IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,

Petitioner,

v. Case no. 87,694

HARRY K. SINGLETARY, J R., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

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Comes now the respondent and, pursuant to this Court's order to show cause dated July 1, 1996, answers the petition for writ of habeas corpus as follows:

RESPONSE TO BASIS FOR INVOKING JURISDICTION

The respondent does not assert that this Court (in the abstract) lacks jurisdiction to entertain petitions for writs of habeas corpus, nor does the respondent assert that the sole ground for relief contained in Bottoson's habeas petition (ineffectiveness of appellate counsel) is not properly raised in a petition for writ of habeas corpus. However, as set out in detail in the argument section of this answer, Bottoson's petition for writ of habeas corpus is untimely. For that reason, the claim contained in the petition is procedurally barred. See pp. 5-7, below.

RESPONSE TO NATURE OF RELIEF SOUGHT

For the reasons set out at pp. 5-20 of this answer, Bottoson is not entitled to have the petition granted, nor is he entitled to an order vacating the judgment and sentence or a new trial and penalty phase proceeding.

RESPONSE TO REQUEST FOR JUDICIAL NOTICE

The respondent does not oppose the request that this Court judicially notice the direct appeal record and briefs (*Bottoson v. State*, No. 60,708). This Court's opinion in that case is found at 443 So.2d 962, and was released on December 15, 1983. Rehearing was denied on February 7, 1984. To the extent that they may be relevant, the respondent does not object to Bottoson's request for judicial notice of the record and briefs from the appeal from the denial of Rule 3.850 relief. This Court's opinion in that case is reported as *Bottoson v. State*, 21 Fla. L. Weekly S205 (Fla. May 9, 1996).

RESPONSE TO PROCEDURAL BACKGROUND

Paragraph 1 on p. 2 of the petition is substantially correct.

The first two sentences of paragraph 2 on p. 2 are substantially correct. The remainder of paragraph 2 is argumentative and is denied. The *State v. Neil*, 457 So.2d 481 (Fla. 1984), issue was not raised during the direct appeal

proceedings.

Paragraphs 3 and 4 on p. 3 of the petition are substantially correct.

Paragraph 5 on p. 3 of the petition has been rendered out-of-date in the sense that this Court issued a revised opinion on May 9, 1996, which modified parts of the original opinion issued on January 18, 1996. The result did not change, and the claim at issue in this petition (along with 12 other claims) was held to be procedurally barred because it was not raised on direct appeal. *Bottoson v. State*, 21 Fla. L. Weekly S205 (Fla., May 9, 1996).

Paragraph 6 on p. 4 of the petition is argumentative and is denied.

Paragraph 7 on p. 4 of the petition is substantially correct.

RESPONSE TO FACTS

The statement of the facts set out at pp. 4-6 of the petition is argumentative and incomplete. The respondent relies upon the statement of the facts set out below, and such additional facts as are set out in the argument section of this answer regarding specific assertions made in the petition.

During the jury selection phase of this trial, the State exercised seven (7) peremptory challenges against various venire

members. *(TR 297; 504; 616; 617; 750; 761)*[1] Three (3) of those peremptory challenges were backstrikes. *(TR 504; 616; 617)* At the time that the State challenged Newton, defense counsel stated

> MR. SHEAFFER: Your Honor, for the record, I would like it to be known that Mr. Newton was the only black juror that had been tentatively seated that the State has just excused. I believe, again, that this is of deliberate exclusion on the part of the Prosecution because the Defendant in this case is also a black man, and, again, I don't believe we're getting a cross representation of the citizens that will hear Mr. Bottoson's case as in this here group. I move this Court to dismiss the panel and declare a mistrial.

(TR 616). The trial court denied the motion. *Id.* Whether or not Newton was the only black on the venire, or was the only black who was not excused based upon a challenge for cause, is not apparent from the record. Trial counsel did not raise any further argument that the State was using its peremptory challenges to remove blacks from the jury.

To the extent that additional facts are necessary to disposition of the jury selection claim contained in the habeas petition, the State relies on the facts contained in this Court's direct and collateral appeal opinions.

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[1]Those jurors were Hosson, Nelson, Newton, Ridings, Henry, Josephson, and Wilson. Nelson, Newton and Ridings were the subject of backstrikes.

ARGUMENT

The only claim contained in the petition for writ of habeas corpus, which is set out on pp. 6-17 of the petition, is Bottoson's claim that his direct appeal attorney was ineffective. The sole specification of ineffectiveness is based on counsel's "failure" to argue on direct appeal that Bottoson was entitled to a new trial based upon a violation of *State v. Neil*, 457 So.2d 481 (Fla. 1984), even though his trial jury was selected in March of 1981. This claim is not a basis for granting the writ for six (6) independently adequate reasons, each of which, standing alone, is a sufficient basis for denial of relief.

The Petition is Untimely

The first reason that this Court should decline to grant the writ is because the petition for habeas relief was filed roughly nine years too late. As Bottoson states repeatedly, *Neil* was decided September 27, 1984, and the United States Supreme Court denied certiorari review in his case on October 1, 1984. *Bottoson v. Florida*, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984). Under settled Florida law, he should have raised this claim by January 1, 1987. *See, e.g., In Re Rule 3.850 of the Florida Rules of Criminal Procedure*, 481 So.2d 480 (Fla. 1985). However, Bottoson did not file this petition until April 3, 1996. That is more than

nine years out of time--the habeas petition should be dismissed on time bar grounds because it was not filed by January 1, 1987.

The second reason that the petition is untimely is because the claim contained in the petition was not raised within the two-year change in the law window established by *Adams v. State*, 543 So.2d 1244 (Fla. 1989), either. Even under the most lenient view of the applicable time limitations, the claim Bottoson now raises should have been raised by June 30, 1991 (two years after the release of *Adams*). Bottoson not only did not raise the *Neil* claim within two years of the release of that decision, but also failed to raise that claim after *Adams* put him on notice that claims based on a change in the law must be raised within two years after the change is announced. Bottoson is time barred from litigating this claim now, years after this Court decided *Neil*.

To the extent that Bottoson may argue that his ineffectiveness of appellate counsel claim is not time barred because it was not "procedurally clarified" until the release of this Court's opinion affirming the denial of Rule 3.850 relief, that position is inconsistent with his position in the petition itself.[2]

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[2]In his April 16, 1996 "Reply to Respondent's Objection to Motion to Consolidate", Bottoson claimed that the ineffectiveness of appellate counsel claim was not "clear" until this Court held the peremptory challenge claim contained in the 3.850 motion

Specifically, Bottoson argues that appellate counsel should have done various things in 1984. That claim did not become recognizable with the denial of 3.850 relief--it was always apparent from the record. Bottoson cannot escape the effect of the clear time bars by arguing that his ineffectiveness of appellate counsel claim was not available long ago, especially in light of his recognition that such claims are properly brought by petition for writ of habeas corpus (*Petition* at 1), and in light of his claim that the claimed ineffectiveness is solely based upon the fact that *Neil* was not raised before this Court in 1984. This Court's decision affirming the denial of Bottoson's 3.850 motion was not a necessary condition precedent to the filing of a petition for writ of habeas corpus. That petition is based on law that has existed for years, and the failure to raise that claim in a timely fashion bars consideration of the ineffectiveness of appellate counsel claim at this late date. This Court should decline to consider this claim, and should specifically hold the claim to be time barred.

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procedurally barred.

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

While the claim contained in the habeas petition, that appellate counsel was ineffective for not raising a *Neil* claim, is time barred, that claim is also meritless for the following additional reasons. The Respondent does not waive the time bar defense, which is an adequate and independent basis for denial of relief--the following additional bases for denial of relief are alternative and secondary to the time bar.

The Peremptory Challenge Claim is Procedurally Barred

The first reason that the ineffectiveness claim is not a basis for relief is because the substantive peremptory challenge claim was not preserved for review. *State v. Castillo*, 486 So.2d 565 (Fla. 1986) ("[a] timely objection must be raised **and the state must be given an opportunity to demonstrate that the use of a peremptory was not motivated solely by race.**")[Emphasis added]; *State v. Safford*, 484 So.2d 1244 (Fla. 1986) (". . . any person whose case was in the original trial or appellate process **and who has followed the procedure specified in *Neil*** to contest the racially discriminatory use of peremptory challenges is entitled to have *Neil* applied to that person's case.")[Emphasis added]; *see also, Wright v. State*, 491 So.2d 1100 (Fla. 1986). As set out

above, the objection at trial asked only that the panel be discharged and a mistrial declared. *(TR 616)* Trial counsel did not ask that the State be required to state its reasons for challenging the juror at issue, a fact that is hardly surprising given that no Florida case had held that the State could be required to do that in 1981. Trial counsel did not follow the *Neil* procedure (or some approximation of it), and that claim is procedurally barred--for that reason, the ineffectiveness of appellate counsel claim collapses because there can be no ineffective assistance of counsel in not raising an unpreserved claim on direct appeal. *See, e.g., Suarez v. Dugger,* 527 So.2d 190, 193 (Fla. 1988).

The heart of the *Neil* decision was whether the State can be required to state the reasons for its peremptory challenges, and, in fact, that procedure had been specifically sought in that case. *State v. Neil, supra,* at 482-3. In contrast, Bottoson never made such a request, and that component of the substantive claim is procedurally barred because, had the claim been raised on direct appeal, the result sought would have placed the trial court in error for not doing something that not only was never requested but also was contrary to Florida law at the time. Bottoson, unlike Neil, did not ask that the State put the reasons for its peremptories on the record--that component of this claim, which is

critical to Bottoson's current claim, is procedurally barred. The ineffectiveness of appellate counsel claim falls with it.

Appellate Counsel's Performance was not Deficient

Claims that appellate counsel rendered ineffective assistance are governed by the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2050, 80 L.Ed.2d 674 (1984), standard. *See, e.g., Chandler v. Dugger*, 634 So.2d 1066, 1067 (Fla. 1994); *Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994); *Johnson v. Dugger*, 523 So.2d 161 (Fla. 1988). To prevail on such a claim, the petitioner must show not only that counsel's performance fell below an objective standard of reasonableness, but also that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The test is in the conjunctive, and, unless the petitioner can meet both prongs, the claim fails. Counsel is not required to raise every possible argument on appeal, *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989), and appellate counsel cannot be ineffective for not raising issues that are procedurally barred because they were not properly preserved at trial. *Williamson v. Dugger, supra.* An allegation of ineffective assistance of counsel does not operate to avoid the settled rule that habeas proceedings do not serve as a second or substitute appeal. *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987);

Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994) (". . . habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been raised in rule 3.850 proceedings." *quoting, White v. Dugger*, 511 So.2d 554, 555 (Fla.1987).). Not filing, as supplemental authority, cases decided after oral argument is not deficient performance. *Darden v. Wainwright*, 475 So.2d 214, 216 (Fla. 1985). The issue in a case in which a claim of ineffective assistance of appellate counsel is presented "is not whether the matters which the petitioner now claims should have been argued on appeal have legal merit, but rather is (1) whether counsel was deficient and (2) whether counsel's failings deprived petitioner of a meaningful appeal." *Francois v. Wainwright*, 470 So.2d 685,687 (Fla. 1985); *see also, Johnson v. Wainwright*, 463 So.2d 207, 211 (Fla. 1985) ("We consider only whether appellate counsel's omission to raise it on appeal was a serious deviation from professional norms and, if so, whether the defect undermines confidence in the outcome of the appellate process."). When those settled principles are applied to the claim contained in this petition, there is no doubt that counsel's performance was constitutionally adequate. Further, confidence in the outcome of the appeal is not undermined.

According to Bottoson, appellate counsel should have not only raised the "*Neil*" issue in his initial brief, but also should have tried to convince this Court to recall the mandate to allow him to brief the *Neil* issue.[3] *Petition* at 10, 15. Because those two claims require slightly different analysis, they are separately addressed.

The initial brief component of the claim is clearly meritless for two reasons. First, the *Neil* claim was not preserved at trial and, under well settled Florida law, counsel cannot have been ineffective for not raising a procedurally barred claim. *Williamson, supra*. Second, the governing case law at the time, *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), required that the defendant establish a systematic pattern or practice by the State of exclusion of blacks from trial juries (through peremptory challenges) despite the case itself, the crime, the defendant, or the circumstances.[4] At the time of Bottoson's

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[3]This Court decided *Neil* three days before the United States Supreme Court denied Bottoson's petition for writ of certiorari.

[4]The *Swain* Court held: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever

trial, only one *Swain* claim had met with any arguable degree of success. *State v. Brown*, 371 So.2d 751 (La. 1979)(prima facie showing made). Moreover, in Bottoson's trial, there was no evidence at all to suggest that the threshold systematic pattern or practice existed. In other words, Bottoson showed only that the State struck one black juror peremptorily--that falls far short of the prima facie showing required under *Swain*, which, at the time of trial, controlled. Appellate counsel cannot be ineffective for deciding not to raise a claim that, under the controlling law, had no chance of success because the facts did not support it. *See, e.g., Atkins, supra; see also, Hardwick v. Dugger*, 648 So.2d 100, 106 (Fla. 1994); *Pitts v. Cook*, 923 F.2d 1568, 1574 (11th Cir. 1991)(no ineffectiveness for not raising *Batson v. Kentucky* claim before release of that decision); *Poole v. United States*, 832 F.2d 561, 565 (11th Cir. 1987) (same). Of course, "'[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536,

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the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance." *Swain, supra*, at 837.

106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (*quoting, Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983)). Appellate counsel did not render deficient performance in not raising an issue that, when the law was applied to the facts, had no chance at all of prevailing.

As far as the claim that counsel should have moved this Court to recall the mandate after *Neil* was decided is concerned, that was not deficient performance by counsel, either. The reason for that is found in the language of the *Neil* decision itself. In *Neil*, this court stated:

> Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral proceedings as set out in *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).
>
> To recapitulate, a party's peremptories cannot be examined until the issue is properly presented to the trial court and until the trial court has determined that such examination is warranted. If such occurs, the challenged party must show that the questioned challenges, but no others, were not exercised solely on the basis of race. We answer the certified question in the affirmative and direct the district court to remand for a new trial. [Footnote omitted]

State v. Neil, supra, at 488. Based on the clear language of the opinion, appellate counsel could reasonably (and correctly) have determined that the record was not sufficient to allow him to bring the *Neil* claim before the Court successfully, even if this Court had agreed to recall the mandate. As the law in this area later developed, counsel's evaluation of the issue was correct. *State v. Safford*, 484 So.2d 1244 (Fla. 1986), specifically held that:

> Any person whose case was in the original trial or appellate process **and who has followed the procedure specified in *Neil* to contest the racially discriminatory use of peremptory challenges** is entitled to have *Neil* applied to that person's case. [Emphasis added]

See also, Wright v. State, supra; State v. Castillo, supra. Bottoson did not follow the *Neil* procedure, and, under the plain language of that case (and the plain statement in *Safford*), counsel's performance in not attempting to place the *Neil* issue before this Court was not unreasonable. Under controlling precedent, Bottoson's *Neil* issue is not preserved--because *Neil* is not available to Bottoson, counsel's performance cannot have been deficient in not attempting to reopen the proceedings to present an unpreserved claim. *Williamson, supra.*[5]

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[5]*Dixon v. Singletary*, 21 Fla. L. Weekly D984 (Fla., 3d DCA April 4, 1996), which is relied on by Bottoson as supplemental authority, is of no help to him. The chronology of events in that case is that the newly-decided case was pending on appeal at

Even had appellate counsel attempted to present the *Neil* claim after the release of that decision by filing a motion to recall the mandate, the ruling on such a motion is discretionary with the Court. *See, e.g., State Farm Mutual Automobile Insurance Company v. Judges of the District Court of Appeal, Fifth District,* 405 So.2d 980 (Fla. 1981). Of course, when the act or omission at trial is one that is within the discretion of the trial court, it is not ineffective for appellate counsel not to raise that issue on direct appeal. *Tompkins v. Dugger*, 549 So.2d 1370 (Fla. 1989). Likewise, because the ruling on a motion to withdraw the mandate is within the Court's discretion, appellate counsel cannot have been ineffective for not making such a motion. Bottoson has failed to meet the first prong of the *Strickland* standard, and his ineffectiveness of appellate counsel claim fails.

Bottoson's claim that appellate counsel was ineffective for not moving for a recall of the mandate is closely related to, and legally indistinguishable from, a claim that counsel was ineffective for failing to petition the United States Supreme Court for a writ of certiorari. The law, however, is clear that counsel is not ineffective for not seeking review by way of certiorari.

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the time *Dixon* was briefed. That is not the case here.

See, Ross v. Moffitt, 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (no right to counsel to pursue discretionary review); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (no right to counsel in post-conviction proceedings). If an ineffective assistance of counsel claim will not lie as to counsel's actions in certiorari or post-conviction proceedings, and that is the law, it makes no sense at all to suggest that counsel in Bottoson's case was ineffective for not trying to convince this Court to recall its mandate based upon the speculative applicability of *Neil*.[6] Bottoson has failed to establish either prong of the *Strickland v. Washington* standard, and the ineffectiveness of appellate counsel claim fails.

The *Neil* Claim is Meritless, Anyway

While the *Neil* claim is clearly procedurally barred and time barred, the claim is also without merit. The State does not waive any procedural defenses. The merits discussion is alternative and secondary to the procedural defenses.

As discussed at p. 4, above, the trial court did not require the State to give its reasons for exercising a peremptory challenge

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[6]As set out at pp. 8-9, above, the *Neil* claim is not preserved, anyway. Obviously, the "failure" to raise an unpreserved claim as grounds for appellate reversal is not ineffective assistance of counsel.

against juror Nelson. Florida law at that time did not provide for such a procedure, and, in fact, was to the contrary. Moreover, Bottoson's trial counsel never suggested that the trial court should require the State to justify that peremptory challenge. Nevertheless, Bottoson criticizes the trial court for not foreseeing the *Neil* procedure when it was never suggested to the court in the first place. *Petition* at 13. This Court recognized the fallacy in Bottoson's argument in *Safford*, where this Court held that *Neil* was only available to those defendants who had followed the procedure announced in that case. *Safford, supra*. In any event, even assuming *arguendo* that this claim should be decided on the merits, Bottoson is still not entitled to relief.

Although the State was not required to justify backstriking juror Newton, the reason is found in an impartial reading of the record of voir dire. Juror Newton said that "I'm not really in favor of the death penalty," and later stated that that feeling was based on his religious convictions. *(TR 231)* Mr. Newton later said that "given the facts, I possibly could [recommend a death sentence]." *(TR 236)*[7] Individual voir dire examination of Mr. Newton consisted of 14 transcript pages. *(TR 230-244)*

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[7]Even though Mr. Newton qualified his answers, he did eventually say that he could follow the law. *(TR 236)*

When Mr. Newton's voir dire is compared with the voir dire of the other prospective jurors whom the State also peremptorily challenged, there was clearly no *Neil* violation. Juror Nelson (who was backstruck when Newton was) stated during individual voir dire that she was not comfortable with the death penalty, and that while she could recommend that sentence, she "wouldn't want to be that way." *(TR 193)* Individual voir dire of juror Nelson consists of six pages. *(TR 190-6)* Juror Hosson stated, when asked if she could recommend a sentence of death, "I don't--I really don't know if I could or not." *(TR 294)* Ms. Hosson later stated that she could follow the law--the State then exercised a peremptory challenge. *(TR 297)* Individual voir dire of Ms. Hosson consists of nine pages. *(TR 288-297)* Juror Ridings, who was also backstruck by the State, was apparently somewhat elderly and experienced some problem hearing (or understanding a Southern accent). *(TR 421-432)* Juror Henry had absolutely no reservations about the need for and propriety of capital punishment--he was excused peremptorily by the State. *(TR 606-9; 617)* Juror Josephson stated that she would have to be "thoroughly convinced" before she could recommend a sentence of death. (TR 709) Subsequently, defense counsel's challenge for cause was denied, and the State exercised a peremptory challenge to remove Ms. Josephson. *(TR 717; 750)* Juror Wilson had never thought

about the death penalty and had no opinion on the subject. *(TR 746)* He did state that ". . . it would take a lot of evidence and, you know, take a lot to convince me to do it." *(TR 746)* Voir dire examination of juror Wilson consists of five pages. *(TR 745-50)*

When the voir dire of the jurors who were peremptorily challenged by the State is examined, it is apparent from the record that Nelson, Hosson, Newton, and Wilson were not at all in favor of recommending a sentence of death and were weak on the issue of capital punishment. Racial motivation does not exist when the State peremptorily challenges jurors who are less favorably disposed to the State's position in favor of stronger jurors. There is virtually no difference in the answers of those four jurors during individual voir dire, yet all were removed by the State. This is not a case that presents cursory voir dire of a black venire member followed by a peremptory challenge when white venire members, who responded to voir dire in the same way, were not challenged. The State challenged every juror who was weak on the death penalty issue, whatever their race. There is nothing in the record, even without expressly stated reasons, which supports Bottoson's claim that a *Neil* violation occurred. The record shows nothing more than a consistent pattern by the prosecutor of challenging the weaker jurors--that is proper, and Bottoson's belated complaints fail to

state a basis for relief.[8]

CONCLUSION

Bottoson's claim of ineffective assistance of appellate counsel is time barred, meritless because the *Neil* claim was not preserved at trial, and, alternatively, wholly without merit. This Court should deny the petition for writ of habeas corpus.

Respectfully submitted,

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[8]Jurors Ridings, Henry and Josephson were apparently challenged for reasons that are not discernable from the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been sent to: The Law Offices of TERRENCE E. KEHOE, 18 West Pine St., Orlando FL. 32801 and the Law Offices of JAMES M. RUSS, P.A., 18 West Pine St. Orlando, FL 32801 on this the 24th day of July, 1996.

Kenneth S. Nunnelley
Of Counsel