FILED
SID J. WHITE
FEB 28 1985
CLERK, SUPREME COURT
By [signature]
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WILLIAM MIDDLETON,
Appellant
v.
STATE OF FLORIDA,
Appellee

CASE NO. 66629

AMENDED INITIAL BRIEF OF APPELLANT

ON APPEAL FROM DENIAL OF MOTION TO VACATE BY THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

GELBER, GLASS, & DURANT, P. A.
1250 N.W. 7th Street
Suites 202-205
Miami, Florida 33125
(305) 326-0090

COUNSEL FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

WILLIAM MIDDLETON,)
)
Appellant)
)
v.) CASE NO. 66629
)
)
STATE OF FLORIDA,)
)
Appellee)

AMENDED INITIAL BRIEF OF APPELLANT

ON APPEAL FROM DENIAL OF MOTION TO VACATE BY THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

GELBER, GLASS, & DURANT, P. A.
1250 N.W. 7th Street
Suites 202-205
Miami, Florida 33125
(305) 326-0090

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1-2
STATEMENT OF THE FACTS	2-8
ARGUMENT	
I. INTRODUCTION/RIGHT TO A HEARING	8-9
II. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE COURT BELOW ERRED IN DENYING A STAY AND AN EVIDENTIARY HEARING ON THIS CLAIM	10-15
A. Both _Strickland v. Washington_ and the Decisions of this Court Require that An Evidentiary Hearing be Conducted and a Stay Granted.	10-13
B. Under the Standard of _Strickland v. Washington_, Appellant Was Prejudiced By the Ineffective Assistance of Counsel.	13-15
III. THE COURT BELOW ERRED BY REFUSING TO CONDUCT A HEARING ON DEFENDANT'S CLAIM THAT THE STATE INTENTIONALLY MISREPRESENTED TO THE COURT AND JURY CRUCIAL FACTS REGARDING THE OFFENSE AND IMPERMISSIBLY SUBVERTED DEFENDANT'S RIGHTS TO COMPULSORY PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, FAIR TRIAL, DUE PROCESS, AND RELIABLE SENTENCING DETERMINATIONS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, UNITED STATESCONSTITUTION	16-17
IV. THE COURT ERRED BY DENYING AN EVIDENTIARY HEARING REGARDING WHETHER THE EVIDENCE OF THREATS TO THE VICTIM AND DEFENDANT FROM THIRD PARTIES, AND OF MEN OTHER THAN DEFENDANT BEING PRESENT AT THE VICTIM'S RESIDENCE BETWEEN FEBRUARY 14 AND FEBRUARY 16, 1980, NONE OF WHICH WAS PRESENTED AT TRIAL, PRODUCES REASONABLE DOUBT REGARDING WHETHER IN FACT DEFENDANT ACTUALLY KILLED OR INTENDED DEATH, WHICH	

(TABLE OF CONTENTS) PAGE

RENDERS DEFENDANT'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. 17-19

V. THE COURT ERRED BY DENYING RELIEF ON APPELLANT'S CLAIM THAT PROSECUTOR COMMENTS AND JURY INSTRUCTIONS IMPROPERLY LIMITED CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 19-22

VI. THE TRIAL COURT ERRED BY REFUSING TO GRANT RELIEF ON DEFENDANT'S CLAIM THAT COMMENTS BY THE PROSECUTOR AND TRIAL COURT MADE TO THE JURORS DIMINISHED THEIR RESPONSIBILITY TO RENDER CONSIDERED RECOMMENDATION AS TO THE APPROPRIATE PENALTY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 22-24

VII. THE TRIAL COURT ERRED BY REFUSING TO CONDUCT A HEARING AND DENYING RELIEF ON DEFENDANT'S CLAIMS THAT HE COULD NOT WAIVE HIS PRESENCE AT TRIAL, AND THAT HIS INVOLUNTARY REMOVAL FROM THE COURTROOM DURING A PORTION OF THE TRIAL VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND F.R.CR.P. 3.180 25-28

VIII. THE TRIAL COURT ERRED BY FAILING TO AFFORD DEFENDANT A HEARING ON WHETHER THE TRIAL COURT'S "FLIGHT" INSTRUCTION IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 28-32

CONCLUSION 32

CERTIFICATE OF SERVICE 33

TABLE OF CITATIONS

As of 1:59 p.m., February 28, 1985, the trial court had not entered a written order herein. Counsel has attempted to prepare this amended brief with all due diligence, and believes that in spite of the trial court's failure to enter an order, it is best to file this brief immediately, inasmuch as the briefing schedule requires filing by 3:00 p.m. Due to delays waiting for the trial court's order, Appellant has not been able to compile a table of authorities as required by the Rules of Appellate Procedure.

PRELIMINARY STATEMENT

At the time of the preparation of this brief, the transcript of the hearing in the lower court was not available, and thus reference to that hearing and the summary of the hearing in the statement of facts are compiled from the best recollection of counsel. Likewise, the written orders of the lower court had not been filed. Thus, references herein to those orders are paraphrased, not verbatim quotes.

In the brief, appellant will be referred to as "appellant" and "defendant," and appellee will be referred to as the "state" or "prosecution." References to the original trial transcript will be designated "(Tr. ___)." References to the Amended Motion To Vacate Judgment and Sentence filed February 25, 1985, will be designated "Amended Motion".

STATEMENT OF THE CASE

On March 27, 1980, Appellant indicted for the first-degree murder of Gladys Johnson. He was convicted of first-degree murder and sentenced to death on September 23, 1980, Judge David Levy, of the Dade Circuit Court, presiding.

The Appellant's conviction was affirmed by this Court. State v. Middleton, 426 So.2d 548 (Fla. 1982). The trial court finding of "heinous, atrocious or cruel" was found to be error, but appellant's sentence of death was nevertheless affirmed. Rehearing was denied March 2, 1983.

Certiorari was denied by the United States Supreme Court on July 6, 1983. A petition for clemency was filed March 21, 1984. On February 8, 1985, the Governor of Florida denied clemency and signed a death warrant requiring Mr. Middleton's death by electrocution between noon on February 28, 1985, and March 7, 1985. Mr. Middleton's execution is scheduled March 6, 1985.

Appellant filed a Motion to Vacate Judgment and Sentence Pursuant to Florida Rule of Criminal Procedure 3.850, and an Amended Motion was filed February 25, 1985, with attached exhibits.

Also on February 25, 1985, Defendant filed a Motion to Stay Execution, and a Memorandum of Law in Support of Motion to Stay Execution.

On February 26, 1985, a non-evidentiary hearing was

conducted on Appellant's Motions, and the trial court (1) refused to conduct an evidentiary hearing on any of the claims raised; (2) denied the Motion for Stay of Execution; and (3) denied the Motion to Vacate Judgment and Sentence. An Order has not been entered reflecting this action.

STATEMENT OF THE FACTS

I. Original Trial

The State and Defendant presented completely different versions of the circumstances surrounding the murder of Gladys Johnson. This Court recited the State's evidence in chief when describing the facts, 426 So.2d at 549-550, noting that "the main evidence of appellant's guilt was a confession. . . ." Id. Although defendant testified at great length at trial in his own defense, and explained that his "confession" was false and that someone else had committed the murder (Tr. 372, 410), this court in its statement of the facts, made only one mention of defendant's side of the circumstances surrounding the offense (See footnote 2 to this Court's opinion: "Appellant testified at trial that when he was arrested the officers told him he was wanted on suspicion of murder in Florida and that he falsely confessed because he was led to believe that this was the only way he would avoid the death penalty." Id, at 550). Thus, while this court's recitation of the evidence, contained in Middleton, is accurate as far as it goes, and is reproduced below, the

evidence presented at the original trial by defendant is presented here, necessarily, without reference to this court's earlier opinion.

A). State's Evidence at Trial -- Guilt/Innocence

The State's evidence at trial, as outlined by this Court, was:

> On February 16, 1980, a citizen called the police and reported that her friend Gladys Johnson had not been seen for two days, that her car was missing and her house was completely closed and locked. Police officers broke into the house and found the body of Gladys Johnson. She had been shot in the back of the head with a shotgun. The murder weapon was found in the house.
>
> On February 17, appellant William Middleton was arrrested in New York City on suspicion of "jostling," that is, being a pickpocket. The main evidence of appellant's guilt was a confession he made in New York to an assistant district attorney of that state. The attorney who conducted the interview and the stenographer who wrote down appellant's statement testified at the trial.
>
> Gladys Johnson was the mother of a man whom appellant had met in prison. When appellant was relaeased on parole on December 28, 1979, he went to live with Gladys Johnson in the Miami area. Mrs. Johnson offered appellant a home because he had nowhere else to go. On February 14, 1980, they had an argument because Mrs. Johnson would not allow appellant to use her car. That evening, when she went to sleep on the living room sofa, he took her shotgun and sat with it across his lap for about an hour, contemplating killing her. When she awoke, he shot her in the back of the head. He locked the house and left in her car. That night, he drove to Tampa. The next day he returned to Miami, left the car

> at a bus station, and boarded a bus for New York City, taking Mrs. Johnson's two pistols with him. He sold the guns in New York.
>
> The manager of the Greyhound Bus station in North Miami Beach testified that he reported the presence of a car that apparently had been abandoned on his lot. This car was identified as belonging to Gladys Johnson. The keys to the locks on the front door of her house were found in the car.

Middleton, 426 So.2d at 549-50.

B. Defendant's Evidence at Trial -- Guilt/Innocence

Defendant testified that he did live with Ms. Johnson, he had had an argument earlier in the day with her, and that he rode his bicycle to a store at about 8:30 p.m. on the night of her death. (Tr. 350). Before he left the house they talked briefly, and he then spent some time speaking with a man at the store. (Tr. 350-52). When he arrived home at about 10:30 - 11:00 p.m., he found Ms. Johnson dead. (Tr. 352). Since he was a convict he assumed he would be blamed for the murder, and he panicked and left, not to return. (Tr. 354).

He testified that after he was arrested in New York, he falsely told officers that he had committed the murder, because he did not think he would be believed if he denied it, and he was afraid of the electric chair. (Tr. 358).

The physical evidence presented at trial was consistent with either the state's or defendant's trial version of the facts.

C. Sentencing Evidence

The State offered evidence of prior convictions. The defendant offered no evidence.

II. Facts in Post-Conviction

The trial court would not allow the introduction of any evidence at defendant's "hearing" below. Defendant had pled very specific non-record facts, but he was denied the opportunity to prove them. Most of defendant's allegations are contained in the Amended Motion, but a few of the allegations will be set forth here, and will be more fully detailed in the arguments that follow. For example, with respect to guilt/innocence, defendant pled that there were at least four witnesses who knew that, contrary to the State's theory at trial, there were two men at the victim's residence between the time that Appellant left on February 14, 1980, and the time the victim's body was discovered February 16, 1980. Although the State knew that people other than the defendant were present over that two day period (one named "Henry" or "Harry"), the State never revealed that evidence to the Court or jury, even though two of the State's trial witnesses knew of "Henry" or "Harry," and never mentioned the men on the stand. See Amended Motion, pages 2 - ---. Instead, the State told the jury the residence was padlocked and deserted

during the two day period. ("[H]er house was completely closed and locked." 426 So.2d at 549).

Appellant further averred that both the defendant and the victim had been threatened by third parties, and that the victim was disliked by neighbors and other persons, none of which is in the Record. Also, defendant averred that the State kept a witness from testifying about the other men at the house.

No hearing was allowed regarding whether the State was guilty of misconduct with regard to these allegations, or whether defense counsel had any tactic or strategy for failing to prove this clearly exculpatory information.

Defendant also requested the opportunity to prove that counsel was ineffective at sentencing for failing to investigate and present mitigating evidence. Although the evidence is outlined in the Amended Motion, some of what defendant would have proved is:

a. Abuse by defendant's father as reflected in psychiatric records, resulting in a temporary protection order being entered by a court that "Father is forbidden to assault or threaten child or mother or administer corporal punishment to child."

b. Statements by defendant's mother in medical records reflect the father constantly "goaded" Middleton into running away from home, resulting in his being on the street for weeks at a time from the age of nine.

c. Court records remanding Middleton to Elmhurst State

Hospital in New York for testing for organic brain damage, and noting the existence of two severe head injuries in 1967 and 1968 in which he was knocked unconscious and required hospitalization.

d. Observation of social workers and psychiatrists both in medical and child welfare records that Middleton was subjected to "chronic neglect" as a child.

e. Observation by psychiatrists and social workers upon his admission to Elmhurst that he was "12 years old, pale, undernourished. . .underdeveloped for his age, looks pathetic."

f. Diagnosis by psychiatrists when defendant was twelve years old of a "schizoid personality, with severe conduct disorder"..."three schizophrenic features exist within this clinical picture and deserve therapeutic attention"; that he never received therapeutic attention, and was finally diagnosed as having a "schizophrenic reaction, chronic paranoid type with passive dependent features."

g. A final recommendation to the court by Elmhurst staff that Middleton should be placed in a setting for emotionally disturbed children, where he could receive psychotherapy, or be placed in the children's division of a psychiatric hospital.

h. Aftercare records show Middleton was released to his father in 1972, but could not be found shortly after; that social workers visited the house, and the father stated he would not allow Middleton to come home again; and that the father was still living alone with his daughter at that time.

In addition, defendant raised numerous claims involving trial counsel's utter failure to properly prepare for and present a defense at trial, and his failure to object to unconstitutional comments and instructions by the State and Court. These facts will be discussed within each argument, below.

ARGUMENT

I.

INTRODUCTION/RIGHT TO A HEARING

A carefully delineated procedure has been established for consideration of motions pursuant to Rule 3.850. See State v. Weeks, 166 So.2d 892 (Fla. 1964). Under this procedure, the trial court must initially consider the motion to determine if it sets forth allegations sufficient to constitute a legal basis for relief. If the motion on its face states grounds for relief, the trial court must then look at the files and records in the case to ascertain whether they conclusively reveal that the movant is entitled to no relief. In making this determination, the court may not look to matters outside the official records.

When the files and records fail to refute conclusively the factual allegations in the motion, the trial court must hold a prompt hearing, determine the issues and make findings of fact and conclusions of law. See, e.g., Meeks v. State, 382 So.2d

673, 676 (Fla. 1980); Martin v. State, 349 So.2d 226 (Fla. 4th DCA 1977); Bagley v. State, 336 So.2d 1236 (Fla. 4th DCA 1976); Brown v. State, 390 So.2d 447 (Fla 5th DCA 1980). The same standard applies to the appellate court's review where a hearing has been denied in a 3.850 proceeding. Rule 9.140(g), Fla.R.App.P.

The allegations presented by defendant and the instant record cannot be said to show that defendant is conclusively entitled to no relief. The factual allegations presented show substantial constitutional claims which, if proven, would require that defendant's conviction and sentence be vacated.

The allegations, based on extra-record evidence, reveal that Appellant's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments were violated before and at trial. As this court recently affirmed, such non-record but compelling allegations, when presented with specificity as Appellant has done, require an "evidentiary hearing," which was denied appellant. O'Callaghan v. State, 9 F.L.W. 525 (Dec. 13, 1984).

II.

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE COURT BELOW ERRED IN DENYING A STAY AND AN EVIDENTIARY HEARING ON THIS CLAIM.

A. Both Strickland v. Washington and the Decisions of this Court Require that An Evidentiary Hearing be Conducted and a Stay Granted.

This court stated in O'Callaghan v. State, 9 F.L.W. 525 (Dec. 13, 1984):

> The law is clear that under rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief. See Riley v. State, 433 So.2d 976 (Fla. 1983); Demps v. State, 416 So.2d 808 (Fla. 1982); LeDuc v. State, 415 So.2d 721 (Fla. 1982).

The "conclusive" demonstration of no entitlement to relief required by this court is unmistakably absent in this case, for two decisive reasons. First, appellant has set forth numerous significant factual grounds detailing trial counsel's failure to adequately represent appellant at trial, see Claim III, Amended Motion, including the failure to investigate and/or present a defense, to prepare for trial, to confront the state's witnesses, to adequately prepare for and present legal arguments supporting the motion to suppress defendant's confession, to object to improper evidence and procedures during the guilt phase of trial, to investigate defendant's background for mitigating evidence

relevant to the sentence, and to adequately argue the existence of mitigating circumstances at the penalty phase of appellant's trial. These claims, and others, thoroughly detailed in the 3.850 motion, warrant an evidentiary hearing It simply cannot be said that "the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan, supra, so as to justify the refusal to conduct an evidentiary hearing.

Moreover, an evidentiary hearing was necessary for the presentation of extra-record facts critical for a full and proper consideration of appellant's claims. As the United States Supreme Court stressed in Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984), 80 L.Ed.2d 674 ( ), "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case ... " Id. In the absence of an evidentiary hearing, the court below did not have the extra-record facts necessary to "judge the reasonableness of counsel's challenged conduct on the facts" of the case. Strickland, supra. For example, the court below, in denying appellant a evidentiary hearing, foreclosed the presentation of evidence concerning trial counsel's failure to adequately investigate the mysterious presence of unidentified persons at the victim's house during the two days immediately following the murder and before the crime was discovered. This evidence, known to trial counsel, was not introduced at trial due to counsel's ineffective representation of appellant. Trial

counsel failed, similarly, to adequately investigate and present the factual and legal circumstances relating to the taking of appellant's confession which would have been suppressed under the law of New York where it was obtained involuntarily and contrary to constitutionally required procedures. Counsel failed, in addition, to conduct a reasonable investigation into defendant's background and family history so as to effectively present mitigating evidence at sentencing. Had counsel conducted a reasonably adequate investigation into defendant's background, he would have discovered appellant's medical, psychological, institutional and juvenile welfare records which were available at the time of trial and have in fact been obtained in a short period of time by an investigator working for present counsel. These records reflect extensive evidence which would have been available in mitigation at trial. See p. 8-9, supra, and Amended Motion, pp. ___, see also proffer of evidence at the "hearing" below, and all records filed with the Amended Motion.

Trial counsel had no discernable strategy at sentencing, at least none that can be deciphered absent the evidentiary hearing denied below.

This court has noted that ineffectiveness claims are particularly suited for evidentiary development, suggesting "even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue." Jones v. State, 446 So.2d 1059, 1063 (Fla. 1984).

Clearly, no "conclusive" showing that appellant is not entitled to relief is apparent from the record. Accordingly, a stay should issue and the case should be remanded to the lower court for an evidentiary hearing.

B. Under the Standard of Strickland v. Washington, Appellant Was Prejudiced By the Ineffective Assistance of Counsel.

In Strickland v. Washington, 466 U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674, the Supreme Court applied a two-part test for effective assistance of counsel claims. Appellant here was denied effective assistance of counsel, in violation of the Sixth Amendment to the Constitution, under both the "performance" and "prejudice" prongs of Strickland. The question of "performance" demands that:

> ... a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case ... [the] court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, 104 S.Ct. 2066.

The failures of appellant's trial counsel detailed supra, hereinunder, and in the 3.850 motion and Amended Motion "fell below an objective standard of reasonableness." Strickland 104 S.Ct at 2065. In Strickland, the record showed "that

respondent's counsel made a strategic choice" in light of Washington's determination to plead guilty and waive both a guilt-innocence trial and a jury sentencing trial, "to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes." Strickland 104 S.Ct. at 2070.

Here, the record shows no "strategic choice". Appellant has referred throughout these pleadings to trial counsel's failure to represent him adequately in the most crucial aspects of his defense. Counsel failed to introduce key exculpatory evidence. He failed to investigate and present a wealth of mitigating information that present counsel has acquired in only a short time working on this case. He failed to object to improper comments and instructions by the court and the state.

Under the second prong of Strickland, a defendant must show that "particular errors of counsel .. actually had an adverse effect on the defense." Strickland 104 S.Ct at 2067.

> [A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case ...
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland 104 S.Ct at 2068.

Given a hearing, defendant would have proved that other men were

present at the victim's residence between February 14-16, 1980, that they had no business being there, and that trial counsel was aware of this exculpatory evidence and did nothing to develop or present it. Defendant would have proved that the victim and defendant had been threatened at the residence, that other people did not like the victim, and that the state's witnesses were aware of but omitted this testimony at trial. Defendant would show that the only evidence of guilt -- defendant's alleged confession -- was obtained illegally, and that the trial court's "evidence of guilt from flight" instruction should have been elided from jury instructions. These, and other facts alleged in the Amended Motion, if proven at a hearing would show a "reasonable probability that but for counsel's unprofessional errors, the result [at guilt/innocence] would have been different." Strickland, 104 S.Ct at 2068.

The prejudice at sentencing is patent: nothing was presented in defense at sentencing at trial, and the record shows no tactic for such an omission. Clear mitigating evidence was available, and the evidence previously outlined "undermine[s] confidence in the outcome at sentencing." Id. at 2068. Furthermore, numerous errors regarding comments and instructions by the Court and the state, had they been caught and corrected, would have affected the outcome.

III.

THE COURT BELOW ERRED BY REFUSING TO CONDUCT A HEARING ON DEFENDANT'S CLAIM THAT THE STATE INTENTIONALLY MISREPRESENTED TO THE COURT AND JURY CRUCIAL FACTS REGARDING THE OFFENSE AND IMPERMISSIBLY SUBVERTED DEFENDANT'S RIGHTS TO COMPULSORY PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, FAIR TRIAL, DUE PROCESS, AND RELIABLE SENTENCING DETERMINATIONS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION

Defendant alleged in Claim I of his Amended Motion that the state (1) Intentionally and affirmatively misrepresented to the court and jury material matters bearing directly upon defendant's innocence, (2) interfered with defendant's right to call witnesses to refute the misrepresentations, and (3) intentionally misled the court and jury through improper cross-examination of the defendant. Without question, these claims encompass grievous constitutional deprivations.

It is fundamental that the State is prohibited by the Fourteenth Amendment from knowingly presenting false evidence to a jury. Alcorta v. Texas, 355 U.S. 28 (1957). This is true whether the falsity involves an issue of credibility, Napue v. Illinois, 300 U.S. 264, 269 (1959), or interpretation or explanation of an exhibit, Miller v. Pate, 386 U.S. 1 (1967), or "manipulation of the evidence by the prosecution [which is] likely to have an important effect on the jury's determination." Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). The fair

trial requirement of the Fourteenth Amendment's due process clause demands that prosecutors "refrain from improper methods which are calculated to produce a wrongful conviction . . ." Burger v. United States, 295 U.S. 78 (1935).

By denying defendant a hearing on this claim, the court failed to inquire into the knowing and calculated misrepresentations pled by defendant, and the prosecutorial misconduct arising from driving a defense witness from the stand, constitutional claims which if proven would require a new trial.

IV.

THE COURT ERRED BY DENYING AN EVIDENTIARY HEARING REGARDING WHETHER THE EVIDENCE OF THREATS TO THE VICTIM AND DEFENDANT FROM THIRD PARTIES, AND OF MEN OTHER THAN DEFENDANT BEING PRESENT AT THE VICTIM'S RESIDENCE BETWEEN FEBRUARY 14 AND FEBRUARY 16, 1980, NONE OF WHICH WAS PRESENTED AT TRIAL, PRODUCES REASONABLE DOUBT REGARDING WHETHERIN FACT DEFENDANT ACTUALLY KILLED OR INTENDED DEATH, WHICH RENDERS DEFENDANT'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court ruled that the State must prove the defendant "killed or attempted to kill" or "intended or contemplated that life would be taken" before the death penalty could be imposed. Id. at 801. Defendant did not have at trial, but this Court now knows, evidence that other people were at the victim's residence around

and at the time of her death -- people who still are unidentified. This information, which bolsters defendant's trial testimony and discredits the state's case (including defendant's "confession"), creates significant doubt that defendant's sentence can withstand Eighth Amendment scrutiny. As this Court recently held, Enmund is "such a change in the law as to be cognizable in post-conviction proceedings..." Tafero v. State, Case No. 66156, Nov. 21, 1984, 9 F.L.W. 488, 489.

Defendant alleged that the prosecution kept Enmund exculpatory material from the jury (Claim I, Amended Motion), and that trial counsel was ineffective for failing to adequately investigate and produce the material, (Claim III, Amended Motion). Regardless of the effect the suppression and non-production had on guilt/innocence, the denial of a hearing on Claims I and III denied Appellant an evidentiary basis to support his cognizable Enmund claim, presented in Claim III of the Amended Motion.

Once a Claim is "cognizable," Appellant must be given an opportunity to prove it. Appellant, upon proper proof, would be entitled to a new sentencing hearing, but no opportunity was given for Appellant to prove his Claim. Upon Appellant's proof that the state and his counsel kept exculpatory Enmund information from the jury, he would without question be entitled to relief.

The Tenth Circuit Federal Court of Appeals recently

addressed a similar claim in Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). In Chaney the prosecution had withheld statements in FBI reports "relevant to a critical issue in the punishment phase -- whether [Defendant] acted alone and himself killed the victims, or whether others were involved who committed the murders, and whether [Defendant] was present at the time." Id. at 1354. The Chaney court reversed the death penalty and remanded for resentencing in light of pre-trial statements:

> The withheld . . . reports might well have made the jurors, or one of them [note - or the judge] doubt the position of the prosecutor. The withheld reports contained important mitigating evidence supporting the inference that another person or persons were involved in the kidnappings, and murders, and that [defendant] may not have personally killed the victims or have been present when they were killed. Moreover, the withheld evidence tends to undermine the aggravating circumstances found . . . which were all premised on the finding that [defendant] himself killed the victims.

Id. at 1357.

V

THE COURT ERRED BY DENYING RELIEF ON APPELLANT'S CLAIM THAT PROSECUTOR COMMENTS AND JURY INSTRUCTIONS IMPROPERLY LIMITED CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In Claim IV, Amended Motion, Defendant alleged that at the

close of the penalty phase, the trial court instructed the jury that: "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence . . .", and listed the statutory aggravating factors by letter. (Tr. 6545). The Court then instructed the jury that: "The mitigating circumstances which you may consider, as established by the evidence are these . . .circumstances." (Tr. 655-56). The trial court did not instruct the jury at any time that it could consider mitigating circumstances other than those appearing on the statutory list. In fact, during jury selection, the court explained to prospective jurors that, "The State of Florida has set guidelines for what is to be considered aggravating and mitigating circumstances having to do with whether or not capital punishment is to be imposed." (Tr. 52). At another point during jury selection, the court indicated the mitigating circumstances were limited to those on the statutory list, saying, "I will give you a new set of legal instructions. Part of what I will tell you are eight or nine factors you are to consider as aggravating circumstances. Things that go to the seriousness of the offense. <u>There are an equal number of things of mitigating circumstances</u>. Things in favor of a lighter sentence." (Tr. 162-163).

During closing argument at penalty phase, the prosecutor told the jury its recommendation should be based on "the specific guidelines. . ." which were "enumerated in what are called

aggravating circumstances and mitigating circumstances." (Tr. 630). He further argued these circumstances were the "only things" the jury could "lawfully take into account" in its recommendation. (Tr. 630). The prosecutor then specifically enumerated each aggravating and mitigating circumstance (Tr. 639-41), and told the jury it had to "determine whether one column outweighs the other column." (Tr. 641). The prosecutor prepared a chart with only the statutory aggravating and mitigating circumstances listed, and informed the jurors: "What you have in front of you is, in substance, the entire basis for your recommendation." (Tr. 630-31). Defense counsel did not seek to correct these arguments and instructions either through objections or rebuttal argument.

Evidence was introduced which could have been considered as nonstatutory mitigating circumstances during the guilt phase, including the fact the defendant confessed, admitted he committed a prior crime by pleading guilty, (Tr. 6257), and that his mother died when he was young (Tr. 338). This evidence was not argued to the jury as probative of nonstatutory mitigating circumstances.

The quoted instructions and statements plainly violate Lockett v. Ohio, 438 U.S. 586 (1978), which held that the sentencer must consider any aspect of a defendant's character or record and any circumstance of the offense a defendant offers as a mitigating factor. The trial court's limiting instructions in

this case which list only the statutory aggravating and mitigating circumstances, coupled with the prosecutor's discussion and enumeration of the statutory mitigating circumstances during jury selection and closing argument clearly could have led the jury to have to conclude it was limited to those factors listed in the statute. The defendant's confession could have been considered as a mitigating factor, as could his testimony at guilt phase that his mother died when he was young, had the jury been properly guided.

The court's refusal to conduct an evidentiary hearing on this Claim, and on Defendant's claim that counsel's failure to object to the comment and instructions was ineffective assistance, Claim III, Paragraph 17(e), was error. In light of Lockett, an evidentiary hearing is required, inasmuch as defendant's allegations raised a substantial factual issue involving fundamental constitutional violation, which also required non-record evidence on the issue of ineffectiveness. Failure to comply with Lockett requires a new sentencing hearing.

VI

THE TRIAL COURT ERRED BY REFUSING TO GRANT RELIEF ON DEFENDANT'S CLAIM THAT COMMENTS BY THE PROSECUTOR AND TRIAL COURT MADE TO THE JURORS DIMINISHED THEIR RESPONSIBILITY TO RENDER CONSIDERED RECOMMENDATION AS TO THE APPROPRIATE PENALTY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In Claim V, appellant outlined that during jury selection, the prosecutor explained the bifurcated nature of a capital trial and told prospective jurors, "and first of all your recommendation has no real effect on the Court. That is number one." (Tr. 60). (emphasis supplied). He also stated the recommendation was "nothing more" than a "recommendation" and disparaged its effect on the court (Tr. 96). During jury selection the court made remarks to the jurors demeaning their role in the capital sentencing process. The court did not tell jurors their recommendation carried great weight, but rather that the proper penalty was the court's "decision" and "responsibility," and that the jurors "just make a recommendation." (Tr. 68). The court further told the jurors in regard to their recommendation: "I don't have to listen." (Tr. 100).

There was no objection or cautionary instruction to dispel the comments of the prosecutor and court which misled the jury as to its advisory role at sentencing from the outset of the trial. The instructions to the jury did not mention the weight given to the jury's recommendation and instead reiterated that "the final decision as to what punishment shall be imposed is the responsibility of the Judge."

These references all downgrade the jury's advisory sentencing function and imply the life or death decision is not

one to be taken seriously. See Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983). The true role of the jury in a capital case is far from that described by the prosecutor and court. The Florida Supreme Court has emphatically and repeatedly declared that "the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration" in the imposition of the sentence. Ross v. State, 386 So.2d 1190, 1197 (Fla. 1980); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The United States Supreme Court relied in part on that deference in upholding a challenge to non-binding jury life recommendations in Spaziano v. Florida, 462 U.S. ___, 82 L.Ed.2d 340, 104 S.Ct. ___ (1984). The remarks encouraged the jury to take its responsibility lightly, in one fell swoop removing the procedural protections the courts have hoped would guide juries in making reliable determinations on the ultimate sentence.

The trial court's refusal to conduct a hearing on this claim, and the parallel claim alleging ineffective assistance of counsel, Claim III, p. 17(f), Amended Motion, was error. Defendant's allegations were without doubt not "conclusively" without merit, and in fact, if proven, entitle him to a new sentencing hearing.

VII

THE TRIAL COURT ERRED BY REFUSING TO CONDUCT A HEARING AND DENYING RELIEF ON DEFENDANT'S CLAIMS THAT HE COULD NOT WAIVE HIS PRESENCE AT TRIAL, AND TAHT HIS INVOLUNTARY REMOVAL FROM THE COURTROOM DURING A JPORTION OF THE TRIAL VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND F.R.CR.P. 3.180

Appellant alleged in his Amended Motion that he was involuntarily removed from the courtroom during several crucial and critical phases of his trial: (1) during a discussion in open court of the appropriate jury instructions at the guilt phase, (2) while his counsel stipulation that certain statements would be redacted from his confession, (3) during the swearing of a prosecution witness, and (4) during a communication to the court from the jury relative to whether it would be permited to view certain evidence (Tr. 252, 437-77). These absences are matters of fundamental error.

First, the removal of the defendant without an express record waiver is fundamental error. In Francis v. State, 493 So.2d 1175 (Fla. 1982), the Florida Supreme Court reversed a capital conviction when a defendant was not permitted to be present during the exercise of peremptory challenges. Relying both on F.R.Crim.P. 3.180 and the Fourteenth Amendment, the Court found defendants have a constitutional right to be present during jury challenges as well as a right created by Florida criminal procedure rules. Such a right must be knowingly and intelli-

gently waived before the defendant can be removed from the courtroom. Reversing the conviction in Francis, the court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process did not constitute a waiver of his right. The state has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See, Schneckloth v. Bustamonte, 412 U.S. 218, 83 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1983).

Francis, 413 So.2d at 1178.

Francis is one of a long line of cases which hold a defendant has a Sixth and Fourteenth Amendment right to be present at any critical stage of trial. Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1954); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Florida Rule of Criminal Procedure 3.180 (a) defines several of the times during which defendant was absent in this case, most notably the point at which the court determined which portions of the defendant's statements should be redacted, and the exercise of peremptory challenges at the bench, and out of the hearing of the defendant. The jury's communication to the court regarding its

view of the evidence is also a notable time during which defendant should have been present in order to enable him to consult with his attorney. Discussion of jury instructions is likewise a critical stage, particularly penalty phase instructions, since the Eleventh Circuit has clearly held that phase of the trial to be a critical stage of the proceedings in Proffitt, 685 F.2d at 1257; Cf. Gardner v. Florida,, 430 U.S. 349, 358 (1977) (sentencing is "critical stage" of capital trial).

This issue is cognizable in a motion for post-conviction relief because it involves the denial of a fundamental constitutional right. Illinois v. Allen, 387 U.S. 337, 338 (1970); Proffitt, 685 F.2d 1260 n. 49; Walker v State, 284 So.2d 415 (Fla. 2d DCA 1972) (resentencing defendant in his absence constituted fundamental error). It also requires the court to consider evidence which does not appear in the record, as in Cole v. State, 181 So.2d 698 (Fla. 3d DCA 1966). In Cole, the Court determined this issue is appropriately raised in a collateral attack on the conviction, saying a defendant "must be given a formal hearing to determine whether his right was denied without his knowledge and consent or acquiescence." Id. at 701.

Like Francis, there is no express record waiver in this case; there is only defendant's bare statement and that of his counsel. Waiver of a fundamental constitutional right will not be presumed from a silent record. Lewis v. United States, 146

U.S. 1011 (1897). Cf. Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436, 384 U.S. 436 (1966). The defendant here was absent during a substantial part of the proceedings. There is no evidence of misconduct justifying such action. Henry v. State, 94 Fla. 783, 144 So. 523 (1927). The Florida Supreme Court has on several occasions reserved deciding whether a defendant in a capital case can ever waive his right to be present in a capital trial. Herzog v. State, 438 So.2d 1372, 1376 (Fla. 1983); Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982). But See Fails v. State, 60 Fla. 8, 53 So. 612 (1910) (defendant in a capital trial has a right to, and must be present, during his capital trial). However, the Eleventh Circuit has repeatedly held the defendant's right to be present at a capital trial is so fundamental that it cannot be waived, in Hall and Proffitt.

Since no record exists with respect to this substantial allegation, the court erred by denying an evidentiary hearing.

VIII.

THE TRIAL COURT ERRED BY FAILING TO AFFORD DEFENDANT A HEARING ON WHETHER THE TRIAL COURT'S "FLIGHT" INSTRUCTION IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Appellant alleged that the Court's "flight" instruction at

trial was improper. See Claim VIII., Amended Motion. The court below would not allow a hearing on the claim, or an evidentiary hearing on counsel's ineffectiveness for failure to object. The court's ruling on the merits on this claim, without a hearing, was error.

At guilt/innocence, the jury was instructed:

> The Court charges you that, when a suspected person in any manner endeavors to escape, or evade a threatened prosecution, by flight, concealment, resistance to a lawful arrest, or other after-the-fact indication of a desire to evade prosecution, such fact may be shown in evidence as one of a series of circumstances from which guilt may be inferred. (TR. 554).

Trial counsel initially objected to the flight instruction, without stating any grounds for his objection (R. 440). This instruction is unconstitutional burden shifting.

In essence, the jury was told: "You may infer guilt from evidence of the defendant's flight." The Court's instruction effectively relieved the state of its constitutional burden of establishing every element of the crime charged, in this case the quintessential element of guilt, beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970). The prejudicial instruction authorized defendant's jury to make a logical leap that the Constitution of the United States does not permit. The impermissible charge, furthermore, was devoid of the "curative language," Corn v. Zant, 708 F.2d 549, 559 (11th. Cir 1983) that must accompany jury instructions in order to assure that no

unconstitutional burden-shifting occurs. Sandstrom v. Montana, 442 U.S. 510 (1979).

In Sandstrom, the Supreme Court asserted the necessary analysis "for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Id., 442 U.S. at 514. This inquiry also requires that a reviewing court "determine the nature of the presumption or inference described by the challenged instruction." Lamb v. Jernigan, 683 F.2d 1332, 1335 (11th Cir. 1982).

Here, a reasonable juror could have found guilt based on flight, and flight did not have to be proven beyond a reasonable doubt. Such an instruction is particularly pernicious in light of the fact that flight can mean so many other things besides guilt. The United States Supreme Court long ago stressed the unreliability of flight evidence as a factor indicating guilt in Alberty v. United States:

> [T]here are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt.... since it is a matter of common knowledge that men who are entirely innocent do sometimes flee from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.

Alberty, 162 U.S. 510 (1895).

Defendant's trial testimony indicated that in fact innocence was his reason for leaving:

> The first thing I thought -- well, I should call the police. Then I figured no. I best leave. I said to myself: I'm out on parole. I'm a convicted convict and there is no way no one is going to believe what I say no matter what happened. I'm going to go to jail either way, so I took the car keys and I left the house.

Because of this type of reason for flight, courts which allow flight instructions demand cautionary language. For instance in United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), the Eleventh Circuit approved a flight instruction that began:

> Intentional flight by a person immediately after a crime has been committed or after that person has been accused of a crime that has been committed is not, of course, sufficient in itself to establish the guilt of that person, but intentional flight under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person. (emphasis added).

Borders, supra, at 1327-28.

See also, United States v. Stewart, 579 F.2d 356, 359, n.3 (5th. Cir. 1978) (trial judge "acted properly" in instructing jury "you may consider that there are reasons for this which are fully consistent with innocence...The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden of calling any witnesses or producing any evidence.")

Unlike the approved instruction quoted above, defendant's jury was not merely informed that it "may consider" evidence of flight. Defendant's jury was informed that such evidence is "one

of a series of circumstances from which guilt may be inferred." The instruction was not followed by the critical qualifier that the jury "should also consider that there might be other reasons fully consistent with innocence" for such flight nor were they cautioned that the defendant must not shoulder the burden of proving his innocence after being instructed that they "may infer" guilt from evidence of flight. Finally, they were not instructed that the accompanying "circumstances" must be proven beyond a reasonable doubt. Particularly where, as here, the defendant offered by his own testimony a reason "fully consistent with his innocence," the failure of the trial court to provide the jury with the appropriate cautionary instruction deprived defendant of his right to a fair trial, and he was entitled to an evidentiary hearing on effective assistance of counsel.

CONCLUSION

The order of the lower court denying Mr. Middleton's Motion to Vacate Judgment and Sentence without an evidentiary hearing must be reversed.

Respectfully submitted,

GELBER, GLASS, & DURANT, P. A.
1250 N.W. 7th Street
Suites 202-205
Miami, Florida 33125
(305) 326-0090

By
N. JOSEPH DURANT, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida, 33125, this 28 day of February, 1985.

N. JOSEPH DURANT, ESQUIRE