IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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ERNEST CHARLES DOWNS, :

Petitioner, : Case No. 66116

-against- :

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, :

Respondent. :

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Ernest Charles Downs, by his attorneys, Kramer, Levin, Nessen, Kamin & Frankel, moves, pursuant to Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure and under the Constitution of the State of Florida, Article V, Sections 3(b)(1), (7) and (9), for a writ of habeas corpus. Petitioner Downs requests that this Court issue its writ of habeas corpus on the grounds that: (1) Petitioner was denied the effective assistance of counsel on his direct appeal from his convictions and sentence of death; and (2) this Court's initial review of Mr. Downs' convictions and sentence was based on an improper, biased record on appeal. The "intermediate" relief he seeks is an order allowing his present counsel to brief and argue all points to this Court as if it were an original appeal. In addition, as an aid to this petition, Downs hereby moves to have the original oral argument to this Court transcribed and copies sent to his attorneys and to have disclosed and given to them a certain "Sealed Presentence Investigation Report (Confidential)" (see pp. 17-18 infra).

Downs seeks relief in this Court because the issues raised in this petition involve this Court's appellate review of his case and do not involve the proceedings in the trial court. See Knight v. State, 394 So. 2d 997 (Fla. 1981).

Background of the Inadequate and Prejudicial Appellate Representation of Downs

On August 12, 1977, Ernest Downs pleaded not guilty to charges of first degree murder and conspiracy to commit the murder of Forrest Jerry Harris, Jr. The jury convicted Downs on the conspiracy and murder counts and recommended the death penalty as punishment. On January 27, 1978, the Circuit Court sentenced Downs to death on the murder count and to thirty years on the conspiracy charge.

Downs appealed his convictions and sentence to this Court. Richard L. Brown, his trial counsel, acted as his appellate attorney. What Brown did on appeal was almost on a par with what he did at trial; he gave Downs the worst kind of representation. Both the quality of his work and his commitment to his client's cause would be substandard in any case. In a capital case, they are shocking.

First, his brief argued wrong and frivolous points and ignored substantial points that any resonably competent attorney would have raised; points that this Court would not consider on an appeal from a 3.850 hearing because the issues should have been raised on the original appeal. We append as Exhibit 1 Brown's brief to this Court on the original appeal and speak of the inadequacy of the representation in Point 1, below.

Second, Brown ignored the basic duty of counsel to live up to the promises he makes to clients -- resulting in Brown being reprimanded by the Florida State Bar -- and as a consequence a most complex case was inadequately presented to this Court on the original appeal. Downs floated alone and at odds with his counsel during the appeal process. These are the facts.

Prior to oral argument, Downs asked Brown to prepare a supplemental brief relating to exculpatory evidence within the meaning of Brady v. Maryland (the so-called "Harris tapes or tape"). Brown promised to do it. He never did. After his promise, Brown indeed closed his office, could not be reached by telephone and, as it turned out, had given up law practice and gone to southern Florida.

As a result, Downs made motions to this Court to dismiss his attorney and postpone oral argument (Exhs. 2A and 2B). He also filed a pro se brief on the Harris tapes with the Court. The motions to remove Brown on appeal and postpone were denied; the pro se brief was apparently accepted by the Court.

As counsel for Downs by expediency, Brown argued the original appeal to the Court on October 2, 1979. Virtually his entire argument was devoted to answering questions about the Harris tapes.

While newspaper stories have referred to "tapes" of Harris conversations, only one tape has so far been identified. It contains the statements of the victim, Forrest J. Harris, Jr., made shortly before his death. Harris told of various criminal ventures. The tape thus recorded statements that bore on whether there were other people who had motive to kill Harris. There are

two other people recorded on that tape. Downs and we have never been told who they are, but Brown learned who they are in late December of 1979 after his oral argument and before your decision on the main appeal. For some mysterious reason and against basic tenets of our lawyers' trade, Brown refused to tell Downs who they are (Exh. 3).

This Harris tape has been and remains in the possession of the District Attorney's office. Brown learned of its existence before trial and knew it contained material that reflected on the motives of others; at that time, he was presenting possible motives of others as his chief defense and argued it in his opening statement. Yet he accepted (right up through appeal) pure hearsay that the tape contained nothing of value and never listened to it. Indeed, the State's attorney in arguing the original appeal to this Court, said: "I find it amazing that counsel knew [the tape] was in possession of an attorney and didn't ask to hear it" (Exh. 4). (Actually it is not so amazing if you are aware of the lower court record and the evidence of Brown's inexperience and ineptness.)

While the appeal was pending, Downs (not Brown) filed a writ of mandamus in December of 1979 to compel the District Attorney to produce the Harris tape for judicial review (Exh. 5).

Down's petition was denied in February of 1980 by a four to three decision of the Court. And Brown filed a motion to withdraw as counsel to Downs at the end of February; the motion was not acted upon for months.

Undaunted, Downs (not Brown) filed a motion for a rehearing asking that this Court listen to the tape (Exh. 6).

Before there was a decision on this motion -- and on May 22, 1980 - this Court affirmed the judgment of convictions and the sentence imposed by the Circuit Court. The motion for rehearing on the tape issue was denied in June.

On May 29, 1980, Downs (not Brown) pursued another writ of mandamus in this Court asking that the District Attorney produce the tape, that Downs be allowed to listen to the tape and that he be given a written copy of its contents.

Then on June 6, 1980, after Downs filed a pro se motion for a rehearing, Brown finally woke up a bit to his role, filed a petition for rehearing of the main appeal and even requested (but very briefly) that the Court listen to the Harris tape. On June 30, 1980, the Court granted Brown's motion to withdraw and, in obvious search for light from a responsible lawyer, appointed Mr. Howard Williams to file a petition for rehearing addressed to the single issue of the Harris tape. Two days later, the Court denied Downs' pending writ of mandamus without prejudice, but stated that Downs' new counsel (Williams) might listen to the tape prior to filing a petition for a rehearing.

On August 4, 1980, Mr. Williams filed a petition for rehearing, in which he asked for an evidentiary hearing at the trial court level on the Harris tape, observing that he needed expert help to make sense of the tape, had worked with a record inherited from Brown insufficient to make a meaningful argument and saw strong prima facie evidence of Brown's incompetent handling of the case from trial to appeal (Exh. 7). The Court

denied the petition on September 12, 1980, without prejudice to a 3.850 application.[1/]

In the meantime, Downs (without the benefit of counsel) filed a motion for emergency relief on September 8, 1980. This motion requested a new trial based on the incomplete record on appeal. Indeed, it was in spite of Brown that Downs developed this point. Only when ordered by a court did Brown turn the record documents over to his death-row client. Still unassisted, Downs filed a supplemental motion on the issue on October 23, 1980. In it, he requested that the Court vacate the judgment and order a new trial based on the incomplete and prejudicial record on appeal. The Court informed Downs on October 29th that his motion for relief would be treated as a petition for a writ of habeas corpus and proceeded to deny "emergency relief." In November, Downs wrote to the Court requesting clarification of the status of the habeas corpus petition and was advised it was still pending.

On January 15, 1981, Downs (not counsel for him) submitted a supplemental amendment in support of his petition for a writ of habeas corpus. This amendment asked the Court to vacate the judgment and order a new trial based on, among other things, the State's failure to disclose the Harris tape. The Court, however, limited the State's response to the "tapes" issue. The State answered on March 9th and Mr. Downs (not counsel for him) responded to the State on March 23, 1981. On May 19th, the Court denied the petition without prejudice to the filing of a 3.850 petition.

1/ At the 3.850 hearing, our motion to listen to the tape with the assistance of an expert was denied and the trial court denied us an evidentiary hearing on the issue.

We raised the Harris tape issue in the 3.850 hearing, but the lower court denied relief on the issue without a hearing. This Court affirmed the 3.850 outcome without writing on the Harris tape issue.

A few words more about the Harris tape. Brown's failure to file the promised brief was the subject of a Florida Bar Association investigation and led to his being reprimanded. (He was also reprimanded for converting $100 of Downs' money and taking the case on a contingent fee basis.) It is a documentable fact that even in defending himself with the Bar Association, Brown was less of a lawyer than is acceptable. He told the Florida Bar Association that he was unaware of the Harris tape's being in the possession of the District Attorney's office until Downs told him; Brown was careful not to pinpoint the date but implied that he learned of it in the appellate process (Exh. 8). The fact was that the tape was in the possession of the District Attorney's office, and was reported to be there in four newspaper articles before Downs' trial in December of 1977: on May 11 (Exh. 9); May 12 (Exh. 10); August 3 (Exh. 11); and August 4 (Exh. 12). All of these publications and Brown's failure to listen to the tape occurred at a time when Brown was supposedly looking for evidence that others had motives to kill Harris and got an investigator to help him on this issue (at the State's expense).

Argument

Point 1

DOWNS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

An appellant who is deprived of effective assistance of appellate counsel is entitled to belated appellate review.

Passmore v. Estelle, 607 F.2d 662, 663-664 (5th Cir. 1979), cert. denied, 446 U.S. 937 (1980). Brown did not render effective assistance of counsel to his client on appeal, mirroring his incompetent performance at trial and at the penalty phase. Brown failed to raise a number of critical issues for the Florida Supreme Court's review, ineffectively presented other important arguments (including the improper composition of the jury and the Circuit Court's faulty jury charge with respect to aggravating and mitigating circumstances) and, critically, failed to include in his brief on appeal an issue which he had promised his client would be argued -- the State's failure to disclose tapes made by the victim which described individuals, other than Downs, with motives to kill him. Moreover, at crucial points in this case, Downs was denied the assistance of any counsel on appeal and the Court has never had properly presented to it a clear briefing of the issues. Consequently, this Court should now allow Kramer, Levin, Nessen, Kamin & Frankel the opportunity to brief this case as if it were the original appeal.

The Right to an Effective Appeal

The fact that an appeal is taken by counsel is obviously not dispositive of an ineffective assistance of counsel claim. "Perfection is half a loaf only"; appellate counsel must both perfect and prosecute an appeal. Foxworth v. Wainwright, 449 F.2d 319, 320 (5th Cir. 1971). Counsel must be "an active advocate" and must "support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744 (1967). Thus, if appellate counsel fails to raise meaningful issues on direct appeal, the petitioner is entitled to renewed appellate review if there existed "an arguable chance of success with respect to

these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978). See also Wright v. State, 269 So.2d 17, 18 (Fla. 2d Dist. Ct. App. 1972) ("The advocate's duty is to argue any point which may reasonably be argued . . . ."); High v. Rhay, 519 F.2d 109 (9th Cir. 1975); Hooks v. Roberts, 480 F.2d 1196 (5th Cir. 1973), cert. denied, 414 U.S. 1163 (1974).

The fact that this Court independently reviews the record in a capital case and reviews the evidence of aggravating and mitigating factors (Proffitt v. Florida, 428 U.S. 242, 252-254, 258-260 (1976)) does not diminish the significance of the deprivation of effective appellate representation or the need for relief in the form of a belated appeal. See Passmore v. Estelle, supra, 607 F.2d at 663-664; High v. Rhay, supra, 519 F.2d at 113; Ross v. State, 287 So.2d 372 (Fla. 2d Dist. Ct. App. 1973); Wright v. State, 269 So.2d 17 (Fla. 2d Dist. Ct. App. 1972).

In sum, an appellant, like Downs, who is deprived of the effective assistance of appellate counsel (and, at times, of all counsel) is entitled to belated appellate review. And the proper means of securing this belated review is pursuant to a petition for writ of habeas corpus to this Court. See, e.g., Smith v. State, 400 So.2d 956 (Fla. 1981); State v. Wooden, 246 So.2d 755 (Fla. 1971).

Brown's Non-Performance

This writ already presents the sorry record of a death-sentenced appellant being represented by counsel who not only was repellant to him, not only failed to assist him on crucial points, and not only broke promises, but cheated him. We submit that was a constitutional violation that requires a chance now

for appellant to brief his arguments in this Court with the effectual assistance of counsel.

As to what Brown did, Brown's brief speaks for itself (Exh. 1). It hardly makes a persuasive argument on any point, and it is no wonder that his oral argument concentrated on a point he was unprepared for. The brief's chief failure, however, is in what it does not say.

In its opinion affirming the denial of Downs' 3.850 motion, this Court rejected a lengthy list of issues presented in Downs' memoranda on the ground that they should have been raised on direct appeal -- and that Brown failed to do so. These issues are straightforward, and go to the heart of Downs' convictions and death sentence. Brown's failure to make these arguments itself amounts to a substantial indictment of his competency as appellate counsel. The Court stated that Brown had not argued the following issues:

> a statement made by the prosecutor to the trial judge at sentencing tainted the sentencing process; that sentencing him to death violated the rule for proportionality of sentences; that he should get a new sentencing hearing because the prosecutor informed the jury that Barfield was going to trial for first-degree murder; that he should not have been sentenced to death because the manner in which immunity was awarded to Johnson cast a shadow on the reliability of Johnson's testimony; that his death sentence should be vacated because of erroneous jury instructions on aggravating and mitigating factors; that the trial court erred in denying him reasonable expenses to employ experts to prove that the death penalty is being imposed unconstitutionally in Florida; that the jury that convicted him was not fair and impartial and was "death qualified" under Witherspoon standards; and that his statement implicating him in the murder was not voluntary and that there was insufficient evidence upon which to convict him.

Brown's failure to raise most of these issues constituted inexcusable incompetence -- not the exercise of professional judgment -- and warrants a finding that he was ineffective on appeal.[2/]

The Harris Tape

An attorney also does not provide effective assistance of counsel on appeal when he assures his client he will brief an important argument to the Florida Supreme Court and then fails to do so. Yet this is precisely the situation here: Downs demanded that Brown file a supplemental memorandum addressing a Brady violation by the State. Brown swore to carry out his client's wishes. But Downs misplaced his trust. Brown inexplicably decided to ignore his client's express instructions and never filed the promised brief. He disappeared. The result? There were a series of appellate papers that never raised the issues in a lawyer-like and effective way. A death-sentenced appellant who, on crucial issues, had no counsel working with him and, on other issues, had the emotional strain of having a lawyer he did not want, a lawyer who failed to do what he promised and a lawyer who converted money. There was chaos on appeal, not light. This

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2/ Brown's failure to make these points on direct appeal does not foreclose later review in a post-conviction collateral proceeding. See, e.g., Reed v. Ross, 52 U.S.L.W. 4905 (June 27, 1984). Moreover, we disagree with the Court's conclusion that Brown failed to raise all of these issues. On direct appeal, Brown did argue that the grant of immunity to Johnson was unconstitutionally disproportionate to Downs' death sentence; that Downs' statement allegedly implicating him in the murder was not voluntary; that there was insufficient evidence upon which to convict him; and that the jury that convicted him was not fair and impartial under Witherspoon standards. However, Brown's arguments on these points were painfully weak -- that is, ineffective -- at best. Moreover, Brown's ability to present them effectively on appeal was crippled by his own errors on voir dire, at trial, and at the penalty phase.

is unacceptable under the Sixth Amendment and the rules of fairness that govern practice before this Court in a capital case.

Point 2

THIS COURT'S AFFIRMANCE OF DOWNS' CONVICTION AND SENTENCE WAS BASED ON AN IMPROPER, BIASED RECORD ON APPEAL

Florida Statutes § 921.141(4) requires the Florida Supreme Court to conduct a review of a judgment and death sentence on the "entire record." The record before the Florida Supreme Court in Mr. Downs' original appeal, however, was either not the "entire record" or was a biased, improper record that was weighted in favor of the State and against Downs. Consequently, Downs' convictions and sentence were affirmed in violation of Florida's death penalty statute, the Florida Constitution, the Eighth Amendment's prohibition against cruel and unusual punishment, and the Due Process and Equal Protection requirements of the Fourteenth Amendment.3/

Section 921.141(4), Florida Statutes, provides:

> (4) Review of Judgment and Sentence:
>
> The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record -- such review by the Supreme Court shall have priority over all other rules promulgated by the Supreme Court.

What does the statute mean by the "entire record"? Does it include depositions not put in evidence? Florida Rule of Appellate Procedure 9.200(a)(1) states that depositions are not

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3/ On this point, Downs has never had the assistance of counsel -- in any way, good or bad.

part of a record on appeal. What then happened on Downs' original appeal? A travesty: depositions favorable to the State were before this Court; depositions unfavorable to the State were not. Thus, if the "entire record" means depositions, the record was prejudicially incomplete. But, if, as the Rules of Appellate Procedure would have it, depositions are not part of the record (it is complete and entire without them), then too much was included and Downs was prejudiced by it.[4/] Moreover, pre-trial proceedings, which Downs had requested be transcribed, were not transcribed and were not part of the record.

Downs' record on his direct appeal in the Supreme Court included:

> (i) the deposition of Julian Wilson, the polygraph examiner of the State's immunity protected witness, Larry Johnson -- evidence which the State now claims is inadmissible, even in a 3.850 hearing;
>
> (ii) the depositions and statements of numerous prosecution witnesses who did not testify at trial; and
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> (iii) one deposition of Larry Johnson taken in another action (clearly, then, having no business being in this case).

Moreover, while the record on the direct appeal in this case erroneously included this prosecution evidence, it excluded all defense depositions and statements.[5/]

4/ A copy of the index of the record preceded by a certificate executed by S. Morgan Slaughter, Clerk of the Circuit Court of Duval County, is attached as Exhibit 13 to this petition.

5/ The record on appeal also did not include:

> (i) Johnson's sworn statements of August 3 and 8, 1977; and
>
> (ii) Johnson's deposition of December 6, 1977.

(footnote continued)

In fact: thirty-nine statements and depositions were taken by either the defense or prosecution prior to trial and filed with the court; only eleven depositions and two statements were transmitted to the Florida Supreme Court as part of the record on appeal;[6] all were of prosecution witnesses.

Five of the eleven depositions were of potential prosecution witnesses, who did not testify at trial. Nor was any testimony from these individuals proffered to the court or placed before the jury. No showing having been made that these witnesses were unavailable, their depositions were not admissible at trial. Yet these too were transmitted to this Court for review.[7] Many of these depositions contained statements that arguably favored the State: the prejudice is clear.

The excluded statements and deposition materially contradict the trial testimony and the improperly included deposition of Johnson. We would show this in detail if the Court granted us leave to file a new appeal on the proper record.

6/ A complete list of the depositions and statements is appended as Exhibit 14.

7/ The depositions and statements made part of the record on appeal were the following:

Dr. Peter Lipkovic-Deposition of November 29, 1977;
Det. David L. Starling-Deposition of November 30, 1977;
Det. P. L. Miles-Deposition of November 30, 1977;
Det. James L. Suber-Deposition of November 30, 1977;
Det. Jim T. Spaulding-Deposition of November 30, 1977;
Officer Julian C. Wilson-Deposition of December 2, 1977;
Robin Downs-Deposition of December 1, 1977;
Jenny L. Stone-Deposition of December 1, 1977;
Gary Holmes-Statement of December 8, 1977;
Robert Browning-Statement of December 8, 1977;
Det. Fred M. Williams-Deposition of November 30, 1977;
Huey A. Palmer-Deposition of December 2, 1977; and
Larry Dee Johnson-Deposition of September 20, 1977.

It is worth stressing that all of the individuals who had testified at the conviction stage had done so on behalf of the prosecution. As has been stressed in Mr. Downs' earlier submissions to this Court, and as this Court is well aware, defense counsel for Mr Downs at trial rested without calling a single witness. All 16 of the depositions taken of possible defense witnesses are absent from the record on appeal.

Perhaps the most egregious error reflected in the present record on appeal is the inclusion of the deposition of Officer Wilson, a State employee who conducted four polygraph examinations of Johnson, the State's key witness against Downs who had been granted complete immunity. In his testimony -- which was subjected to minimal, ineffective cross-examination -- Wilson claimed that Johnson had "passed" the polygraph tests. (At this deposition, Brown was not present and left the matter to a junior!) Strangely enough Johnson, in the deposition that was not included in this case, testified that he "ran through" polygraph tests about four times and never learned the results (Dec. 6 Dep. p. 76). If he passed, would the authorities have given him four tries and if he passed, wouldn't he have been told? Despite numerous demands, requests and implorings since new counsel came on the scene, the District Attorney's office has refused to show Downs or his counsel the results of the tests, and neither the lower court nor this Court has required any disclosure.8/

In all events, as the State argued so strenuously at Downs' 3.850 hearing and on appeal, the results of polygraph tests are not admissible in evidence. Accordingly, Officer Wilson's testimony would never have been admissible at trial. Tragically and improperly, this Court's review of the record necessarily included an examination of that deposition transcript.

8/ When Downs was arrested in Alabama, after Johnson had gotten immunity, Downs asked to take a polygraph test and was refused (statement of August 3, 1977); later he raised $100 and Brown was supposed to arrange for a polygraph test. Brown never did, kept the money and was reprimanded by the Florida Bar on that score, too.

Moreover, since Johnson's suspect testimony concerning the crime was not corroborated by any witness at trial, the prejudicial effect of Wilson's statement that Johnson had "passed" polygraph tests is especially keen. An error of this magnitude standing alone suffices to warrant the relief Downs requests.

In contrast to the largesse accorded the State and compounding the unfairness, sixteen depositions or statements of potential defense witnesses were excluded from the record, one of them -- a key deposition -- on the basis of the State's objection to inclusion of depositions of persons who did not testify at trial. Indeed, the State characterized as "shocking and crude" prior Brown's efforts to alert the Supreme Court to Sharon Darlene Perry's deposition testimony that Johnson confessed that he was the triggerman. But the State cannot have it both ways -- inclusion of potential prosecution witnesses and exclusion of potential defense witnesses.

The record did not even contain the depositions of two witnesses who actually testified for the defense at the penalty hearing. And again, it did not include the depositions of fourteen other potential defense witnesses.

Moreover, although the trial court had ordered that Downs' statement to Jacksonville detectives be included in the record on appeal, it was not:

> Mr. Brown: I would also like to put in evidence for the purpose of this hearing, the entire statement of Mr. Downs that was taken on August 3, 1977, as a part of the record in this case. . . .
>
> The Court: And it will be part of the file in the event, you know, of any adverse ruling to you, and in the event that it goes up to any other court. . . .

The Court: Over the State's objection, a copy of the transcript will be filed in the cause so it will be available for any Appellate review. (Trial Tr. 536-540.)[9/]

These omissions were clearly prejudicial to Downs in light of what went before the Supreme Court. Sharon Darlene Perry's deposition, for example, would have alerted the Supreme Court to the fact that Johnson -- not Downs -- confessed to being the triggerman. Again, the State should not have had it both ways.

In the words of the State, it is "shocking and crude" that Downs' record on appeal contained such clearly objectionable items as the deposition of Wilson (who took Johnson's polygraph exams) and that of Johnson, taken from another case. It also undoubtedly prejudiced Downs that the record contained the depositions of numerous prosecution witnesses who did not testify at trial, yet was devoid of all defense depositions and statements. Such a biased record deprived Mr. Downs of his constitutional right to a full and fair Supreme Court review of his conviction and sentence.[10/]

Finally, this Court received ex parte on February 13, 1978 a Psychological Screening Report -- without protest from

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9/ In her opinion denying 3.850 relief, Judge Pate said, concerning our complaint about the use of out-of-court statements of Downs at trial, that she had ruled on them at trial and this Court had reviewed the claims on appeal (opinion, p. 4, § 4). But this could not be true in large measure, since the record was incomplete.

10/ The Court's review of the denial of Downs' 3.850 motion did not remove the taint from its earlier review based on a biased record. The 3.850 proceeding and appeal were necessarily more limited than the original trial and direct appeal and did not require this Court to examine the entire record for fundamental error.

Brown. Later, this Court received a "Sealed Presentence Investigation Report (Confidential)" -- which also may be something not seen by Brown and surely was not shown to Downs. (Downs filed an application to obtain a copy of this Presentence Report; and it was denied.) It was not until we came into the case that there was a challenge to the ex parte receipt of the Psychological Screening Report and possibly other documents by this Court. We briefed the grievance in the 3.850 petition and asked to have the death sentence vacated based on it (Point 11, pp. 105-112) (Exh. 15). We renew that application, relying on the arguments made and cases cited in the petition (e.g., Gardner v. Florida, 430 U.S. 349 (1977)). Beyond: the unprotested receipt by this Court of ex parte papers goes into the mosaic of an appeal unconstitutionally distorted by ineffective representation. And we ask as a prelude to full relief to have a copy of the Sealed Presentence Investigation Report in order to gather the facts and make a fuller presentation.

Based on the facts of a badly bungled appeal, we respectfully request that this Court use the power provided by Florida Rules of Appellate Procedure 9.200(f) to correct the appellate record by including only evidence admitted at trial and those depositions and statements introduced at Downs' 3.850 hearing and to hear a de novo appeal from the original judgment and sentence based on a corrected trial and 3.850 record. No other relief would remove the fundamental prejudice to Mr. Downs which resulted from the Supreme Court's review of a biased record.

Point 3

THE COURT SHOULD GRANT AN EVIDENTIARY HEARING IF IT FINDS DISPUTED FACTS

Downs' verification of this petition is being submitted to this Court along with this petition. Should any of the facts contained in the petition be disputed, Downs requests that this Court refer the case to a Special Master for hearing and resolution of evidentiary matters.

Conclusion

Wherefore, we respectfully request that the Florida Supreme Court grant the intermediate and final relief requested.

Dated: October 18, 1984

Respectfully submitted,

KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL

By: Maurice N. Nessen

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VERIFICATION

STATE OF FLORIDA)
: ss.:
COUNTY OF DUVAL)

ERNEST CHARLES DOWNS, being duly sworn, deposes and says:

I am the Petitioner in this action. I have read the within Petition for Writ of Habeas Corpus and know the contents thereof; it is true to the best of my knowledge, except as to the matters stated to be alleged upon information and belief, and as to those matters I believe them to be true. The grounds of my belief as to all matters not stated upon my knowledge are the documents underlying this action.

Ernest Charles Downs
ERNEST CHARLES DOWNS

Sworn to before me this
25 day of October , 1984

10/25/84
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 25, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For Writ of Habeas Corpus has been forwarded to the Office of the State Attorney, 220 East Bay Street, Jacksonville, Florida, and to Raymond Markey of the Office of the Attorney General, by mail, this 30th day of October, 1984.

Maurice N. Nessen

MAURICE N. NESSEN