>
> Q: And do you recall whether or not the only diamonds that supposedly were examined by Mr. Donner were loose diamonds or diamonds that were mounted in

rings?

MR. SIMS: Everything mounted, everything was mounted is what Donner had examined.

Q: So there was a question regarding whether or not she, in fact, possessed loose stones on the day that she disappeared?

MR. SIMS: Right.

Q: Would this not have been helpful to you in impeaching the credibility of Ms. Ward if she testified contrary to that?

MR. SIMS: Yes. If she testified contrary.

(PC-R. 54-55).

Defense counsel would have used the information to impeach the credibility of the state's witnesses. These state witnesses were even questionable in Judge Baker's mind to such an extent that he decided to do his own investigation. See, Argument II. Judge Baker testified at the evidentiary hearing that he ordered the victim's probate records from Seminole County to help make the State's case "more clear." The records for Seminole County inventoried the remaining jewelry that Ms. Caruso's estate was require to return to its owners.

At trial, Kevin Donner also was a key witness who identified Mr. Vining as the man with the victim on the day that she disappeared. He identified Mr. Vining from photographs before the trial and again in court. However, the jury did not know that his ability to observe the suspect was questionable because a police note withheld from the defense showed he was in the back

of the store and not paying attention to Ms. Caruso and her client. The withheld notes said he was concentrating on evaluating the rings.

> Q. ....Do you recall having access to that particular note during your preparation for Mr. Donner's cross-examination?
>
> MR. SIMS: No.
>
> Q. Do you recall that there was an issue as to...the attentiveness that he was showing towards the suspect when he came in the door, would that have assisted you in your cross-examination of that witness?
>
> MR. SIMS: Yes, Ma'am.
>
> Q. Would that have assisted you in impeaching his credibility regarding any descriptions that he may have subsequently given?
>
> MR. SIMS: Yes.
>
> Q. And if you recall, was this contrary to what his testimony was at trial?
>
> MR. SIMS: I believe, and you may need to refresh me, I don't know, I believe the testimony was that, oh, I saw this individual and I asked, isn't it true that your job there was to evaluate the diamonds, that's what you were busy doing in the back room, you were evaluating diamonds.
>
> And I believe the fellow said, no, but the door was open and I was watching him.
>
> And this note that says guy more interested in diamond and didn't pay much attention, in back with rings, would have been important in those two areas for two reasons, I think on that one, I could very well ask Mr. Donner and perhaps object to, I don't know, isn't it true that you told Detective Nazarchuk you were more interested in the diamonds and you were in back with the rings or certainly we could have called Nazurchuk back to the stand and said or actually got that out of Nazarchuk in cross-examination, isn't it true that Mr.

Donner told you he was more interested in the diamonds.

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Q. Okay. And would the note that was not given to you have helped in impeaching his testimony at trial?

MR. SIMS: Yes, Ma'am.

Q. And if you will look further in there that you did ask some questions concerning the attentiveness of Mr. Donner during the examination but did you have any hard evidence on which to impeach him?

MR. SIMS: I was unaware of any hard evidence that said anything different than - - I mean, nothing that I could show this witness to say isn't it true...

- - you were more interested in the diamond, you were in the back with the rings, you never mentioned that you could see him the whole time while you did your work.

(PC-R. 49-52).

Had defense counsel had the Brady material on Mr. Donner, cross examination would have been compelling. Before hypnosis, Mr. Donner viewed only an Identi-Kit of a possible suspect. Mr. Donner did not look at any photographs of the suspect until after hypnosis (PC-R. State's Ex. 11 at pgs. 29-30). In his deposition after hypnosis, Donner magically remembered another time that he might have seen the suspect weeks before the crime outside a jewelry store (PC-R. State's Ex. 11, R. 2891).

At trial, Mr. Donner identified Mr. Vining as the suspect. This identification was only made after he was hypnotized by the Orange County Sheriff's Office (R. 1156). Contrary to the Brady evidence that has now been disclosed, Mr. Donner told the jury at

trial that he was able to see the suspect "during the whole time." "He was visible at all times; both of them were." (R. 1158-59). Defense counsel had nothing to impeach him with except inferences. The detective's notes said:

> Guy more interested in diamonds. Kev--didn't pay much attention.

(PC-R. Defense Ex. 1-3).

This note was the hard evidence the defense needed to impeach Donner. Under Brady, evidence that tends to impeach a critical state witness is clearly material. See, Smith v. Wainwright, 741 F. 2d 1248, 1256 (11th Cir. 1984); Brown v. Wainwright, 785 F. 2d 1457, 1465 (11th Cir. 1986).

The detective's notes also revealed that Joann Ward told the detectives that the victim got into the suspect's car and left about 9:00 a.m. on November 18, 1987. This was inconsistent with all other versions of the day's events given to police. Defense counsel testified that this three-hour time difference between Ms. Ward's trial testimony and the Brady evidence could have been used to impeach the credibility of Ms. Ward had it been provided to counsel (PC-R. 53-54). This is the same witness who saw detectives **eight times** before testifying at trial. This was the same witness who identified a picture of George Williams and was 85% sure it was the suspect.[2] The time discrepancy and the "no

[2]Detectives King and Rettig of the Winter Park Police Department showed a driver's license photo of a possible suspect,

loose stones" statement in the detective's notes were made before the hypnosis session.

After hypnosis, the descriptions of the suspect and the car changed. After the hypnosis session, Ms. Ward remembered more details about the car. Specifically, she remembered where the antennae were (R. 2707). Before hypnosis, Ms. Ward told Detective Gay there were no loose stones in the victim's possession. After hypnosis, she does not mention loose stones and has no specific time in which she saw the victim leave with the suspect. Cf. (PC-R. Def. Ex. 6; 12/27/87 Ward statement at 13:00 hours and at 14:30 hours).

By the time Ms. Ward testified at trial, her description of the suspect is different yet again. In the withheld December 17, 1987 statement-- no long face, no loose skin.(R. 1010). Her testimony about the victim's departure time is inconsistent (R. 1017). More importantly, Ms. Ward testifies under oath that the victim had "**some loose diamonds**" when she left the store with the suspect (R. 1021). This Brady information was material and

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George S. Williams to Ward and Vietti on November 23, 1987. Detective England testified that Ward and Vietti were "85% sure" that this was the man seen with Caruso (England Deposition at pg. 8). In cross, trial counsel questioned the witness on her earlier inability to identify a suspect. Ward denied any memory of her uncertainty and the previous identification (R. 1045-46). Trial counsel failed to refresh her memory or impeach her on this evidence. This is included in the ineffective assistance of counsel claim at guilt phase where no evidentiary hearing was granted.

exculpatory to the issue of motive and identification. Defense counsel testified that they would have used this information to impeach the witness's credibility on descriptions and motive (PC-R. 174-75). Confidence in the reliability of the outcome is undermined. This omission cannot be harmless in the context of this highly circumstantial case.

The State knowingly allowed this misleading evidence to go uncorrected and consciously withheld the exculpatory information from defense counsel despite request for the information contained in the detective notes.

> Q. Did there come a time during his [Nazarchuk's] deposition that you thought perhaps you had not gotten all the discovery you were entitled to?
>
> MS. CASHMAN: Yes. When I was questioning Detective Nazarchuk I spent a great deal of time trying to elicit from him the details surrounding the interviewing of these witnesses. He had notes, and as I questioned him during the depo, he needed to refer to his notes because a lot of what was in his notes was not in his report.
>
> Q. Did he tell you that some of the information was not in his reports?
>
> MS. CASHMAN: Yes, I believe that he did. The state was present. The state, as I recall, it was **Mr. Hebert who was there, and he was very adamant that I not actually get copies of the detective's notes,** and what I was trying to do since they would not give me the notes was get the information so that I could use it in conducting other depositions, use it in terms of giving my investigator suggestions and instructions on follow up work for her to do, and learn everything I could about the state's case so I could prepare to represent Mr. Vining at trial.
>
> Q. Were you able to do that, were you able to get the

information from Detective Nazarchuk?

MS. CASHMAN: I have since learned I was not. I learned through this motion being filed that there were notes and there was information contained in those notes and I in fact was not provided that information during deposition or during the course of - -

(PC-R. 172-73)(emphasis added).

Defense requested the detective's notes. Trial counsel suspected the notes contained exculpatory material, but Mr. Hebert, the assistant state attorney, refused to disclose them even after a request. Under Kyles v. Whitley, 514 U.S. 419 (1995), knowledge of the exculpatory information is imputed to the prosecutor whether or not they have actual knowledge of the information from the law enforcement agency. By any definition of Brady, Mr. Vining was entitled to have this exculpatory information.

The State also failed to disclose an exculpatory FBI report that showed negative results in the testing of car fiber in Mr. Vining's car and a fiber on the victim's blouse. Again, defense counsel testified that they had not been provided this beneficial piece of evidence.

Q. Showing you what has been marked as Defense Exhibit four, have you seen that report before?

MS. CASHMAN: I don't believe so. No.

Q. Was one of the issues in your case that the defendant's car had been found burning in Ocala sometime after the victim's name had been released?

MS. CASHMAN: Yes. I remember the state sending me

lots of pictures, and I went to Ocala to take some depositions, I believe of a fire inspector and I don't know who else. The car, yes, was an issue in the case.

Q. Would it have been important for you to know if there was evidence that had been tested by the FDLE [sic] Lab that turned up no positive comparison between your client, or his car and the victim, would that be something you would have wanted to present?

MS. CASHMAN: That would have been critical, because the state's theory was the car was burnt to destroy evidence, and **if we could have been able to show the state's theory was wrong it would have given us more reason to argue, reasonable doubt, and is that the state had not met its burden of proof and that, in fact, their theory was speculation rather than something based on evidence.**

(PC-R. 186)(emphasis added).

Despite filing numerous discovery demands, the State failed to turn over this critical FBI report (PC-R. Def.Ex.11, Notice of Discovery; Def. Ex. 12 State's Response to Demand for Discovery). Had counsel been provided with this piece of evidence, she would have presented it to the jury.

Q. (BY MR. LERNER) And the fiber could have come from anywhere, could have been blown from the window on the body - -

MS. CASHMAN: I was just told by you to assume it came from Georgia Caruso, so reading the report if I'm to assume the fiber came from Georgia, the report tells me you cannot connect Caruso and Vining based on the FBI's examination, you would be connecting Georgia Caruso to someone else.

Q. Well, actually you wouldn't be connecting Georgia Caruso to anybody based on that report, would you?

MS. CASHMAN: I would be connecting Georgia Caruso to someone other than John Bruce Vining, because the

fiber did not match John Bruce Vining.

Q. That particular rug?

MS. CASHMAN: Yes, based on the assumptions I was told to answer the questions under. It would tell me that Georgia Caruso fiber does not connect to John Bruce Vining, client on trial.

Q. And you said that's something you would have liked to have presented or thought about or used, is that correct?

MS. CASHMAN: Absolutely. Absolutely. That would be evidence that would exonerate my client, that would show that someone else had a connection to the deceased.

(PC-R. 221-22).

Q. (BY MR. LERNER:) If one of the fibers - - from Georgia Caruso's blouse or wherever it came from, her dress had matched something that could be linked to Mr. Vining, that would have been a significant fact. Would it have not?

MR. SIMS: Sure.

Q. But the fact that a fiber, polyester fiber in and around her body did not match the rug is of no consequence at all. Is it?

MR. SIMS: Well, I can tell you've been a prosecutor for a long time.

If I have a firearm and there's a fingerprint on in but it's not by client's, that's important because there's a fingerprint that's not my client's.

And you say that - - that was the gun that was used in the robbery, if you have a fiber on the body of a person and you're assuming that either came from a crime scene or was left by an assailant, every little bit, especially in a circumstantial state, every little bit of reasonable doubt counts.

So in a situation like that, you say, well, somebody left that fiber and, of course, you can rebut it as the

> prosecutor saying , well, you don't even know that fiber is a part of this case but we don't know that it isn't.
>
> Q. From that report, you have no idea where the fiber came from. Do you?
>
> MR. SIMS: No. That's why you would have to have that report to track it down and see if they - - when you say fiber, I assume you are telling me the fiber that was on Georgia's person?
>
> Q. I believe that's what it says but I can go fetch it.
>
> MR. SIMS: That's all right. I don't think that that matters where it came from as long as we can show that it didn't come from Mr. Vining because then I don't have to pick out who committed the crime. I just say it wasn't him. And so a fiber found on a body which, you know, in mystery novels and in movies and in these courts of law are always brought in to try to say this links it up matters just as much when it doesn't link it up and you have always the possibility as a prosecutor to say that doesn't matter, she could have picked it up sitting at the briar patch earlier that morning.

(PC-R. 91-92).

In its cross-examination at the evidentiary hearing, the State attempted to shift the burden to Mr. Vining to discover whether any hair or fiber from the car should have been tested (PC-R. 222-23). This is not the test under Brady. It is the state's burden to turn over exculpatory information. It is not Mr. Vining's responsibility to imagine that there may have been exculpatory FBI reports in the state's possession. See, Kyles v. Whitley, supra. The state cannot shirk its duties under Brady by suggesting that it was Mr. Vining's responsibility to have the

evidence tested.

The United States Supreme Court has explained that in addition to exculpatory evidence, the Brady rule requires disclosure of evidence that might be used for impeachment purposes. Giglio v. United States, 405 U.S. 150, 154 (1972). Impeachment evidence is "evidence that is favorable to an accused" where, if disclosed and used effectively, it may make the difference between conviction and acquittal, or affect the penalty. United States v. Bagley, 473 U.S. 667, 676 (1985).

To establish materiality, a defendant need not establish that the withheld information would have resulted in an acquittal; he need only raise a reasonable probability that the result would have been different. Bagley, 473 U.S. at 682. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. For example, in Jacobs v. Singletary, 952 F. 2d 1282, 1289 (11th Cir. 1992), withheld evidence was considered material because it "would have provided the defense with more than merely insignificant supplemental support for cross-examination purposes."

Just as this Court held in Young v. State, 739 So. 2d 553 (Fla. 1999), the withheld documents in this case were material to Mr. Vining's defense. The state has not disputed the existence or the content of these withheld documents.

Judge Bronson conceded that the State failed to disclose

this information (PC-R. 2487-88).

However, Judge Bronson erroneously analyzed each piece of Brady information separately and never considered the cumulative effect of all of the Brady violations. The hearing court found that:

> However, even if Ward's testimony on this issue had been severely impeached or excluded entirely, other evidence in the record provides strong support for the conclusion that the "motive diamond" was in the victim's possession the day she disappered. First, witness Donner testified that although he didn't appraise it, the victim had a one carat round diamond about which she asked a question (R. 1155). Second, the witness Piantiera specifically described a rare diamond which she had purchased and given to witness Ryan to sell (R. 1208-11). Witness Ryan testified that he gave this diamond, a loose stone, to the victim on the day before she disappeared (R. 1219). Further, witness Jones testified that a man identified as the Defendant sold this stone to him the day after the victim disappeared (R. 1222-26). In light of the testimony of these four witnesses, **the impeachment value of Ward's statement was minimal**, and Defendant cannot prove materiality as to this piece of evidence.

(PC-R. 2488)(emphasis added).

Judge Bronson examined each individual note and report and drew the same conclusion--they were not material (PC-R. 2489-2492). Apparently, Judge Bronson is more confident in the State's testimony than Judge Baker was at trial. Judge Baker was so doubtful of the State's case that he felt forced to do his own investigation.

Judge Bronson also used the wrong analysis to deny the claim. The hearing court examined each Brady violation as to whether each single piece of evidence withheld would have caused

a different outcome. Under Young and Kyles, this is incorrect. Judge Bronson should have considered the potential cumulative effect of the evidence on the jury's verdict. This Court in Young specifically adopts the standards set out in Kyles:

> On habeas review, we follow the established rule that the state's obligation under Brady v. Maryland (citation omitted) to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.
>
> * * *
>
> Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but **whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.** A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Young v. State, 739 So. 2d at 556 (Fla. 1999)(citing Kyles v. Whitley, 514 U.S. at 434).

Also, in Strickler v. Greene, 119 S. Ct. 1936 (1999), the U.S. Supreme Court detailed the obligations of defense counsel to show cause in failing to raise a Brady claim. Its discussion is directly analogous to the facts here:

> If it is reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable...

> ...Although it is true that petitioner's lawyers - - both at trial and in post-trial proceedings - - must have known that Stoltzfus [a state's witness] had had multiple interviews with police, it by no means follows that they would have known that records pertaining to those interviews or that the notes that Stoltzfus sent to the detective, existed and had been suppressed. Indeed, if the Commonwealth is correct that Exhibits 2, 7, and 8 were in the prosecutor's 'open file,' then it is unlikely that counsel would have suspected that additional impeaching evidence was being withheld. The prosecutor must have known about the newspaper articles and Stoltzfus' meetings with Claytor [a detective], yet he did not believe that his prosecution file was incomplete.

See, Strickler v. Greene at 119 S. Ct. at 1950.

The hearing court ignored the fact that Ms. Ward's testimony at trial flatly contradicted the statements it now suggests defense counsel should have known about.[3] The defense testified at the evidentiary hearing that it had no affirmative statement by Ms. Ward that contradicted her trial testimony. If they had the withheld statements, defense counsel would have used them

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[3]The time discrepancy and the "no loose stones" statement in the detective's notes were made before the hypnosis session. After hypnosis, the descriptions of the suspect and the car changed. After the hypnosis session, Ms. Ward remembered more details about the car. Specifically, she remembered where the antennae was (R. 2707). Unbeknownst to defense counsel, Ms. Ward told Detective Gay before hypnosis there were no loose stones in the victim's possession. After hypnosis, she does not mention loose stones and has no specific time in which she saw the victim leave with the suspect. Cf. 12/27/87 Ward statement at 13:00 hours and at 14:30 hours. By the time Ms. Ward testified at trial, her description of the suspect is different yet again. Cf. 12/17/87 statement-- no long face, no loose skin. (R. 1010). Her testimony about the victim's departure time is inconsistent (R. 1017). More importantly, Ms. Ward testifies under oath that the victim had "**some loose diamonds**" when she left the store with the suspect (R. 1021).

(PC-R. 174-75). The hearing court said it did not matter that Kevin Donner said that Caruso mentioned another diamond she wanted appraised. This fact was never impeached because the defense did not know that Ms. Ward did not have loose stones on the date she had Donner appraise only mounted diamond rings. Therefore, the information was material to Donner and Ward. The hearing court never addressed how one piece of information like the "loose stones" statement can be used to impeach several witnesses such as Donner and Ward. Judge Bronson never addressed the interrelationship between the Brady evidence of Donner's inattentiveness and the loose stones statement and the time discrepancies in Ward's testimony. The trial attorneys testified that the violations created reasonable doubt. There was no evidence to the contrary. Judge Bronson cannot after the fact suggest that the evidence was not important when the only evidence presented to him at the evidentiary hearing was that it was "critical."

Mr. Vining's case was circumstantial and tenuous. No confessions, jailhouse admissions or physical evidence linked Mr. Vining to this crime. He consistently and vehemently maintains his innocence. While he admitted selling a diamond, the defense argued that it could not have been the same diamond that Ms. Caruso supposedly possessed.

The testimony of the state's witnesses consistently showed

that the diamond that Pianteri and others examined was a greenish-tinged diamond. It was a unique stone and with its distinctiveness came a concomitant high value. The diamond sold by Mr. Vining was worth approximately $600, hardly the price that would be brought by a rare green diamond. But, the jury did not know that Ms. Caruso did not have in her possession on the day of the crime "loose stones."

The two diamond rings evaluated by Kevin Donner were much larger than the diamond Mr. Vining sold. It is only logical that a person with the criminal intent to kill Ms. Caruso would take the larger diamond rings that would ultimately bring a higher price. This discrepancy in the State's case is what made Ms. Ward's testimony so valuable and the withholding of the evidence so egregious. Without the motive diamond, there was no case. Without the diamond, there was no explanation for the crime.

The State went to great lengths to twist the facts and withhold evidence, instead of searching for the truth. It cannot be said that the impeachment of Ms. Ward's pivotal testimony that the victim did not carry loose stones would not have undermined confidence in the outcome of the trial. The State used the force of Ms. Ward's story-telling to make its case come alive. No other testimony came close in force or prominence as Ms. Ward's emotional account of the suspect, his description, and the items possessed by Ms. Caruso. According to trial counsel's testimony

at the evidentiary hearing, they could have wreaked havoc with cross-examination if they had the exculpatory information in the possession of the State.

In Strickler, the U.S. Supreme Court made a factual distinction in denying relief when it was clear from the facts that forensic evidence and Strickler's own confession were sufficient to sustain a conviction despite the significant and material Brady violations that occurred. Here, we have significant and material Brady violations, but no forensic evidence or confessions linking Mr. Vining to the crime. Under Strickler, Kyles and Brady, Mr. Vining would be entitled to a new trial.[4]

The State contends that its misdeeds do not rise to the level of a material Brady violation because there was sufficient evidence outside the diamond evidence and the fact that no evidence linked the car with the victim to sustain a conviction. If this were true, then there would have been no reason for the State to withhold the evidence, despite counsel's specific request for the notes Detective Nazarchuk's deposition. (PC-R. 172-73).

The State withheld evidence that the victim carried no loose

[4]Mr. Vining need not prove that the outcome would have been different, he need only prove that there is a "reasonable probability" exists that but for the State's withholding of evidence, confidence in the outcome of the trial is undermined. See, Kyles v. Whitley, 514 U.S. 419, 434 (1995).

stones. None of the items examined by Kevin Donner were loose stones. None of the diamonds weighed the same as the alleged motive diamond. The descriptions of the suspect seen with Georgia Caruso changed several times depending on whether the statements were taken before or after the "relax and recall" sessions by the Sheriff's Department hypnotist. Ms. Ward saw detectives eight times before making an identification and then only after a "relax and recall" session.

The State argued in closing that defendant's car was burned to hide evidence. But, the State withheld the report that proved that no hair or fiber from the victim existed in the car. The State withheld the exculpatory FBI report that showed the fibers did not match the car. The State knew this evidence was significant and in the hands of an informed defense attorney would ruin its case.

Judge Bronson conceded that the FBI report "tended to negate a connection between the victim and the Defendant's car" but found the Defendant would have been convicted even if the FBI report had been disclosed to the defense." (PC-R. 2490). Once again, the hearing court ignored the dictates of Young and Kyles. The only evidence in front of Judge Bronson proved the importance of having such an exculpatory piece of evidence (PC-R. 54-55; 49-52). Both defense attorneys testified it was valuable. The testimony was unrebutted by the State.

Q. And you said that's something you would have liked to have presented or thought about or used, is that correct?

MS. CASHMAN: Absolutely. Absolutely. That would be evidence that would exonerate my client, that would show that someone else had a connection to the deceased. (PC-R. 221-22).

Q. (BY MR. LERNER:) If one of the fibers - - from Georgia Caruso's blouse or wherever it came from, her dress had matched something that could be linked to Mr. Vining, that would have been a significant fact. Would it have not?

MR. SIMS: Sure.

Q. But the fact that a fiber, polyester fiber in and around her body did not match the rug is of no consequence at all. Is it?

MR. SIMS: Well, I can tell you've been a prosecutor for a long time.

If I have a firearm and there's a fingerprint on in but it's not by client's, that's important because there's a fingerprint that's not my client's.

And you say that - - that was the gun that was used in the robbery, if you have a fiber on the body of a person and you're assuming that either came from a crime scene or was left by an assailant, every little bit, especially in a circumstantial state, every little bit of reasonable doubt counts.

So in a situation like that, you say, well, somebody left that fiber and, of course, you can rebut it as the prosecutor saying , well, you don't even know that fiber is a part of this case but we don't know that it isn't.

Q. From that report, you have no idea where the fiber came from. Do you?

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> Q. I believe that's what it says but I can go fetch it.
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> MR. SIMS: That's all right. I don't think that that matters where it came from as long as we can show that it didn't come from Mr. Vining because then I don't have to pick out who committed the crime. I just say it wasn't him. And so a fiber found on a body which, you know, in mystery novels and in movies and in these courts of law are always brought in to try to say this links it up matters just as much when it doesn't link it up and you have always the possibility as a prosecutor to say that doesn't matter, she could have picked it up sitting at the briar patch earlier that morning.

(PC-R. 91-92).

The report was important to the defense. Despite Judge Bronson's order that said other people connected the defendant to the crime, he failed to address that all of these witnesses gave inconsistent descriptions and could not positively identify the defendant until two years later and after they had been hypnotized/relaxed and recalled. Judge Bronson suggest that Ward's description of the suspect vehicle was enough. But it wasn't until after hypnosis that she gave details about the car. Judge Bronson also said that the testimony of Pianteri, Ryan and Jones provided a "strong connection between the victim and the Defendant." (PC-R. 2490). However, none of these people ever saw the suspect. All these people could testify to was a diamond they consigned to Mark Ryan and Mark Ryan said he gave to Ms. Caruso. Nothing in their testimony connects Mr. Vining to the car, the victim or the greenish-tinged diamond. As a result, the

hearing court's order is in error.

Without the testimony about loose diamonds, the State had no motive for the crime. The physical descriptions of the suspect were tainted by hypnosis or "relax and recall." The burning of the car has no significance because it cannot be linked to the victim. The withheld FBI report suggests that nothing linked the burning car with the crime. The phone numbers did not match. The chain of custody of the "motive diamond" is tenuous at best, particularly when the "motive diamond" spent a good deal of time being carried in Detective Nazarchuk's pocket. The chain of custody was suspicious. The weight of the diamond differs from the diamonds shown to Kevin Donner and others. All of the evidence was either withheld or tainted by the State's conduct.

To further prove that the prosecution's case was weak, the trial judge, who was deeply disturbed by the lack of evidence, conducted an independent investigation without notice to defense counsel. The judge requested the Seminole County probate inventory of Ms. Caruso's property. Judge Baker testified that he did this "to make the evidence more clear."(R. 2622; PC-R.141)

Judge Baker also made a trip to the "alleged" crime scene presumably to make the witness's testimony more "clear." The judge was obviously troubled by Ms. Ward's testimony regarding the suspect's description. She was the only witness who testified about the nail salon, its location, and the times that

the suspect allegedly came to the salon. She was the only witness who could have caused the Judge Baker to investigate (PC-R. 147).

The jury viewed Ms. Ward as the only witness to put the suspect, the location of the nail salon and the diamonds with Ms. Caruso. She was the only witness who could testify about the contents of Ms. Caruso's purse. The State emphasized her testimony in closing argument. If defense counsel could have impeached Ms. Ward's testimony regarding the loose stones, the arrival and departure times, her description of the suspect, and the fact that the FBI found no connection between the car and the victim, it is a "significant possibility" that the jury would have had a reasonable doubt about Mr. Vining's guilt and recommended either an acquittal or a lesser included offense.

The Brady violations in this instance were material and significantly undermined confidence in the outcome of the trial. So much so, that the judge was compelled to make the evidence "more clear" by conducting his own investigation.

> The Court of Appeals' negative answer to that question rested on its conclusion that, without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. **The standard used by that court was incorrect.** As we made clear in Kyles, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Id., at

> 434-435. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' Id., at 435.

Strickler v. Greene, 119 S. Ct. at 1952, (citing Kyles v. Whitley, 514 U.S. 419 (1995); Cf (PC-R. 2487-92).

Mr. Vining is entitled to a new trial.

ARGUMENT II

MR. VINING WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND IMPARTIAL TRIBUNAL DURING HIS CAPITAL TRIAL BECAUSE HE WAS SENTENCED TO DEATH BASED ON EXTRA-RECORD INFORMATION, IN VIOLATION OF GARDNER V. FLORIDA AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. DEFENSE COUNSEL'S FAILURE TO OBJECT DEPRIVED MR. VINING OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND GARDNER V. FLORIDA.

Introduction

In his rule 3.850 motion, Mr. Vining claimed that he was denied his right to a fair and impartial tribunal during his capital guilt and penalty phases. Mr. Vining argued that defense counsel's unreasonable failure to object to the trial judge's consideration of extra-record information and seek recusal was ineffective assistance of counsel under Gardner v. Florida, 430 U.S. 349 (1977), and Porter v. State, 400 So.2d 5 (Fla. 1987). This Court failed to consider this claim on direct appeal because:

> We find that this issue is waived for purposes of appellate review as defense counsel never objected to the court's consideration of this material.

Vining v. State, 637 So. 2d 921, 927 (Fla. 1994).

In its brief on direct appeal, the State conceded that defense counsel failed to object to the judge's actions. See, Appellee's Brief at page 14 ("No objection to the viewing of such materials was ever raised below by defense counsel at the penalty phase, sentencing, or any time prior thereto"); Id at 15 ("The letters of the trial judge and the record demonstrate clear knowledge on the part of defense counsel of the judge's undertaking").

Mr. Vining's case was Judge Baker's first and only death penalty case that had proceeded completely through sentencing phase (PC-R. 123). Judge Baker's unorthodox methods of trying cases has been the subject of contentious recusal motions since Mr. Vining's capital trial. See, Rollins v. Baker, 683 So. 2d 1138 (5th DCA 1996) (on writ of prohibition ex parte communications between judge and wife's counsel, together with judge's comments at motion to compel hearing were sufficient to create a well-grounded fear of lack of impartiality); Time-Warner Entertainment Company v. Baker, 647 So. 2d 1070 (5th DCA 1994)(judge had complied with requirements for discussing case with expert when he gave notice to the parties and afforded a reasonable opportunity to respond. See also, dissent by Judge Dauksch with opinion); Lowman v. Baker, 595 So. 2d 1121 (5th DCA 1992)(on a petition for writ of prohibition while denied on appeal dissenting opinion by Judge Dauksch "It is obvious to me

that the circuit judge who is requested to recuse himself is personally affronted by the actions of the lawyer for the petitioners. That circumstance gives an appearance of less-than-objective attitude by the judge toward the lawyer which may affect the petitioners and their perception of the judge's fairness.").

Even though these are civil cases, the same conduct occurred here except Judge Baker **did not** notify defense counsel of his activities until **after** the sentencing phase of trial. Trial counsel did not object, move for mistrial or move to recuse the judge as the civil attorneys did in the above cases.

The Judge's investigation

> ...As the judge presiding at guilt phase and the advisory sentence phase of the jury trial, I was present for all of the testimony and evidence introduced during both phases of the trial. Also, I have read all of the depositions transcribed and filed with the clerk of the court. I read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance...

(R. 2630)(sentencing order).

None of the evidence described in the judge's sentencing order was admitted or presented at trial. The revelations in the judge's sentencing order were the tip of the iceberg as to his consideration of extra-record information that was not presented

to the jury or noticed to defense counsel. Counsel only learned of this **after** the trial was completed.

In his rule 3.850 motion, Mr. Vining argued that the judge failed to disclose his personal experience with hypnosis and the fact that he had, in the past, engaged in self hypnosis. He did not reveal these experiences until Kevin Donner's testimony was proffered at trial (R. 1135-40). Trial counsel did not object. By this time, Mr. Vining's Motion to Exclude Hypnotically-Tainted Evidence had been denied by the court (R. 1780-83). The State's witnesses had already identified Mr. Vining in court without being cross-examined on their journey into "relax and recall."

During the evidentiary hearing, Judge Baker testified that before ruling on Mr. Vining's motion to suppress hypnotically-refreshed testimony, he mentioned to his friend, psychologist, Steve Jordan, that the issue of hypnosis had come up in the case. Mr. Jordan had given the judge a copy of a book, Trance on Trial, by Alan Scheflin and Jerold Shapiro (PC-R. 128-29). The judge admitted reading the book in connection with the hypnosis issue in the case and said the book was not an "outside source" but was a law book on the admissibility of evidence in courtroom proceedings (PC-R. 129, 135). He admitted reading "sections of the book" prior to ruling on the motion to suppress in Mr. Vining's case and took it "as a guide for what a judge should do." (PC-R. 130). However, the judge could not recall whether

during trial he notified counsel that he had read the book or consulted any other sources on the topic (PC-R. 130). He did not know if the book had been discredited or whether he had read Chapter Six, the definitions section, that specifically states that the purpose of this book is not to discuss the admissibility of hypnosis as it relates to eyewitness testimony. See, Trance on Trial, supra at Chapter Six. The judge did not know if defense counsel asked to look at the book but he had it in his office (PC-R. 135). Had counsel known of the judge's conversation with Dr. Jordan or his use of Trance on Trial, they could have refuted some of the legal principles the court relied on and discovered that the principles espoused in the book have been seriously discredited. Instead, counsel was denied that opportunity and Mr. Vining was denied his due process right.

Judge Baker based his decision on whether the State's witnesses had been hypnotized **not** on the evidence presented at the suppression hearing or at trial but on his own experiences with hypnosis. The judge had personal knowledge of disputed evidentiary facts concerning the proceeding. Cf. Canon 3 (E)(1)(a), Code of Judicial Conduct.

In addition, the judge repeatedly conducted extra-record investigation into Mr. Vining's case, such as contacting witnesses and visiting the crime scene. Because the judge engaged in these activities outside the presence of counsel and

without informing counsel of the information he was receiving, the evidence was unrebutted. The evidence was unrebuttable because the judge never disclosed what he had learned. Without tactic or strategy, counsel did not object to the judge's activities even after it was disclosed.

At the evidentiary hearing, the judge admitted to having a conversation with the medical examiner, Dr. Thomas Hegert, during Mr. Vining's case. The subject of the conversation was never revealed to defense counsel.

> Q. Is that your sentencing order?
>
> A. It reads like it. It has my signature on the bottom of it. ...I assume it is without verifying it myself. I can't tell you except to say that **conversations with the medical examiner are not unusual.**
>
> In fact, I had–nowadays, we have Internet electronic mail communication, and I don't have to call people anymore, so I have correspondence with the medical examiner now. I had correspondence with the medical examiner last week and have had correspondence with the medical examiner, that's Doctor Gore on various subjects, and just--I was asking him last week for copies of his records related to -- nothing to do with this case, but I was asking him for records related to the number of deaths in Orange County from heroin overdose and how they arrived at this figure and I asked him to send me the records, and he did. **I would assume that's the same conversation with the medical examiner, would be is this your report and is there anything notable about it, and -- it's like the other records that are public records, records of public officials, accessed by the public, I felt [an] obligation to tell the people I had these records and I looked at them, and if they were anything I discovered in them that swayed my decision that I would have said so.** (PC-R. 139-140)(emphasis added).

The judge's extra-record consultation with Dr. Hegert was considered routine except that defense counsel was not notified until after the trial was over. The judge received the only written autopsy report of the victim. He could not recall whether the report was admitted into evidence at trial. (PC-R. 137-39). The record on appeal reflects that is was not admitted at trial. Despite the State's attempt to rehabilitate the judge on whether he had considered the autopsy report in his sentencing order, the fact remains that gathering the evidence and having an *ex parte* conversation with a witness at trial is improper (PC-R. 155).

Following penalty phase but before sentencing, Judge Baker followed the same procedure in procuring the victim's probate records through *ex parte* contact with the clerk of probate court:

> A. The clerk of the probate court was Bob Herndon...who was a classmate of mine in high school, and I've known him--I grew up with him here in town, and I either called him or saw him or went to his office and asked if there were a probate file on Georgia Caruso, and he said, no. But he said maybe she didn't live in Orange County, might be an estate filed someplace else and I said, would you find out ...
>
> ...Then about, I don't know, five, six, seven days later I got an envelope that had this estate file of Georgia Caruso from Seminole County. I didn't ask for it, I really just asked if there were such a file, and **I wanted to look at the inventory** to -- again, we're talking about a record of a circuit court in Seminole County which of course as I'm sure you know, we're entitled to look at under the --take judicial notice of, or take notice of, and I take that as a guide, if you're going to look at any of these things you ought to tell people. So when I received it I told him this is what I have and filed it in the court file.

(PC-R. 141)(emphasis added).

Judge Baker "checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance." (R. 2630). It is obvious from the judge's testimony and the sentencing order that the judge was troubled by the lack of direct evidence regarding the **motive diamond.**

Instead of finding that the State had not proved its case, the court went out to prove it for them. This was evidence that the defense could not rebut because it did not know of its existence. It is obvious that the judge considered this evidence in making his decision on Mr. Vining's guilt and whether to sentence him to death. (R. 2630-2637). Otherwise, the judge would not have looked for it. The jury was never shown nor told about these probate records (PC-R. 142). Defense counsel was not informed about the judge's inquiry and examination of these files until the trial was over. Even then, defense counsel did not object or move for mistrial or recusal. The information obtained by the judge was improperly used against Mr. Vining.

Judge Baker also obtained information about Mr. Vining's prior conviction in Georgia and used that information against him at sentencing (R. 2634). The judge said he read and considered depositions that were contained in the court file but not

admitted into evidence. He did not recall disclosing to defense counsel that he had read the depositions, with the exception of the Ferguson deposition (PC-R. 143). The jury did not know of or consider any of the depositions (PC-R. 143).

> Q. I was thinking specifically of the depositions in the Georgia case that was used as an aggravator. [Do] [sic] You know if any of these depositions were ever disclosed to the jury?
>
> A. I doubt it. I don't recall...I remember there were some witnesses about the Georgia case. I can't imagine how you would publish a deposition from the Georgia case to a jury, in the citizen [sic][sentencing] phase.

(PC-R. 144-45).

Judge Baker used this extra-record information as non-statutory aggravation against Mr. Vining even though the State had not introduced it at trial. Despite the inability of the judge to recall whether he relied on any of the information in the depositions, it is apparent in the sentencing order that the judge was greatly affected by the information he compiled about the Georgia case and by probate records of the victim. Much of the information he relied on at sentencing was **not** presented in open court. For example, the judge found in his sentencing order that the Georgia victim was "taken to a wooded area where she was rescued as she lay helpless, with a gun pointed at her head, beside a vertical grave that had been dug for her in her presence." (R. 2634). There is no mention of any rescue in the trial testimony at trial.

Judge Baker also made efforts to locate the crime scene in Orange County. He said that he was confused about the location and had called the library asking if they had a "Nail Expressions" listed in the telephone book (R. 1913). After penalty phase but before sentencing, the judge conducted his own view of the crime scene, even though no jury view had been requested or conducted (PC-R. 146).

Judge Baker never disclosed the results of his personal investigation and never indicated what information he found. The information he learned made the case "more clear" yet he never explained what facts he found that made his decision to impose a death sentence "more appropriate." (R. 2622).

At the evidentiary hearing, the judge testified that:

> ...I personally drove out on, I'm going to say 436, but maybe it was 434, I don't remember where it was, but I drove out in the vicinity of -- drove out to the vicinity of some building out there that had something to do with the case. **Because I wanted to get the kind of general of what the witnesses had been talking about.** I can remember driving out there and I can remember looking at the building, and I think I stopped. And I think I -- I noticed in one of the papers you just handed me it's the Jamestown Shopping Center, and I couldn't tell you right now where the Jamestown Shopping Center is, but if that's the place I went there and -- **I remember there was testimony about an upstairs and a downstairs, and stairway and looking out the window, and I simply wanted to get an idea of what the witnesses were talking about.** And I understand that to be a view as a jury would take a view. And I have never remembered that a judge was prohibited from taking a view from the premises that are involved, in fact, I'm going to take a view of premises in another lawsuit next week, and had done so

often.

(PC-R. 147)(emphasis added).

Defense counsel was not noticed that the judge was going to view the crime scene.

Instead of relying on the evidence presented by counsel, Judge Baker became a second prosecutor and took it upon itself to investigate the facts. "It simply made the testimony more understandable to me regarding these places to have looked at them." (PC-R. 158). The judge misunderstood his role in deciding the case. "The only person who can collect evidence and include it in the record of the case is the trial judge." (PC-R. 158). The judge is to collect evidence presented before him at trial, not to act as a second prosecutor in gathering evidence that the defense has no opportunity to rebut. See, Porter v. State, infra.

To the extent that defense counsel was aware that Judge Baker was privy to information that had not withstood adversarial testing, counsel's failure to request access to that information constitutes ineffective assistance of counsel. Gardner v. Florida, supra at 361.

> In Gardner v. Florida, [citation omitted], the United States Supreme Court reminded us that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. Gardner held that using portions of a presentence investigation report without notice to the defendant to rebut or challenge the report denied due process.
>
> That ruling should extend to a deposition or any other information considered by the court in the

> sentencing process which is not presented in open court. Should sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

Porter v. State, 400 So. 2d 5, 7 (Fla. 1987).

The Florida Supreme Court in Porter vacated the death sentence and remanded for a resentencing when the trial judge relied on information contained in a deposition that was not in evidence. Here, the due process violations are more egregious and go to both phases of trial. The judge has admitted these violations and obviously relied on them in his sentencing order. Mr. Vining is entitled to a new trial.

Trial counsel's Deficient Performance and Prejudice

Trial counsel's ability to effectively represent Mr. Vining was thwarted by the trial court's improper actions. Trial counsel was rendered ineffective by the trial court's independent investigation, *ex parte* communications and consideration of information not presented in open court. Mr. Vining had no opportunity to respond or confront the information.

To the extent that trial counsel was aware of the judge's actions, counsel should have investigated the nature of the trial court's extra-judicial investigation. Trial counsel's failure to investigate the judge's conduct and move for his recusal resulted in unfair and biased consideration of extra-judicial material. Mr. Vining still does not know the substance

of the conversations the trial court had with outside experts, clerks and the medical examiner. The failure to object to the judge's conduct in conjunction with the state's improper conduct in withholding material Brady evidence prevented an adversarial testing of the evidence. Judge Baker's investigation went to both phases of trial (PC-R. 187).

Mr. Vining was prejudiced by counsel's omissions and the trial court's interference. For example, the trial court expressly rejected uncontradicted testimony in mitigation that Mr. Vining was a good father and a family person. In its sentencing order the judge wrote:

> There is conflicting evidence on how good a father John Bruce Vining was. That two of his children testified to his parental responsibility to them should be considered, but it is not a reasonable conclusion from the evidence that defendant was a "good father."

(R. 2633).

No conflicting evidence was presented at the penalty phase about Mr. Vining being a good father. The only information suggesting that Mr. Vining may not have been a good father was contained in depositions that were **not** admitted at trial. Neither the State nor defense presented or elicited any statements or evidence contradicting defense witness testimony offered in mitigation. See, Spenser v. State, 645 So. 2d 377, 385 (Fla. 1994).

The trial court also aggravated Mr. Vining's sentence with the probate records and his prior conviction in Georgia with

deposition information that was not introduced at trial.

> Q. To your knowledge was any of the probate records or depositions the judge looked at ever presented to the jury?
>
> MS. CASHMAN: No. No depositions were presented to the jury and nothing about Mrs. Caruso's probate file.

(PC-R. 187).

At the evidentiary hearing, Ms. Cashman, lead attorney on the case, testified that she first realized the judge had conducted extra-record investigation when she received letters from the court on March 1, 1990 and March 14, 1990 detailing the court's investigation and search for information outside the trial record.

> MS. CASHMAN: It's my understanding from reading the letter the Judge used the phrase during the trial in the opening sentence in the letter, he did not specifically clarify what things he did during the trial and what things he did after the trial, but the March 14th letter, I believe is the correct date, clearly states he did some things during trial, which I was totally unaware of, as was Mr. Hebert.

(PC-R. 188).

Had trial counsel known about the independent fact investigation of Judge Baker, she would have objected to preserve the issue for appellate review.

> Q. Would you have taken some kind of further action?
>
> MS. CASHMAN: Yes. I would have objected to the Judge going outside the record. It's a Gardner violation under the law. I would have needed to know what exactly he had read and viewed and done. I would have done additional research on it during the trial.

I would have spoken with Kelly, probably gone back and talked to Mr. Durocher, my boss or our chief assistant, Mr. Lorincz, on a number of issues in the case. Would go back to the office and bounce it off other senior attorneys and get ideas and talk about what's the best way to handle the issue, what's the best way to preserve the issue, you know, what needs to be done, what sort of record needs to be made and then made a decision based on what information I had, what was best for my client and best for the case.

Q. But because of the Judge's late discloser [sic], you didn't have that opportunity?

MS. CASHMAN: **You can't object to something that's already happened**. As I stated previously, you know, we have a contemporaneous objection, we're all in - - because I wasn't given notice and the opportunity to be heard before it happened, all I could do was make sure that the letter was made part of the file, and it could be addressed on appeal.

(PC-R. 189-190)(emphasis added).

Trial counsel also testified that she was unaware that Judge Baker had done independent research into hypnosis. Trial court's ruling that the witnesses had not been hypnotized prevented trial counsel from cross-examining the state's alleged eyewitnesses.

Q. Were you aware at that time that he [the trial judge] had done his own independent research into the hypnosis issue?

MS. CASHMAN: I don't believe so. There was something that came up about the fact Mr. Sims and I weren't allowed to use the word hypnosis or refer to it in that manner. I have a really vague recollection. But I remember that issue being discussed.

Q. Did you feel constrained by the court's order as far as what you could get into on cross examination of the state's witnesses after his ruling?

MS. CASHMAN: Absolutely. The court ruled that it wasn't hypnosis. I wasn't allowed to say it was

> hypnosis, that it was relax and recall. That the testimony was coming in, that the state was going to be allowed to put all that on. I had been told these were areas of cross examination that I was very clearly not to go into.

(PC-R. 180).

The record does not reflect any court order that counsel could not cross examine the witnesses on their "relax and recall" sessions. The prejudice to Mr. Vining was that the eyewitness recollections and descriptions of the suspect were never adversarially tested through cross examination before the jury. The jury did not know that the state's key witnesses had been subjected to a "relax and recall" session because the witnesses were not cross examined on this significant issue.

Trial counsel did not know until the proffer of Kevin Donner's testimony **during trial** that the court was involved in self-hypnosis and had never been able to hypnotize himself. Trial counsel also did not know that the court had spoken about the case with Dr. Steven Jordan, a psychologist who regularly testifies for the state. Had counsel known, she would have objected and filed the motions to suppress to preserve the issues properly for appellate review (PC-R. 188).

Mr. Vining also was prejudiced by the judge's consideration of an autopsy report that was not admitted at trial and the ex parte communications he had with Dr. Thomas Hegert. Trial counsel was unaware that Judge Baker had contacted the medical

examiner, who was a trial witness for the state.

> MS. CASHMAN: This is a letter dated March 1st of 1990 sent to Ken Hebert and I from Judge Baker...
>
> ...The substance of the letter is that the judge, after the trial had been completed, spoke to Doctor Thomas Hegert who had been the medical examiner called by the state in this case, and he goes on to say what he confirmed, and that informs me that Mr. Hebert had given him a copy of the autopsy report.
>
> Q: Do you remember whether or not that autopsy report was admitted into evidence?
>
> MS. CASHMAN: There has never been an autopsy report entered into in all the cases I've done, so there wouldn't have been.
>
> Q: Would the autopsy report or information about the autopsy gone to guilt phase evidence or penalty phase evidence?
>
> MS. CASHMAN: Both. The state is required to prove issues on cause of death, time of death, those sorts of things for purposes of guilt phase, and it is usually the first witness they call in penalty phase and they reshow the slides and argue either heinous, atrocious and cruel or cold, calculated , premeditated, but it goes to both aggravation as well as having to prove the element of the victim being dead. So - -
>
> Q: He refers in that letter to an item, phone conversation. Do you recall receiving a telephone call from the judge regarding his investigation into an autopsy report?
>
> MS. CASHMAN: I don't. It doesn't mean he didn't call. I don't know. I have no recollection of speaking to the judge on the phone.

(PC-R. 181-82).

Mr. Vining did not know that Judge Baker had doubts about the victim's death. This is particularly important in this highly circumstantial case. Mr. Vining's arrest was not made

until nearly **two** years after the discovery of the victim's body. Judge Baker admitted in his testimony that he conducted his extra record fact investigation to make the evidence "more clear."

> MS. CASHMAN: This is a letter dated March 14th. Again, from Judge Baker, sent to Ken Hebert and myself. It informs Mr. Hebert and myself that since the trial the court read all the depositions and had attempted to obtain documents that were referred to in trial and depositions not in evidence. It goes on to say such as Doctor Heggert's report, the probate records of the deceased, indicates he's familiar with the downtown Winter Park area, where important events occurred, and that before sentencing he expects to drive out to the Jamestown Shopping Center, and the Judge ends the letter by talking about his preference being to go to places, talked about her testifying, that usually it's not possible but he doesn't want to overlook anything that might **make the case more clear or his decision more appropriate**.
>
> Q: Was that the first that you knew that the judge had collected this extra record material?
>
> MS. CASHMAN: Yes.
>
> Q. By this time had the trial been completed?
>
> MS. CASHMAN: Yes.
>
> Q: Penalty Phase was completed?
>
> MS. CASHMAN: Yes.
>
> Q. The only thing that remained was sentencing?
>
> MS. CASHMAN: Yes.
>
> Q. At the time you received that, did you have any opportunity to view any of the materials or raise an objection to the judge's conduct?
>
> MS. CASHMAN: No, Florida has a contemporaneous objection rule. And I was given notice of things that had already occurred that was one of those situations

> where the bell had been running [sic] and you could not unring it. It was too late for me to enter an objection of any sort. I had no idea during the trial that the judge had been reviewing things not in evidence and that he was attempting to obtain anything -
>
> Q: Well, certainly had you known about this information during trial , would you have taken that opportunity to look at what the judge had read?
>
> MS. CASHMAN: Yes, Absolutely.

(PC-R. 183-84)(emphasis added).

Mr. Vining was prejudiced and to the extent that counsel knew after the fact of the judge's activities, counsel offered no tactical or strategic reason why she did not object.

At the evidentiary hearing, the State argued that the contemporaneous objection rule did not prevent counsel from objecting and making a motion for mistrial to preserve the issues. For example, on cross-examination, Mr. Lerner questioned Ms. Cashman about the objections she made to the testimony of Detective Ferguson from Georgia (PC-R 241-242). Mr. Lerner suggests that defense counsel should have known that Judge Baker was reading the depositions by statements he made in court:

> Q: And during that time the judge revealed at several points he had already prior to that read the Ferguson deposition and he was recalling it at that point. Isn't that true?
>
> MS. CASHMAN: Yes. And I was objecting based on what was contained in the deposition, the he didn't have personal knowledge, the state shouldn't be allowed to call him, I moved for mistrial, other objections I made that were appropriate based on what the state was trying to get into evidence.

(PC-R. 249).

Before his March 14, 1990 letter disclosing the full extent of his investigation, it was apparent Judge Baker had actively conducted his investigation without thought as to what was going to be entered into evidence or without giving notice to counsel (PC-R. 251). It also was evident from the sentencing order that the court relied on more than just Detective Ferguson's deposition:

> Q: Was it your understanding from reading the sentencing order that he [the judge] relied on more than one deposition than [sic] his sentencing order?
>
> MS CASHMAN: Yes, Ma'am.
>
> Q: And was the deposition referred to as Detective Ferguson's deposition, had that been used at trial and was it something that was disputed?
>
> MS. CASHMAN: Yes.
>
> Q: Did you feel your objections had put the judge on notice that the deposition should not be considered?
>
> MS. CASHMAN: Yes. I didn't think Mr. Ferguson should be called as a witness at all.
>
> Q: Did you feel your objections had sufficiently preserved the issue for appellate review?
>
> MS. CASHMAN: Yes, Ma'am.

(PC-R. 258-59).

If Judge Baker gave notice at the penalty phase, counsel should have objected and moved for mistrial. Judge Baker's conduct interfered with counsel's ability to try the case and present information to the jury. See, Blanco v. Singletary, 943 F.2d

1477, 1499 (11th Cir. 1991).

Community Standards in 1990

Chandler Muller, expert capital defense attorney, testified at the evidentiary hearing as to the community standards in 1990 for attorneys faced with the knowledge that the trial judge has considered extra-record information or done independent investigation.

> THE COURT: ...Could I just find out from you personally if you are aware of any situations like this in which a judge in a case of this magnitude was complained about or accusations were made that he or she was conducting independent investigation which would have undermined the integrity of the trial?
>
> MR. MULLER: Judge, I'm not specifically aware of a specific case, but **I'm aware where a lawyer was confronted with anything that would be an ex parte introduction of evidence that fundamentally would be something lawyers should have objected to and moved to strikes [sic] and move to recuse.**

(PC-R. 303-304)(emphasis added).

During cross-examination, Mr. Muller testified to the prejudicial effect of this impermissible conduct on the jury.

> MR. LERNER: Now, you're talking about you gave an answer and I didn't write it down verbatim, I'm not a fast writer, but you said something about unless there was a crucible where the material testified to, cross examination referring to outside information, the jury verdict is unreliable?
>
> MR. MULLER: Yes.
>
> MR. LERNER: That would only be if that information actually made it to the jury, is that correct?
>
> MR. MULLER: No, the information might not make it to

> the jury. For example, you could have a case where a court has proffer during trial of an alleged eye witness to a crime and the court rules that person could testify because they have not been hypnotically induced, and then the court could make a comment, by the way, I know about this, and proceed to talk about things that were the product of the court's own investigation.
>
> If the lawyer at that point did not move for mistrial or move to strike that, by omission the jury would get unreliable information, because the lawyer, for example, if the judge let that witness testify, may not have cross examined a witness about relax and recall as opposed to hypnosis, and that type of thing, and the jury may never have heard of it.
>
> MR. LERNER: You know the comment on the record that would be reviewed is part of the issue being considered?
>
> MR. MULLER: I guess in your hypothetical, if the court made that on the record and the lawyer did not move for a mistrial at that point, training would have dictated **any reasonably competent lawyer would have done that, and if a lawyer didn't do that, that would be outside the training.**

(PC-R. 309-310).

The prejudice is obvious. All of the state's key eyewitnesses had been subjected to a "relax and recall" technique. The issue of whether or not the witnesses had been hypnotized was hotly contested issue. The trial judge, relying on his own experience with hypnosis, denied the defense motion to suppress the post-hypnotic identifications by the witnesses (R. 1781). Trial counsel did not object to the judge's consideration of extra-record information nor did they attempt to impeach the witnesses on the fact that they had been "relaxed and recalled."

Both omissions were unreasonable under the circumstances of the case.

Mr. Muller's unrebutted testimony proves the prejudice that Mr. Vining suffered from defense counsel's failure to object and the trial court's interference in considering information that was not before the jury.

For example, the jury never knew the state witnesses identification of Mr. Vining was done **after** they had been subjected to a level of hypnosis or "relaxation." The jury never knew that Kevin Donner's testimony was different after hypnosis. In fact, he was not shown any photographs until after he had been "relaxed." He had only looked at an Identi-Kit. (PC-R. State's Ex. 11). Mr. Donner magically recalled seeing the suspect weeks before outside the jewelry store (PC-R. State's Ex. 11). He never identified Mr. Vining until after "relax and recall" (R. 1156); and they jury never knew that by the time Donner testified at trial he was able to see the suspect "during the whole time." "He was visible at all times: both of them were." (R. 1158-59). This information never reached the jury, but the trial judge based his opinion on this evidence. The jury did not know this information because counsel did not object or cross-examine on the issue.

Judge Baker pre-determined the issue for the jury based on his own experiences and his consultation with outside experts

that the witnesses had **not** been hypnotized. According to the unrefuted testimony of Chandler Muller, the expert capital educator and litigator, these omissions fell below the community standards for reasonable attorney performance in 1990.

Judge Bronson's Order Denying Relief

The hearing court relied on erroneous statements of fact and ignored the applicable law in denying relief to Mr. Vining.

> Defendant avers that defense counsel was ineffective in failing to object to or comment on the trial judge's consideration of extra-judicial materials including depositions in the court file, the medical examiner's report, the probate record of the victim's estate and other extra-judicial materials. This issue was also addressed at the evidentiary hearing, at which the trial judge testified. Assuming arguendo that trial counsel should have objected to the trial judge's review of extra-record materials, this Court cannot conclude that Defendant has proven that he suffered prejudice therefrom. First, at the evidentiary hearing, trial counsel conceded that the penalty phase testimony of Gail Flemming was "devastating." Second, trial counsel also conceded that the jury recommended a sentence of death by a vote of eleven to one. It has not been alleged that the jury considered any extra-record evidence.
>
> Moreover, on direct appeal, the Florida Supreme Court rejected the circumstance of cold, calculated, and premeditated, and went on to examine the other aggravating circumstances. The Supreme Court concluded that the record supported "the trial court's conclusions that the murder was committed during a robbery, was committed by a person under sentence of imprisonment, and that the defendant was previously convicted of a felony involving use of violence to a person." Vining v. State, (citation omitted). The Supreme Court also found that the record supported "the court's conclusion that the other proposed factors either had not been established by the evidence presented or could not be considered of a mitigating nature." Id. It appears that the Supreme Court did not

> consider any extra-record evidence. Accordingly, the Defendant has failed to prove prejudice and this claim is denied as to this issue.

(PC-R. 2496-97).

Nowhere in the court's order does it apply the proper standards to the claim, either under Porter, Gardner or Strickland. The hearing court's analysis was completely incorrect.

The hearing court suggests that this Court's consideration of this claim on direct appeal foreclosed Judge Bronson from granting relief. This Court specifically held that the claim had not been properly preserved by trial counsel.

Therefore, the proper appellate avenue to challenge the due process claim is through a Fla. R. Crim. P. 3.850 post-conviction motion. This ineffective assistance of counsel claim and the due process violation could **only** be raised in a Rule 3.850. The issue had not been previously addressed. See, Fla. R. Crim. P. 3.850.

Judge Bronson completely ignored the seminal case on point, Porter v. State, 400 So. 2d 5 (Fla. 1981).

> Gardner held that using portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut or challenge the report denied due process. That ruling should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

Id., at page 6.

Just as in Porter, Judge Baker conducted an independent investigation in which he used extraneous factors against Mr. Vining in his rulings on the hypnosis issue and in determining the sentencing issues. This "injuriously affected" Mr. Vining's trial because Judge Baker failed to be fair and impartial and trial counsel failed to object. The hearing court does not mention the Porter case or how it affects the Strickland analysis that must be used in an ineffective assistance of counsel claim. This Court on direct appeal virtually mandated a finding of ineffective assistance of counsel because it could not address the merits of the claim because of counsel's deficient performance. See, Vining v. State, 637 So. 2d 921 (Fla. 1994). Mr. Vining was prevented from appellate review of the issue by counsel's deficient performance.

In addition, the only evidence before Judge Bronson was that counsel's conduct was deficient. Mr. Muller testified that it was below community standards in 1990 for counsel not to have objected or moved for a mistrial and recusal (PC-R. 309-310).

Judge Bronson fails to address counsel's failure to object to the trial court's consideration of outside experts, retrieving probate records, traveling to the crime scene, or his research into whether or not the State's witnesses could have been under hypnosis. Defense counsel testified at the evidentiary hearing

that by the time she realized what the Court was doing, it was too late to object (PC-R. Def. Ex. 7-8).

The hearing court also erroneously suggested that this Court's finding the evidence on appeal supported all of the aggravating factors demonstrates that there was no prejudice to Mr. Vining(PC-R. 2497). Incredibly, the hearing court fails to address that the trial court found the aggravators based on the extra-record information. The hearing court ignored that Judge Baker specifically relied on the information.

> ...As the judge presiding at guilt phase and the advisory sentence phase of the jury trial, I was present for all of the testimony and evidence introduced during both phases of the trial. Also, I have read all of the depositions transcribed and filed with the clerk of the court. I read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance...

(R. 2630)(sentencing order).

Judge Baker relied on these materials otherwise he would not have included them in his sentencing order. Even then, defense counsel did not object. The hearing court ignored this obvious error.

Defense counsel testified that Ms. Flemming's testimony (the victim in the Georgia case) at penalty phase was devastating. Judge Bronson relied on this statement to support his position

that it would not have mattered if the judge did extra record investigation (PC-R. 2497). If this were true, there was **even more** reason for defense counsel to object to the consideration of extraneous facts by the judge.

The judge was supposed to be the fair and impartial arbiter of the facts. He was not to be swayed by inflammatory or excessively emotional issues. As a co-sentencer, the judge was to consider only the evidence presented to him. In reality, he aggravated the case because of the information he investigated through the deposition of Detective Ferguson from the Georgia crime.

The hearing court failed to address the Strickland[5] test for ineffective assistance of counsel. The hearing court failed to mention that regardless of the evidence presented in penalty phase, a Gardner[6] violation is a constitutional due process violation of the most fundamental kind. A Gardner violation cannot be harmless. If the hearing court's position were correct, Mr. Porter would never have been granted relief in Porter v. State, supra, where, contrary to this case, there was a confession and overwhelming evidence of guilt.

Neither Ms. Cashman nor Mr. Sims testified that they discussed recusing Judge Baker at any time during trial. Neither

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[5]Strickland v. Washington, 466 U.S. 668 (1984).

[6]Gardner v. Florida, 430 U.S. 349 (1977).

said that they would have kept Judge Baker had they known about his extra-record investigation.

A decision not to recuse a judge who conducted an independent investigation of the facts would have been below community standards for reasonably competent counsel in 1990, according to Chandler Muller. Neither defense counsel testified to any strategy or tactic for not recusing Judge Baker.

Conclusion

Mr. Vining was prejudiced by the trial court's conduct and counsel's failure to object and move for mistrial or recusal when it was apparent the judge had considered extra-record information. The jury never knew that it was not privy to all of the information considered by the court. The facts in this case are more egregious than what occurred in Gardner and Porter. Mr. Vining never had an opportunity to rebut the factual matters in the depositions, probate records, autopsy report, the judge's research or his conversations with the medical examiner, probate clerk or Dr. Jordan. Defense counsel offered no strategic decision for not objecting to the unconstitutional Gardner violations. Due process is denied when an adversarial testing of the state's evidence does not occur. See, Strickland v. Washington, supra. Mr. Vining is entitled to a new trial before a fair and impartial judge.

ARGUMENT III

MR. VINING WAS DENIED A FULL AND FAIR HEARING IN CIRCUIT COURT BY THE COURT'S FAILURE TO ALLOW HIM TO EXAMINE THE MOTIVE DIAMOND AND FAILURE TO GRANT A HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE AND NEWLY-DISCOVERED EVIDENCE.

The trial court failed to conduct a full and fair hearing on the claims not supported by the record. The trial court granted a hearing on a fraction of the claims in Mr. Vining's Rule 3.850 motion for postconviction relief (PC-R. 1970-71). Judge Bronson only granted a hearing on three issues:

> 1. Claim VI - Brady v. Maryland claim;
>
> 2. Claim IX - No Adversarial Testing at Penalty Phase claim--but only as to allegations of counsel's ineffectiveness in connection with the trial judge's consideration of extra-record material not presented in open court;
>
> 3. Claim X - Ineffective Assistance of Counsel and Failure to Ensure a Fair and Impartial Tribunal--but only as to the allegations of counsel's ineffectiveness in connection with the trial judge's independent investigation and consideration of extra-record materials not presented in open court (PC-R. 1970-71).

Mr. Vining filed a motion for rehearing asking the court to reconsider such a severe limitation on the issues that were not rebutted by the record, particularly the court's failure to grant an evidentiary hearing on ineffective assistance of counsel at guilt/innocence phase and the newly-discovered evidence claims (PC-R. 1977-80). This motion was denied (PC-R. 1981).

Before the Huff hearing, counsel repeatedly requested access to the motive diamond, which was held in the Orange County

Circuit Clerk's office as a State's exhibit 18. The diamond is a public record.

Mr. Vining argued that the characteristics of this diamond are so unique that it cannot be the same diamond Mr. Vining possessed at the time of the crime. To prove that the State's diamond is not the same, the diamond would have to be mapped to document the imperfections and unique features of the diamond.

Mr. Vining argued that had his trial counsel mapped the motive diamond, they could have refuted the State's evidence that the diamond was the same diamond on consignment to the victim, and eliminating the motive for the murder as to Mr. Vining. It was ineffective for counsel not to have requested or investigated the possibility of expert testimony with regard to the diamond.

In his postconviction motion, Mr. Vining alleged that expert witnesses were now available to testify that a diamond could not be identified two years after it had been examined unless a legitimate appraisal with a plotting of the diamond had been done and used for comparison. This witness also could have proved that when a lower quality diamond is cut, as was the diamond sold by Mr. Vining, the appearance of the diamond is altered because the purpose of cutting the diamond is to enhance its brillance. Another witness could confirm that a diamond of the size and quality in the victim's possession could not be identified two years later. This witness would have said that such an

identification could only be accurate if the diamond contained a dramatic flaw that would classify the diamond as a lower quality than that involved in this case.

The diamond consigned to Georgia Caruso on the day before her disappearance had not been plotted by any of the witnesses at Mr. Vining's trial. These witnesses testified from memory that the diamond recovered from Michelle Merola in 1989 was the same diamond that had been consigned to Caruso in 1987.

Mr. Vining also could have presented an expert who would have testified that the descriptions of the two diamonds as set forth in the trial testimony describes two different diamonds. The expert would have pointed out the inconsistencies in the descriptions of the diamonds, and explain how in the science of gemology, these inconsistencies are significant. The expert would also have explained that, without examining the diamond in evidence, he could not give a definite opinion.

The hearing court denied postconviction counsel access to plot the diamond, and said:

> Furthermore, even if Defendant had brought in an independent diamond expert to examine the diamond, he has failed to show that there is a reasonable probability that such expert testimony would have changed the outcome of the verdict in this case. Accordingly, this claim is summarily denied.

(PC-R. 2486-87).

Once again the hearing court ignored the big picture. If the diamond, is the motive for the crime, then the elimination of

that diamond also erases the reason for the crime to occur in the first place. To not allow counsel's experts to the map the diamond, then deny the claim as a failure to prove its significance, is the ultimate Catch 22. The files and records do not conclusively show that Mr. Vining was not entitled to a hearing on this claim. See, Fla. R. Crim. P. 3.850.

As a result of Judge Bronson's ruling, Mr. Vining could not prove that the motive diamond's greenish tinge excluded it from being the common yellowish diamond Mr. Vining sold or that the value of the diamond would have been markedly higher than the amount of money Mr. Vining received.

This interference by the trial court prevented Mr. Vining from proving his ineffective assistance of counsel claim. See, Blanco v. Singletary, 943 F. 2d 1477, 1499 (11th Cir. 1991). The diamond as State's Exhibit 18 is a public record. Mr. Vining should be granted the same access to the diamond that is available to all citizens of Florida. He is sentenced to death based on a false assumption that the diamond in evidence is the same diamond that Mr. Vining possessed. Mr. Vining is entitled to relief.

Ineffective Assistance of Counsel at Guilt Phase

The hearing court also summarily denied the ineffective assistance of counsel at guilt phase claim as procedurally barred (PC-R. 2483-84). It was summarily denied despite sharing some of

the same facts regarding Judge Baker's consideration of extra-record information. It is difficult to understand how one claim can be sufficient for an evidentiary hearing on second phase, but the same facts in regard to first phase were not. The files and records do not conclusively show that Mr. Vining was not entitled to relief. The hearing court failed to attach any portions of the records that show why Mr. Vining is not entitled to a hearing. See, Fla. R. Crim. P. 3.850.

The evidence presented at the evidentiary hearing regarding Judge Baker's misconduct also applies to guilt phase. Each of these acts and omissions was prejudicial to Mr. Vining's defense. "But for" any of these errors, there is a "reasonable probability" the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). A "reasonable probability" is one sufficient to "undermine confidence in the outcome" of Mr. Vining's trial. Id.

In his postconviction motion, Mr. Vining alleged that trial counsel failed to challenge the State's case with discrepancies in the witnesses testimony. These discrepancies were obvious from depositions taken pre-trial. For example, the testimony of Zaffis, Donner and Ward was critical to the case. Trial counsel testified to their importance at the evidentiary hearing. Each witness testified he had seen photos of Mr. Vining before trial. What the jury did not hear was that each witness had been

"relaxed and recalled/hypnotized" by the Orange County Sheriff's Office prior to identifying Mr. Vining. After the relax/recall sessions, the witnesses worked with a sketch artist to construct a composite sketch of the man they saw with Georgia Caruso on the day she disappeared.

Detective Payne's deposition showed many inconsistencies in the identification of Joann Ward. It reflected that she was uncertain and couldn't make an identification (See, Payne Deposition at page 17). Detective Nazarchuk's notes indicated that Ward was "uncertain and unable to make a positive identification." Police Department notes dated June 5, 1989 also indicate that "Ward does not identify Vining." However at trial, Ward identified Mr. Vining and denied ever being uncertain (R. 1045-46).

The same type of information was available in depositions from Detective England of the Winter Park Police Department, who conducted the initial investigation of the case. Detective England testified that Ward and Vietti were "85% sure" that a driver's license photo of a George S. Williams was the man they saw with Caruso on November 23, 1987. (England Deposition at page 8). Trial counsel questioned Ward about this, but when Ward denied uncertainty, failed to impeach her with the information. The same was true of Kevin Donner. See, State's Ex. 11, Donner Deposition. None of counsel's reasons for failing to impeach on

this evidence is a matter of record. An evidentiary hearing should have been granted on this claim.

At the suppression hearing on hypnosis, Ward testified that she did not think she was hypnotized but that she does not know what hypnotism is (R. 1749-50, 1757-58). However, in deposition Ward referred to being hypnotized and indicated particular details she remembered after the hypnosis (Ward Deposition at p. 35-6, 38-40).

Surprisingly, trial counsel never informed the jury that the witnesses had been relaxed/hypnotized at all. After the Motion to Supress was denied, trial counsel never cross-examined or argued to inform the jury that the witness's memories had been "refreshed." Also, trial counsel failed to object to Judge Baker's use of extra-record material to rule on the suppression motion.

The trial judge based his ruling on the testimony of Lt. Watson, the man who had conducted the hypnosis sessions, and his hypnosis subjects, Ward, Zaffis and Donner. Watson testified that he used the "relax and recall" procedure to "eliminate as much as possible any barriers to recall and therefore enhance recall." (R. 1733). After testifying that it is the intent of the hypnotist that determines whether the subject is hypnotized or merely "relaxed," Watson admitted it was possible for the subject to slip from one level to another without the hypnotist

knowing it (R. 1731). He also admitted that he did not know whether the subjects were under hypnosis and admitted it was possible they were (R. 1737). Defense counsel failed to bring this to the jury's attention or object to the judge's *ex parte* reliance on outside sources to rule on the motion to suppress.

Defense counsel also failed to present expert testimony on the subject of "relax and recall" testimony. This expertise was readily available in 1990 and an expert would have been presented to testify had an evidentiary hearing been granted on this claim.

These omissions in conjunction with the Brady violations by the State and the misconduct of Judge Baker rendered trial counsel ineffective under Strickland. Mr. Vining was prejudiced by his jury never having known that the witnesses that purportedly identified him in court were uncertain, relaxed and recalled and had been 85% sure it was someone else two years earlier. Mr. Vining was entitled to a hearing on this claim. Summary denial was not proper because the files and records did not conclusively show that Mr. Vining is not entitled to relief. An evidentiary hearing is needed.

ARGUMENT IV

MR. VINING WAS DEPRIVED OF AN ADVERSARIAL TESTING AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE OUTCOME OF HIS SENTENCING PROCEEDINGS IS THEREFORE UNRELIABLE. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. TRIAL COUNSEL

WAS RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION AND THE TRIAL COURT, AND BY THE COURT'S REPEATED EXTRA-RECORD INVESTIGATION INTO MR. VINING'S CASE.

Mr. Vining was denied an adversarial testing during the penalty phase of his capital trial. Mr. Vining is entitled to an evidentiary hearing on this entire claim because the files and records do not conclusively establish that Mr. Vining is entitled to no relief.

Trial counsel's ability to effectively represent Mr. Vining was severely hampered by the improper actions of the trial court. See, Blanco v. Singletary, supra. The trial court abandoned its judicial responsibility to function as a detached and neutral arbiter in this adversarial case. See, Argument II.

In addition to the allegations regarding Judge Baker's reliance upon extra-record information, Mr. Vining alleged that trial counsel failed to investigate and present statutory and nonstatutory mental health mitigating evidence. A neuropsychologist who examined Mr. Vining was prepared to testify to his mental deficits and brain damage, facts that should have been presented to the sentencing judge and jury in mitigation. Mitigating evidence also was available that showed that Mr. Vining had good moral character. The jury did not know that Mr. Vining's mother was an alcoholic or that he was a good student and a good son. He stuttered as a child and volunteered for his community. The jury never knew that Mr. Vining saved his wife's

life and was a family person or that he succumbed to alcoholism himself. None of Mr. Vining's family history was discovered or presented by defense counsel.

Postconviction counsel filed a Motion for Rehearing of Judge Bronson's order limiting the evidentiary hearing, postconviction counsel attached copies of the reports of the diamond and mental health experts (PC-R. 1978-80). Judge Bronson denied the Motion for Rehearing (PC-R. 1981).

Trial counsel failed to ensure the presence of Mr. Vining at critical stages of his penalty phase proceedings. Trial counsel failed to make a complete record of these omissions. Mr. Vining was not present for off-the-record bench conferences (R. 2045). During many of these bench conferences, the trial court made rulings adverse to Mr. Vining based upon admissibility of testimony for the prior conviction in Georgia (R. 1958-60, 1966-68, 1970-74, 1985-88). Detective Ferguson testified over defense objection to disputed facts derived from Mr. Vining's purported confession. Mr. Vining's personal knowledge of that incident would have been relevant to trial counsel's argument and the court's rulings. Judge Bronson procedurally barred this claim but failed to address trial counsel's role in failing to ensure Mr. Vining's presence at these conferences (PC-R. 2498).

During penalty phase, the State presented two witnesses for Mr. Vining's involvement in a prior felony in Georgia (R. 1962-

92, 1993-2008). The jury was not presented with an accurate picture of the Georgia incident, because trial counsel failed to adequately investigate and prepare the case. Evidence that rebuts the aggravators and establishes mitigation must be presented to the jury in order to ensure a reliable adversarial testing.

Judge Bronson did not adequately address this claim. Judge Bronson found that the testimony from Mr. Vining's family members at penalty phase was sufficient (PC-R. 2498). However, the court does not address how these factors affected Mr. Vining's mental health or address that mental health mitigation was available but not used by defense counsel. The record does not refute this claim. It was error for the trial court to summarily deny this aspect of the claim. Mr. Vining is entitled to a hearing on these issues.

ARGUMENT V -- FAILURE TO OBJECT TO CONSTITUTIONAL ERROR

A. AUTOMATIC AGGRAVATOR.

Mr. Vining's jury was unconstitutionally instructed to consider an automatic aggravating factor: "committed while he was engaged in the commission of the crime of robbery" (R. 2616). The use of the underlying felony -- robbery -- as a basis for any aggravating factor, rendered that aggravating circumstance "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). See also Blanco v. State, 706 So. 2d 7, 12 (Fla. 1998) (Anstead, J., specially concurring). Due to the outcome of the

guilt phase, the jury's consideration of automatic aggravating circumstances served as a basis for Mr. Vining's death sentence.

Trial counsel's failure to object, which is cognizable in Rule 3.850, see, e.g., Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995), constituted ineffective assistance, and an evidentiary hearing is warranted, as no tactical reason existed for failing to object.

B. COLD, CALCULATED AND PREMEDITATED INSTRUCTION.

The trial judge instructed Mr. Vining's sentencing jury that when considering aggravating circumstances it could consider that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (R. 2616). This jury instruction violated the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420 (1980); Jackson v. State, 648 So. 2d 85 (Fla. 1994). The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder, which, as this Court has held, does not establish the "cold, calculated and premeditated" aggravating factor. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). To the extent that Mr. Vinig's counsel failed to adequately object, Mr. Vining did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984). At a minimum, an evidentiary hearing was required.

C. UNCONSTITUTIONALLY VAGUE STATUTORY LANGUAGE.

At the time of Mr. Vining's sentencing, the language of § 921.141 (5), Fla. Stat. (1991), which defined the "cold, calculated and premeditated," was facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980); Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). To the extent that Mr. Vining's counsel failed to adequately object, Mr. Vining did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984). At a minimum, an evidentiary hearing was required.

D. EDDINGS/LOCKETT ERROR.

The proceedings resulting in Mr. Vining's sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978). Limited evidence was presented showing Mr. Vining's history of alcoholism, he was a family man and a good father. Judge Baker's sentencing order said there was "conflicting evidence" on how good a father John Bruce Vining was. "That two of his children testified to his parental responsibility to them should be considered, but it is not a reasonable conclusion from the evidence that defendant was a 'good father.'" (R. 2633). However, there was no conflicting evidence presented at trial. The only information suggesting Mr. Vining may not have been a good father was contained in depositions that were not admitted or presented at penalty phase. The judge relied on extra-record information in rejecting Mr. Vining's non-statutory mitigation.

Judge Bronson procedurally barred this claim and found that any ineffective assistance of counsel with regard to this claim was without merit (PC-R. 2508). As illustrated above, the issue of Mr. Vining's mitigating evidence was not effectively argued. Had it been, the trial court would have had to find this evidence in mitigation. To the extent that counsel inadequately failed to litigate this issue at trial, Mr. Vining was denied effective assistance of counsel.

E. PRIOR VIOLENT FELONY AGGRAVATOR.

The jury was instructed on and the judge relied upon Mr. Vining's prior convictions to establish aggravating circumstances under sentence of imprisonment and prior violent felony upon which his death sentence was based. The sentencing court found that aggravating circumstance sufficient to outweigh mitigation.

The underlying Georgia and South Carolina convictions upon which Mr. Vining's sentence of death rests were obtained in violation of Mr. Vining's rights under the Fifth Sixth, Eighth and Fourteenth Amendments. His death sentence, founded upon these unconstitutionally obtained priors, violates his constitutional rights. Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Duest v. Singletary, 967 F.2d 462 (11th Cir. 1992). The failure to raise this claim at trial or on direct appeal constitutes ineffective assistance of counsel.

F. UNDER SENTENCE OF IMPRISONMENT AGGRAVATING FACTOR

Mr. Vining's jury was instructed that "the crime for which John Bruce Vining, Sr. is to be sentenced was committed while he

was under sentence of imprisonment." (R. 2616). The jury was not told that the weight of the aggravator was less if the defendant had not committed the homicide after escaping from confinement. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court indicated that the gravity of the aggravator is diminished since the defendant "did not break out of prison but merely walked away from a work-release job." Mr. Vining was on parole at the time of the offense.

The jury was not advised that the weight of the aggravator was lessened because Mr. Vining obtained his release from prison by legal and non-violent means. The jury must be fully instructed. Defense counsel argued in closing that this factor should not be given great weight because Mr. Vining was on parole (R. 2160). However, she failed to request constitutionally adequate limiting instructions or object to the inadequate instruction. As a result, the penalty phase instructions on aggravating circumstances "failed adequately to inform [Mr. Vining's] jury what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356 (1988). Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992) and the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT VI -- RULE 3.851

On January 1, 1994, Rule 3.851 of the Florida Rules of Criminal Procedure went into effect. Under this rule capital

defendants are allowed one year from the date their conviction becomes final to file a motion to vacate judgment and sentence under Rule 3.850 of the Florida Rules of Criminal Procedure. Rule 3.851, which sets out this time requirement, is unconstitutional on its face and in its application since it denied Mr. Vining due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Rule 3.851's time requirement also violates Article I, §§ 2, 13 and 21 of the Florida Constitution. Relief is warranted.

ARGUMENT VII -- DEATH PENALTY UNCONSTITUTIONAL

Florida's death penalty scheme is unconstitutional on its face and as applied to Mr. Vining. Execution by electrocution and lethal injection is cruel and unusual punishment under the Florida and United States Constitutions. Mr. Vining hereby preserves any arguments as to the constitutionality of the death penalty, given this Court's precedent.

ARGUMENT VIII -- INNOCENCE OF THE DEATH PENALTY.

Where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). This Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850, Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So. 2d 911 (Fla. 1991), and that innocence of the death penalty constitutes a claim. Scott (Abron) v. Dugger, 604

So. 2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Vining's trial court relied upon four aggravating circumstances to support his death sentence: (1) the crime was committed during the course of a robbery; (2) cold, calculated, and premeditated; (3) prior violent felony and (4) the crime was committed during while under sentence of imprisonment. As noted in this brief, however, the jury was given an inapplicable aggravator - - cold, calculated and premeditated. The rest of the aggravating circumstances relied upon by the judge to support Mr. Vining's death sentence: (1) cold, calculated, and premeditated; and, the other two aggravators constituted unconstitutional automatic aggravating factors, and are insufficient standing alone to establish death eligibility. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Relief is warranted.

ARGUMENT IX -- JUROR INTERVIEWS PROHIBITED

Florida Rule of Professional Conduct 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Vining's ability to allege and litigate constitutional claims that would show that his conviction and sentence of death violate the United States Constitution. Moreover, because of this

prohibition, Mr. Vining is prevented from discovering information which could warrant a new trial and which will be procedurally barred if not investigated now. Buenoano v. State, 708 So. 2d 941 (Fla. 1998).

Florida's rule prohibiting Mr. Vining's counsel from contacting his jurors violates Mr. Vining's rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It also denies him access to the courts of this state in violation of Article I, § 21 of the Florida Constitution and the federal courts in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. This Court must grant relief or decide that the Rule is unconstitutional.

ARGUMENT X -- UNRELIABLE APPELLATE TRANSCRIPT

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). See also Evitts v. Lucey, 105 S. Ct. 830 (1985).

At the time of direct appeal, appellate counsel was provided with an inadequate record where substantial proceedings were made off the record. Proceedings were conducted off the record during voir dire (R. 5, 32-33, 59), trial (R. 1221, 1330), and penalty phase(R. 2186). A review of the record on appeal reveals that portions of the penalty phase proceedings were either not transcribed or conducted off the record (R. 2186-92). Mr.

Vining's sentencing order was entered in open court on April 9, 1990. No transcript of the sentencing proceeding exists in Mr. Vining's record on appeal.

Because the record in this case is incomplete, inaccurate, and unreliable, confidence in the record is undermined. As it was trial counsel's duty to raise this issue on appeal, and trial counsel was ineffective for failing to do so, this claim is proper under rule 3.850. An evidentiary hearing is warranted.

ARGUMENT XI -- ABSENCE DURING CRITICAL STAGES

Mr. Vining was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death. Mr. Vining never validly waived his right to be present. During his absence, important matters were attended to, discussed and resolved. Defense counsel never objected to the proceedings going forth without the presence of Mr. Vining.

Mr. Vining was absent during pre-trial proceedings, the trial court heard testimony, evidence and argument related to critical defense motions including the motion to suppress hypnotically-tainted evidence (R. 2279-2291); motion in limine re: Williams Rule evidence(R. 2292-2293); motion to discharge based on Interstate Agreement on Detainers (R. 2328-2330); and motion to prohibit in-court identification by witnesses whose memory had been hypnotically refreshed (R. 2294-2295). Mr. Vining did not waive his presence at these proceedings. Mr. Vining was also absent when his guilt phase jury, during its deliberation, submitted a jury question to the court (R. 1652).

In Savino v. State, 555 So. 2d 1237 (Fla. 4th DCA 1989), the defendant's absence from the courtroom when the court answered a jury question on third-degree murder constituted reversible error, despite the State's contention that the jury asked only a legal question and trial counsel waived the defendant's presence.

Trial counsel also failed to ensure the presence of Mr. Vining at critical stages of his penalty phase proceedings. Trial counsel failed to make a complete record of these omissions. Mr. Vining was not present for off-the-record bench conferences (R. 2045). During many of these bench conferences, the trial court made rulings adverse to Mr. Vining based upon admissibility of testimony related his Georgia prior (R. 1958-60, 1966-68, 1970-74, 1985-88). For example, Detective Ferguson testified over defense objection to disputed facts derived from Mr. Vining's purported confession. Mr. Vining's personal knowledge of that incident would have been relevant to trial counsel's argument and the court's rulings. Judge Bronson procedurally barred this claim but failed to address trial counsel's role in failing to ensure Mr. Vining's presence at these conferences (PC-R. 2498). The trial court conducted sixteen (16) bench conferences without Mr. Vining's presence during the penalty phase alone (R. 1939-1940, 1944-45, 1940-53, 1958-60, 1970-74, 1985-88, 1988-1900, 1995-97, 2006-08, 2121-22, 2124-25, 2131-32, 32138-41, 2147-48, 2153-54, 2175-76). Mr.

Vining's absence from these bench conferences was error. See, Gethers v. State, 620 So. 2d 201 (Fla. 4th DCA 1993).

The denial of Mr. Vining's right to be present violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel's failure to object to Mr. Vining's absence constitutes prejudicially deficient performance. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991).

ARGUMENT XII--PROSECUTORIAL MISCONDUCT COLLATERAL CRIMES

At Mr. Vining's penalty phase, the State presented evidence that was irrelevant and inflammatory. The evidence rendered Mr. Vining's trial fundamentally unfair and his resulting conviction violates due process. See Redman v. Dugger, 866 F.2d 387 (11th Cir. 1989). Mr. Vining's prior conviction in Georgia for kidnapping and aggravated assault dominated the State's penalty phase case. The State presented six witnesses, four of whom were brief and ministerial in nature, amounting to less than ten (10) pages of testimony (R. 1942-43, 1947-49, 1954-56, 1976-77). In contrast, the testimony of the Georgia victim and the investigating detective on the crime consumed more than forty-two (42) pages of the record on appeal (R. 1962-75, 1979-92, 1993-2009). The Georgia case was the highlight of the State's case. The testimony of these two witnesses was dramatic, inflammatory and prejudicial. Trial counsel repeatedly objected to the admission of the testimony as non-statutory aggravation,

inflammatory, prejudicial and evidence of uncharged acts (R. 1966-67, 1970-74, 1984, 1985-90). Judge Baker admonished the State:

> One of the things that I want to be very careful about here we're not really in a situation where there is Williams Rule theory. That's one of the things that keeps lurking in my mind is that we might be getting to the point where we're trying the defendant in this case on some other case and I just want to caution on that that I'm not trying that case.

However, the judge overruled the defense objection (R. 1996-97). The judge made two other comments about the prejudice resulting from the State's presentation of the victim's testimony (R. 2008). He finally said, "listening to [Gail Flemming] today concerns me that this is going to - -that she's kind of a voice from the grave." (R. 2097). The State cashed in on the prejudicial testimony at closing argument (R. 2133-34, 2136-38, 2142). Trial counsel repeatedly objected to the State's closing as irrelevant, prejudicial, and non-statutory aggravating circumstances. Although the trial court acknowledged that "we're trying the case in Savannah, not this one" (R. 2139), the trial court overruled the defense objections.

Despite these fundamental constitutional errors, Judge Bronson found this claim to be without merit and procedurally barred (PC-R. 2507).

The improper evidence violated Mr. Vining's rights under the Sixth, Eighth and Fourteenth Amendments to the United States

Constitution. Individually, these errors render Mr. Vining's penalty phase fundamentally unfair. See, Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Martinez v. State, 2000 WL 766454 (Fla. 2000). When considered cumulatively, the errors resulted in a denial of due process. Derden v. NcNeel, 938 F. 2d 605 (5th Cir. 1991).

This conduct by the prosecutor in conjunction with the extensive Brady violations in withholding exculpatory evidence render Mr. Vining's trial fundamentally unfair. See, Argument I. A new trial is warranted.

ARGUMENT XIII–PUBLIC RECORDS

A full and fair evidentiary hearing was not held on the public records claim. The files and records do not conclusively show that Mr. Vining is not entitled to relief on this claim. It appears obvious from the records that the level of cooperation between CCRC and Ms. Coffman of the Orange County State Attorney's Office was non-existent. Undersigned counsel took over Mr. Vining's case on February 26, 1998. Many public records were not provided to Mr. Vining that are routinely provided to other inmates. Mr. Vining's case has suffered because he was not provided with records that are normally provided to defendants in postconviction proceedings. See, Mordenti v. State, 711 So. 2d 30 (Fla. 1998).

For example, a records custodian from Florida Department of Law Enforcement (FDLE) testified at the public records hearing

that there were records that she brought to court that counsel had never seen before. However, upon her return to the FDLE office in Tallahassee, she sent a letter stating that all records had been provided. This cannot be true because a portion of the records she brought with her to the public records hearing had never been disclosed to Mr. Vining. The significance of this omission is that Mr. Vining is prevented from investigating any evidence contained in those files.

FDLE examined the physical evidence in this case, including the hair that allegedly implicated Mr. Vining. FDLE's examination of the physical evidence was the basis for the court granting the state's request for an extension of the time on speedy trial. Besides the questionable history of the diamond, the only physical evidence which allegedly linked Mr. Vining to the crime was the handwriting analysis on a pawn slip and hair analysis. Mr. Vining is prevented from exploring the possibility that the FDLE crime lab did not properly analyze the hand writing and hair samples. There is good cause to question the results of the hair analysis because of the sheer number of hairs that were allegedly found on the victim's body and the conclusions drawn by the lab technician. It is clear from the notes provided by the state attorney's office that the state had no intention of calling the FDLE lab technician until the last minute. In deposition, FDLE analyst Dawn Rainwater testified that three of

the hairs were consistent with the hair of Mr. Vining but there were literally hundreds of hairs that were not consistent. Based on the number of hairs in the comparison samples from Mr. Vining, Ms. Rainwater's testimony was flatly wrong and not supported by any scientifically valid proof. The state decided at the last moment not to call Ms. Rainwater as a witness. However, the notes contained in the state attorney's file regarding the witness list do not indicate that Ms. Rainwater was going to testify. To the contrary, the only notes on the witness list regarding hair analysis is a handwritten note at the end of the list. The State's basis for getting an extension of time on the speedy trial was false. Failure to effectively argue this issue before the trial court was deficient performance.

In addition, most of the FDLE crime lab technicians, such as Ms. Rainwater, were trained by the FBI crime lab in Washington D.C. Since the time of Mr. Vining's trial, the results and scientific methods of the FBI crime lab have been under investigation by the Office of the Inspector General (OIG) for such practices as poor lab technique, exaggeration of results to fit the state's case and false testimony. The FDLE lab technicians were trained using the same techniques and controls that were taught by the FBI crime lab personnel who have been discredited by the OIG.

Equally important to the Brady claim is the access to the

notebooks of the investigating officers in the case. Detective Nazurchuk's notes have been provided to defense counsel however, no other officer's notes have been forthcoming. This case was an unsolved murder for two years before an arrest was made. It is reasonable to assume that other officer's kept investigative notebooks or notes on the investigation of this case. This should be true particularly where two other bodies were found at the same location as Ms. Caruso and a string of jewelry robberies had occurred before, during and after Mr. Vining's arrest. None of this was disclosed to postconviction counsel. It is obvious that other materials exist that have not been turned over to Mr. Vining.

Because so many records are outstanding, it is difficult to assess the true nature of the issues, even those limited issues that the court granted an evidentiary hearing. Even though Chapter 119 hearings took place on motions to compel, the litigation was not completed when undersigned counsel took over the case. Judge Bronson granted CCRC leave to take depositions of these agencies but those depositions were never taken. Now both the Assistant State Attorney, Paula Coffman, and CCRC are no longer on the case. It was error not to complete this litigation. See, Ventura v. State, 673 So. 2d 479 (Fla. 1996). Mr. Vining is entitled to a hearing on this claim.

ARGUMENT XIV-CUMULATIVE ERROR

Mr. Vining did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See, Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The process failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

Repeated instances of ineffective assistance of counsel and error by the trial court at both the original trial tainted the process. These errors cannot be harmless. The cumulative effect of these errors was to deny Mr. Vining his fundamental rights and vitiate his trial. State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986), Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993). The errors in Mr. Vining's trial, sentencing, and direct appeal deprived him of effective assistance of counsel, his right to counsel, a fundamentally fair trial, due process of law, and individualized sentencing under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and those corresponding amendments in the Constitution of the State of Florida.

CONCLUSION

Mr. Vining is innocent and submits that relief is warranted in the form of a new trial. At a minimum, an evidentiary hearing

should be ordered on the claims he was not afforded an opportunity to present evidence.

I HEREBY CERTIFY that a true copy of the foregoing Corrected Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 24, 2000.

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