IN THE

SUPREME COURT OF FLORIDA

NO._____

WILLIAM MICHAEL SQUIRES,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Litigation Director

Office of the Capital Collateral
Representative
225 West Jefferson Street
The Independent Building
Tallahassee, Florida 32301
(904) 487-4376

Counsel for Appellant

PRELIMINARY STATEMENT

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

"R" Record on Direct Appeal to this Court;

"PC" Record on Appeal of Motion to Vacate Judgement and Sentence Pursuant to Fla. R. Crim. P. 3.850

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mr. Squires was convicted for the murder of Jesse Albritton on March 5, 1982. After a penalty proceeding which commenced immediately after the jury's verdict of guilt, and at which no evidence was presented or argued, the jury recommended death. The trial judge orally pronounced the death sentence on March 5, 1982, after the discharge of the sentencing jury, and entered a written order on March 15, 1982. This Court affirmed the conviction and sentence. Squires v. State, 450 So.2d 208 (1984).

On December 3, 1985, Appellant acting pro se filed a Motion for Post Conviction Relief pursuant to Fla. R. Crim P. 3.850 in the the trial court before which he was convicted and sentenced to death. On February 14, 1986, the Office of the Capital Collateral Representative (CCR), pursuant to its motion, was appointed to represent Appellant. Appellant's amended motion, filed by CCR was denied without a requested evidentiary hearing. The trial judge made no findings of fact, and his only conclusions of law were "denied" as to each claim.

B. SUBSTANTIVE FACTS

1. The Offense

The uncontested facts show that Jesse Albritton, attendant at a 500 service station on Rowlett Park Drive in Tampa, Florida, was discovered missing from the station at approximately 10:00 p.m. on Sept. 9, 1980. (R.440, 445). It was later determined that an indefinite amount of cash and possibly some cigarettes were missing from the station. (R.458). No indication of violence or struggle of any sort was evident at the scene. (R.469). No fingerprints nor any other physical evidence linking the Appellant to the scene were introduced at trial.

The body of Jesse Albritton was discovered in an overgrown orange grove off of Hanna Ave., in Hillsborough County, close to the service station but outside of the Tampa city limits, on September 3, 1980. Mr. Albritton had been shot five times,

four times in the head. Other than the bullets removed from the body itself, no physical evidence connecting any suspect to the murder was found at the scene.

2. The State's Theory

The state's case was based partly on internally inconsistent statements made by the Appellant to various persons at various times, and partly on the testimony of one Terry Chambliss, a convicted armed robber, and his wife, at whose home the Appellant had apparently stayed for a few days in September of 1980. The state offered absolutely no physical evidence which would even arguably connect appellant with the crime: although it now appears that usable fingerprints were lifted from the gas station and that firearms taken from the Appellant were tested for ballistic comparison purposes, none of this evidence was adduced at trial.

What the state bought is what convicted the Appellant: three of five felony charges pending against Terry Chambliss were dropped, a five year sentence and five years probation were imposed on the remaining two, (R.619), and he received $2,000 in cash. (R.634). Mrs. Chambliss also received $2,000 for her testimony. (R.564). According to the state, and "supported" by the testimony of Chambliss, the Appellant and one Donald Hynes robbed the 500 station on the evening of September 2, 1980, and in the course of that robbery abducted the attendant, Jesse Albritton, at gunpoint. Albritton was then taken a short distance, to an overgrown orange grove off of Hanna Avenue, and shot. While the trial judge found that the Appellant played a relatively minor role as an accomplice in a capital felony committed by another, (R.124), the state contended that the Appellant, rather than Hynes, fired the fatal shots. Donald Hynes was never arrested for the crime, nor was he produced at trial as a witness for the state or the defense.

The Donald Hynes accomplice theory was derived solely from the testimony of Terry and Charlotte Chambliss. According to the Chamblisses, the Appellant first came to their house in late August, 1980, possibly the 26th or 27th, looking for a place to stay (R.551, 602). With him during that initial visit, according to the

Chamblisses, was Donald Hynes, whom Appellant allegedly was going to "teach. . . how to make money by robbing people." (R.603). According to Mr. and Mrs. Chambliss, Appellant stayed with them for a few days, and left at the very end of August. (R.551, 603).

According to the Chamblisses, the Appellant next appeared at their house on September 2, 1980, at approximately 10:00 p.m., again in the company of Donald Hynes. (R. 551, 604). The Chamblisses testified that the Appellant showed up in his black Camaro and asked Terry Chambliss if he could hide the car in his backyard, as it was "hot" because of some "trouble" he had had on Hillsborough Ave. (R.551, 604-05). According to Mr. Chambliss, he helped Appellant conceal the car, and then took Donald Hynes home. (R.552, 605). During that trip, according to Chambliss, Hynes acted as if he'd "seen a ghost," (R.605); "he wouldn't talk. He sit [sic] right on the edge of his seat and his hands were all bunched up. . . and he never said a word." (Id.). From this purchased testimony, the state conceived of a theory of Appellant's guilt, and presented to the jury, not through evidence, but through argument: Appellant and Donald Hynes "pulled a robbery" together on September 2, 1980, and Donald Hynes watched "that man pump four shots in Jesse Albritton's head." (R.933, 975: State's closing argument). Hynes was not prosecuted for the crime in which he was, as the state argued, a willing participant, nor was he called as a witness at trial. The "theory" was not "testified to" at all-- it was "argued" from the bargained testimony.

The Donald Hynes/accomplice theory presented by the state was inconsistent with the only other available evidence that they presented, the Appellant's own statements. According to detectives from both the Tampa Police Department and the Hillsborough County Sheriff's Office, the Appellant on several occasions admitted knowledge of the crime, implicating one Ed Fowler as the active participant, and at one point asserted that he was present when Ed Fowler shot Jesse Albritton. These statements were elicited by the detectives while Mr. Squires was in custody and

receiving treatment for a near fatal infection which ultimately resulted in the amputation of his leg. Because trial counsel did not attempt to have these incriminating statements suppressed, no pretrial determination of voluntariness was ever made, and consequently the facts and circumstances surrounding the elicitation of these statements are not clear from the record.

Like Donald Hynes, the 'phantom' codefendant and critical witness, Ed Fowler was never charged for the crime nor called as a witness for either the state or the defense. The latter's absence, however, is manifestly explicable: his testimony would have created havoc with the state's case, which was based on the testimony of Terry and Charlotte Chambliss, which in turn was based on the presence and involvement of the 'phantom' codefendant and witness Donald Hynes. For the state to implicate Ed Fowler, it would have had to discredit and abandon the key testimony of the Chamblisses.

The Appellant also allegedly made incriminating statements to a Department of Corrections Employee and a fellow inmate while he was in custody and was receiving medical treatment. The employee was admittedly aware of and interested a the reward that had been offered for information implicating Mike Squires in the murder of Jesse Albritton, (R.574), and the inmate, although he neglected to mention it on direct examination, had an avowed hatred for the Appellant as a result of a beating he had received at his hands. (R.779-80). Again, because no pretrial motion to suppress these statements was ever filed, the facts and circumstances surrounding these statements, and the extent of the state's involvement in their elicitation, is not apparent from the record.

The state thus took the bits and pieces of the Appellant's statements which best fit its theory of the case, and discarded those parts which were inconsistent or simply did not fit. The remainder, that part with which the state constructed its Donald Hynes theory, was the entirety of the state's case against William Michael Squires: absolutely no direct evidence, physical or otherwise, which would

even remotely connect the Appellant to the crime was presented by the state. As will be discussed below, (see claims II, III, infra), it is now apparent that evidence which could have entirely discredited the testimony of Terry and Charlotte Chambliss, and utterly destroyed the state's Donald Hynes theory, was withheld from the jury, the trial court, the defense, and this Court on direct appeal.

3. The Defense

Mr. Squires has maintained his innocence of the instant crime from the initiation of the original charges to this very day. His protestations of innocence are not, however, bare allegations: he provided a detailed and provable alibi which, if diligently pursued and properly investigated, could have unimpeachably established his absence from the area of the crime on the dates in question.

Appellant established his whereabouts on the days preceding and following the crime, as well as the day of the crime itself, through both testimony and documentary evidence. Although admittedly engaged in a series of robberies throughout the Southeast, in the company of Ed Fowler, Appellant did not, indeed could not have, committed the crime in question.

The documentary evidence establishing Appellant's alibi defense was in the form of credit card receipts from a series of gasoline purchases made by him with stolen credit cards. The state stipulated to the fact that the Appellant had these cards in his possession and used them on the dates for which receipts were presented. (R.787).

On August 26, 1980, Appellant purchased gasoline in Haddisburg, Mississippi, with a credit card belonging to an A.F. Petit. (R.786). On the following day, August 27, 1986, Appellant was in Biloxi, Mississippi, as evidenced by the receipt from a purchase made with a card belonging to one David Locke. (R.789). The 28th was spent in transit from Biloxi to Bowden Junction, Georgia, as evidenced by receipts from Pascagoula, Miss., Spanish Fort, Miss., Fort Deposit, Alabama, and

Auburn, Ala. (R.790).

The 29th and 30th of August were spent in Bowden Junction, Georgia, as evidenced by the testimony of Rayford Chambers, with whom the Appellant and Fowler stayed during their visit their. (See R.728-732). On the 31st, Appellant and Fowler journeyed to South Carolina, as evidenced by charge card receipts from Fort Wintworth, SC, and Earhardt, S.C. (R.734).

Even more compelling evidence of their presence in the state of South Carolina in the latter part of August and the early days of September, 1980, was presented in the form of testimony by the victims of various crimes committed by Fowler and the Appellant. Neil Hughes testified that he and three companions were robbed by a man whom he had prior to trial identified as the appellant and an unidentified man whom he heard the Appellant refer to as "Ed." (R.665-70). This robbery occurred in Foley Beach, South Carolina, shortly after sunset on August 31, 1986. (Id.). Among the items taken were a gold Boliva Accutron watch and a credit card belonging to James Bitner. (Id.).

In the early morning of September 1, 1980, Officer Harry Kinnard of the Earhart, South Carolina, Police Department was abducted at gunpoint when he pulled over a car during the routine discharge of his duties. Officer Kinnard testified at trial, and identified Mike Squires as one of the men who abducted him that night. (R.679). Officer Kinnard also testified that the other man, whom the Appellant prevented from killing him, was named "Ed." (680).

After abducting Officer Kinnard in Earhart, the Appellant and Fowler headed for Dothan, Alabama. Their progress was documented by credit card receipts from purchases in Hardeeville, SC, Midway, Ga., and Valdosta, Ga. (R.809-10). Upon arriving in Dothan, the pair checked into the Walker Motel, with Ed Fowler paying for the room and signing the register. (R.696, 811). While in Dothan on the 1st, Appellant discovered that his car would not start, and attempted to call a wrecker to tow it to a service station. (R.812). Charles Barr, operator of a

nearby service station, responded to Appellant's telephone call and came to the Walker Motel to look at his car. (R.689, 812). Barr, who later identified the Appellant through a photo array, (R.688, 698), inspected Appellant's car and told him to bring it to the station the next day, September 2. (R.689, 812). Appellant brought his car to Mr. Barr's service station on the 2nd, as they had previously arranged, and waited while Mr. Barr performed the necessary repairs. (R.690, 813).

Appellant and Fowler stayed over in Dothan on the night of the 2nd, again at the Walker Motel, (R.697, 817), leaving on the morning of the 3rd. (R.817). Later on the 3rd, Appellant and Fowler sold the gold Accutron watch stolen earlier from Neil Hughes to Mr. Lloyd Carlton at his pawnshop in Marianna, Fla. (R.703). Although Mr. Carlton could not remember the exact date of this sale, he did have good reason to remember the Appellant-- Carlton testified that Mike Squires robbed his store at gunpoint on September 18, 1980, approximately two weeks after he had bought the watch from the Appellant and Fowler. (R.702, 705). An employee of Carlton's, Timothy Stevens, who had been present in the pawn shop when Appellant and Fowler made their first appearance there, testified that the date of that initial visit was the 3d of September, a date he remember because of its proximity to Labor Day and the day on which Mr. Carlton received a monthly check. (R.710-11).

After selling the merchandise in Marianna, the pair headed back to Tampa, purchasing gas in Perry, Florida, on September 3d with the credit card stolen earlier from James Bitner. (R.821). They arrived in Tampa on the 4th, as evidenced by their next documented credit card purchase on that day. (R.822). Sometime that day, the Appellant and Ed Fowler parted, and Appellant took up with Donald Hynes. (R.829).

During this stay in Tampa, the Appellant did stay with the Chamblisses, sleeping there on the nights of the 4th, 5th, and 6th of September. (R.823). He left on the morning of the 6th, and returned there on the afternoon of the 7th, this time in the company of Donald Hynes. (R.830). Sometime that evening,

Appellant and Hynes left the Chambliss house to rob a nearby Thoni service station that Terry Chambliss had told them about. (R.831). Upon their return, Appellant asked Chambliss to help him hide his car, which he now believed was "hot" because of the robbery he and Hynes had just pulled off, in the backyard. (R.832). Chambliss helped him pull down part of the fence so they could pull the car into the backyard. (R.Id.). At this point, Chambliss, at Appellant's request, took Hynes home while Appellant stayed at the house. (832).

The Thoni robbery is documented by the police: that station was robbed by the Appellant and Hynes on September 7th, 1986. The only evidence connecting Hynes and the Appellant to the 500 station robbery on September 2, and the death of Jesse Albritton, was the testimony of Terry and Charlotte Chambliss implicating the Appellant and Donald Hynes. We now know, although the judge, jury, and defense did not, that Donald Hynes was cleared of any involvement in the September 2 robbery and in fact was not even with the Appellant on that date.

ARGUMENT

CLAIM I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S 3.850 MOTION AN WITHOUT EVIDENTIARY HEARING

Mr. Squires' verified Rule 3.850 Motion alleged facts in support of claims which have traditionally been raised by sworn allegations in post-conviction petitions, and tested through an evidentiary hearing. For example, he identified specific unreasonable omissions by trial/sentencing counsel which caused prejudice, see claim IV, infra, and claimed that he was consequently denied in a capital case the fundamental constitutional protections afforded by the sixth, eighth, and fourteenth amendments to the United States Constitution. With regard to these and other claims, the trial court made no findings of fact, no conclusions of law: no evidentiary hearing was allowed, and no factual disputes were resolved, because the claims for relief were each disposed of with one word: "denied."

Regardless of whether Mr. Squires would ultimately prove and win his claims, he is entitled to an evidentiary hearing with respect to them, unless the files and records in the case conclusively show that he will necessarily lose the claims. In that instance, the judge must attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief. . ." Fla. R. Crim. P. 3.850. Otherwise, an evidentiary hearing is proper.

In O'Callaghan v. State, 461 So.2d 1354, 1355-56 (Fla. 1984), this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vaught v. State, 442 So.2d 217, 219 (Fla. 1983). Indeed, this Court has stated that it

> ...encourage[s] trial judges to conduct evidentiary hearings when faced with this type of proceeding in view of the relatively recent decision in the United States Supreme court in Sumner v. Mata, 449 U.S. 539 (1981). It is important for the trial courts of this state to recognize that, if they hold an evidentiary hearing on this type of issue, under the Sumner decision their finding of fact has a presumption of correctness in the United States district courts.
>
> * * *
>
> When a state court does not hold an evidentiary hearing, the United States district courts believe they are mandated to hold an evidentiary hearing because of the provisions of subparagraphs (2), (3), (6), (7), and (8) of section 2254 (d) unless they can find that the petition is totally frivolous. the practical effect of the state court's denial of an evidentiary hearing on an ineffective-assistance-of-counsel claim is to leave the factual finding of this issue to the federal courts. It is for this reason that we suggest, 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 1056, 1062-63 (Fla. 1984).

Thus, this Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So.2d 537 (1984); Vaught, supra; Smith v. State, 461 So.2d 1354 (Fla. 1985); Morgan v. State, 461 So.2d 1534 (Fla. 1985); Meeks v. State, 382 So.2d 673 (Fla. 1980); McCrae v. State, 437 So.2d

1388 (Fla. 1983); LeDuc v. State, 415 So.2d 721 (Fla. 1982); Demps v. State, 416 So.2d 808 (Fla. 1982); Arango v. State, 437 So.2d 1099 (Fla. 1983). These cases control.

CLAIM II

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW AND A RELIABLE CAPITAL SENTENCING DETERMINATION WHEN THE STATE PRESENTED FALSE TESTIMONY AT HIS TRIAL, AND THE RESULTING CONVICTION AND SENTENCE THUS VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The state has a constitutional duty to alert the defense when a state witnesses gives false testimony. Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. U.S., 405 U.S. 150 (1972); U.S. v. Agurs, 427 U.S. 97 (1976); U.S. v. Bagley, ___ U.S. ___, 105 S.Ct 3375 (1985). This is so because of the unique position of the prosecutor in our system of justice, a position which transcends the role of mere advocate:

> The [state prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88 (1935).

A conviction obtained through a prosecutor's knowing use of false testimony deprives a defendant of due process. Agurs, supra; Bagley, supra. As sworn in the

Rule 3.850 Motion, the testimony of two key state witnesses was patently false, and that the state knew it, or should have known it. The trial court summarily denied this claim without an evidentiary hearing, and without mentioning, much less allowing presentation of, the compelling facts presented for the first time in Appellant's post-conviction motion, or the files and records which would conclusively show that the new non-record facts could not provide relief. The files and records, including the 3.850 Motion and the supporting materials, demonstrate that an evidentiary hearing was mandatory.

A. The State Knew, Contrary to Sworn Police Depositions, That Hynes Was Not Where They Said He Was-- With Appellant.

Donald Ross Hynes, the "phantom witness," was crucial for the State and for Mr. Squires. Terry and Charlotte Chambliss both testified that Hynes was with the Appellant when he came to their house on the night of September 2, 1980, after having committed a robbery. This was the testimony around which the state chose to base their case. What the state deliberately did not tell the court, however, was that Donald Hynes took and passed a polygraph which cleared him of any involvement in the crime or of even being with the defendant on that date.

Appellant testified that he was not in Tampa in late August or early September, 1980, but was on September 4, when he spent the night at the Chambliss's home. (R.822). On September 7, 1980, he and Donald Hynes were at the Chambliss's and learned from them of a Thoni gas station which would be easy to rob. (R.827-30). Defendant and Hynes robbed the Thoni station that night, returned to the Chambliss home, hid defendant's car, and Terry Chambliss took Hynes home. (R.831-2). It is clear that Donald Hynes held the key to this case, the key which could have either permanently locked the door on Mike Squires or set him free.

Assistant State Attorney Benito embraced Hynes early on, when he told the jury in opening argument that the Chamblisses would place Hynes was with the Appellant when he came to their home late at night on September 2, 1980, and that Hynes had

acted "like he had seen a ghost...didn't utter one word." (R.426-7). This theme was repeated in closing argument, when the State told the jury that "the guy [defendant] was with" on the night of September 2, 1980, was Donald Hynes, whom Appellant was teaching to commit robberies. (R 933). Later, the State again urged the jury to believe that the Appellant was with Hynes that night:

> "I tell you why he [Hynes] acted like he had seen a ghost... Because he had just seen that man [defendant] pump four shots in [victim] Jesse Albritton's head"

(R.975).

In his final summation to the jury, Assistant State Attorney Benito left no doubt as to the importance the state was placing on its "phantom witness:"

> There is a common theme, ladies and gentlemen, that runs in this case and the common theme is William Michael Squires and Donald Hynes. The Defendant was with Donald Hynes when he came into Chambliss house in late August. He told Chambliss, "We are going to teach Hynes how to make a living by robbing." Remember that is what Chambliss told you. You recall he didn't see Fowler at the house. He left Chambliss a few days and came back and hooked up with Hynes.

(R.974).

Incredibly enough, Donald Hynes, the alleged eyewitness to and co-perpetrator of the crime, never appeared at trial! Nor was he ever charged with either the Thoni robbery of September 7 or participation in the Albritton offenses. As will be explained below, the state's reasons for not producing Hynes are apparent: his testimony would have utterly destroyed the credibility of the Chamblisses and, ultimately, the state's entire case against Mike Squires.

It is now apparent that Donald Hynes had taken a polygraph and been cleared of any involvement in Albritton murder over a year before Appellant's trial was held. It is also clear, as is shown below, that the state and its critical law enforcement witnesses were aware of this fact, and consequently aware of the falsity of the Chamblisses testimony, yet deliberately ignored the truth. On September 23, 1981, defense attorney Edwards took the deposition of Detective

George L. Peterson, Tampa Police Department. With reference to Hynes, Peterson testified as follows:

Q: Okay. All right. Did you ever talk to a -- well, did you ever talk to Donald Hynes?

A: Yes, we talked to Donald Hynes.

Q: What did he tell you pertaining to this crime, if anything?

A: Well, Donald Hynes never had -- we were talking to Donald Hynes, at the time, about -- in reference to Chambliss and Squires living together, these kind of things, and also, Ed Fowler.

Hynes is the person who saw this Ed Fowler on one occasion; told us that Squires had told him that this Fowler had shot a person and that he had to get rid of him. And to Hynes' thinking, that meant kill him. And he told him, "No, don't kill him, just drop him off someplace."

So, they dropped him off on Hillsborough Avenue, around the theater, which would be the Hillsboro Theater, around Lincoln and Hillsborough. That has never been confirmed or denied.

Q: But he said, in essence, that Squires told him that Ed Fowler had killed this guy from the station.

A: Well, he said he'd killed a guy.

Q: Killed a guy. He didn't relate to it Albritton or station.

A: He didn't know what place or whatever. He said he'd killed a guy. And he, himself, meaning Squires, himself, was going to get rid of him. And he knew that to mean that he was going to kill him. He told him, "Don't shoot him. Let's drop him off somewhere," which he did.

Q: Did Hynes admit being in the car with them, say the first part of September?

A: I think Hynes' statement was -- yeah, I think he mentioned somewhere around the 7th of September, he remembers going back by Chambliss' house 'cause, see, he wasn't -- he wasn't welcome there because of his criminal activities and everything from prison. Chambliss' wife did not like him. And the way he let his kid or his child go around dirty, filthy. His wife didn't like it, so he wasn't welcomed around Chambliss' house.

But when we asked him what time, or can you best remember when this thing happened, when he's talked to you about Fowler. And I believe he said it was around the 7th, as best he could remember.

Q: Okay. But he didn't admit being around them, say, the 2nd or 3rd of September; is that correct?

A: Well, he says it was somewhere in the latter part of August, he met Squires in Tampa, at a skating rink. He was there skating with his wife. It was old home week between the two of them.

Squires had asked about Chambliss. And he said, "Fine, I'll take you by to see him." He took him by, dropped him off. And then, he and his wife left and went and got a pizza.

He went back later that afternoon or that evening. Squires stayed there with Chambliss. And he took his wife and went on home. He didn't stay there. That was in the latter part of August.

The next time he says he saw him was with this Fowler character, which he believed to be somewhere around the 7th of September.

Q: Did he deny ever being in the car at the time of this murder -- Hynes?

A: I've never spoken to Hynes about this murder.

Q: Oh, you haven't?

A: No, sir.

Q: But Terry Chambliss had told you that Hynes was in the car, too, didn't he, when he came up that night?

A: Yes, sir. That's as of recent. Now, I'm talking about the last six, seven days, eight days.

Q: Oh, he just recently told you that?

A: Uh-huh.

Q: Okay. Did Hynes relate anything to you then pertaining -- well, you said you didn't talk to him about the murder.

A: The last time I talked to Hynes, my goodness, man, it's been months. I guess January of last year or this year -- January, February, somewhere in there.

Q: Why were you questioning Hynes at that time, for

what purpose?

A: Well, I'm going to get these names mixed up. Squires had copped out to us that he and Hynes had done that smaller service station, the Thoni station on Waters.

And we, in fact, had contemplated, at that time, charging him. But we did not charge him with that since we exceptionally cleared it to him and to Squires 'cause Squires copped out to us.

Q: I see. So, really, at the time, you were -- you were investigating this robbery at the Thoni station; is that correct?

A: No, not per se. Of course, it was a robbery in the city. It was a service station. It just fell into the realm of the field I work as robbery.

Q: And you say since that time or within the last six, seven days since he's told you this -- Chambliss -- you have not been back in touch with Hynes then as pertaining to this murder charge.

A: At this particular charge -- point, I haven't been in touch with the State Attorney's Office. What it basically boils down to is this is Hillsborough County case, although I received the information. It's left up to Detective Nelms who I've also been in touch with and told him what Chambliss has been saying. Now, to what degree he's gone from there, I don't know. I'm talking about Jerry Nelms.

Q: All right.

A: He may be tied up on other murders that he can't get to him. I don't know. But the information has been passed on. And whether there is going to be forthcoming arrests, I don't know.

(PC. 143-48).

However, a supplemental police report dated February 16, 1981, fully seven months before the deposition sworn to and signed by Detective. Peterson, contains the following with reference to Donald Hynes:

UNITED "500" SERVICE STATION
7301 Rowlette Park Drive...

The u/signed made contact with DONALD HINES with the assistance of HC Detective Nelms at his trailer, which is THE OLD PALMETTO BEACH TRAILER PARK, located in Palmetto Beach.

WM HINES was talked to and he told the u/signed detectives that he was told by WM SQUIRES on approx 7 Sept 80, that a WM known only to him as ED, who was with WM SQUIRES had committed a murder and that SQUIRES wanted to get rid of WM ED. When asked how this all happened, WM HINES states that he had received a call at his mother's house from W/M SQUIRES on the morning of 7 Sept 80. He at that time made arrangements to meet with SQUIRES at the SHELL STATION located at Westshore Blvd., and Kennedy Blvd. He states on that morning he did meet with SQUIRES and at that time, he had with him another WM whom SQUIRES introduced to him as ED. He stated that SQUIRES wanted to go someplace where it was quiet and cool so that they could talk, and he at that time, referred them to a park, they both driving their separate vehicles to this park.

HINES states that the park was PHILLIPPE PARK, located out in Oldsmar and upon their arrival there, he stated that SQUIRES and he left their separate vehicles, leaving ED at SQUIRES vehicle and walked into the park where they smoked some marijuana and drank a couple of beers. He stated at this time is when SQUIRES told him that ED had shot and murdered somebody and that his car had been used and that he didn't know what to do, whether to just get rid of ED and he was asking WM HINES what he thought he should do. HINES at that time told him, not to kill the guy, but just drop him off somewhere and forget him. HINES stated that they then left the park, drove to the Hillsborough Theater on Hillsborough at Lincoln, where ED left the car and he and WM SQUIRES went to another friend's house, that of TERRY CHAMBLISS, located at 1803 West Sligh. He stated that SQUIRES stayed at CHAMBLISS' house while he and his wife went to get a pizza. A short time later, that evening, he responded back to SQUIRES and CHAMBLISS' house where they talked for awhile and then he left and went home. He stated, that was all he knew about this particular murder. He stated that he did not know what murder ED had committed, other than the fact of what SQUIRES HAD TOLD HIM.

The u/signed and DETECTIVE. NELMS arranged for WM DONALD HINES to take a polygraph examination with AL DAYTON in the PAM AM BANK BUILDING located on Sitka near the Interstate. WM HINES was given a polygraph examination by AL Dayton, the results of this polygraph examination were to the effect that, DONALD HINES was telling the truth in as much as his information about the murder and was told to him by SQUIRES.

It is to be noted that a service station robbery, located on Water Ave., was Exceptionally Cleared to WM WILLIAM MALCOLM SQUIRES and that during this polygraph examination, it was shown that the WM HINES, was in

fact, the second person involved in this robbery and not ED FOWLER, whom SQUIRES had told the u/signed had committed the robbery with him. This particular polygraph examination was conducted by ALLEN H. DAYTON, on 15 Jan 81 with WM SUBJECT, DONALD ROSS HYNES, Add: 108 S. 28th Street, Lot 17, Tampa, Fla.

The report received by the u/signed from AL DAYTON noted in the last two (2) paragraphs was that WM DONALD ROSS HYNES was in fact, telling the truth on the questions that he was given, prior to taking the examination.

THOSE QUESTIONS ARE AS FOLLOWS:
QUESTION NO 1
DO YOU INTEND TO DELIBERATELY LIE TO ME DURING THIS TEST CONCERNING THIS MATTER WE DISCUSSED?

ANSWER: NO

QUESTION NO. 2
DID YOU ACTUALLY MEET WITH SQUIRES IN PHILLIPPE PARK AS YOU STATED IN THE MONTH OF SEPTEMBER 1980?

ANSWER: YES

QUESTION NO. 3
DURING YOUR MEETING WITH SQUIRES IN PHILLIPPE PARK, DID HE TELL YOU THAT HIS COMPANION, ED, HAD KILLED SOMEONE?

ANSWER: YES

QUESTION NO. 4
WERE YOU ACTUALLY PRESENT WHEN JESSE ALBRITTON WAS SHOT?

ANSWER: NO

QUESTION NO. 5
HAVE YOU BEEN COMPLETELY TRUTHFUL WITH DETECTIVE. PETERSON REGARDING THIS MATTER UNDER INVESTIGATION?

ANSWER: YES

As noted in this supplement, WM HYNES was truthful about these particular questions.

(PC.164-65).

Not only had George Peterson spoken with Hynes specifically about the murder in January of 1981 (contrary to his sworn testimony at deposition), but Peterson also reported that Hynes had passed a polygraph, on the question of whether he was present when the victim was shot. Hynes' negative answer to that question was

reported as "truthful." (See above).

George Peterson's testimony at deposition in September 1981 misled defense attorney Edwards into believing that Hynes had little or nothing to contribute to his defense of Mr. Squires. For this and other reasons--see Claim IV, infra--Edwards never really attempted to locate Donald Ross Hynes. Hynes, we now know from the polygraph results, would have testified - truthfully - that he was with Mr. Squires during the Thoni robbery of September 7, and that he was not with Mr. Squires during the Albritton offenses of September 2 - contrary to the testimony of both Terry and Charlotte Chambliss. Nor was he a witness to the Albritton offenses, information not made available to the defense at the time of trial.

As previously noted, Hynes was never charged with either the Thoni robbery or the Albritton offenses. In addition, his Department of Corrections records state that the charge of "aiding an escaped prisoner" was dropped by the State Attorney's office because Hynes passed a lie detector test to the effect that he did not know Michael Squires was an escapee. (PC.113). This is totally belied by a police report dated February 19, 1981, by Detective Gerald Nelms, Hillsborough County Sheriff's Office, which states: "Hynes admitted meeting with Squires and knowing he was an escaped prisoner." (PC.173).

One cannot help but conclude from the police reports uncovered by post-conviction counsel that the trial testimony of Terry and Charlotte Chambliss as it regarded Donald Hynes was totally false, and that the state knew it to be so before it was presented. The state knew that Donald Hynes had nothing to do with the Albritton offenses and was not even present. Had he corroborated their version of the offense, the State surely would have called Hynes as a witness at trial. Since the State never charged Hynes (for these offenses or the Thoni robbery - to which he admitted - or the parole violation of "aiding an escaped prisoner" - to which he also admitted), giving Hynes immunity for his testimony would have obviously been no problem. Additionally, the fact that none of these charges was prosecuted

corroborates the State's recognition that Hynes was not a participant in the Albritton-robbery-abduction-murder.

It is also apparent that defense counsel Edwards never saw the police reports. Had he done so, he could never have permitted without objection or cross-examination 1) the Chambliss' testimony that Hynes was with Michael Squires at their home the night of September 2, 1980, immediately after the Albritton offenses or 2) Assistant State Attorney Benito's flat argument to the jury that Hynes "had just seen [the defendant] pump four shots into Jesse Albritton's head."

The State did not want Donald Hynes as a witness for Mr. Squires, since his testimony could have totally undercut that of the State's "star witnesses" (Terry and Charlotte Chambliss), in reference to the Thoni robbery, and, in other ways, would have corroborated the defense case. It would appear that a "deal" was cut with Hynes: don't testify for Mr. Squires, stay out of sight, and no charges (on either the Thoni robbery or the parole violation) would be filed. Hynes almost blew it, by being arrested and convicted on an unrelated "grand theft" offense in July of 1981, but because of defense attorney Edward's ineffectiveness (see Issue II below), he was nonetheless never brought into the Albritton murder case. As part of the State's "package," this prior offender was put on probation on the unrelated grand theft charge.

B. The State's Action Was Unconstitutional

A prosecutor has the constitutional duty to alert the defense when one of his witnesses gives false testimony. Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 264 (1959). As long as fifty years ago the United States Supreme Court established the principle that the prosecutor's deliberate use of false testimony violates the defendant's due process rights and denies him a fair trial. Mooney, supra. In Alcorta v. Texas, 355 U.S. 28 (1957), the Court broadened this principle to encompass not only a prosecutor's active and deliberate solicitation of false testimony, but also his failure to correct false testimony.

Enlarging the Mooney principle still further, the Napue Court, supra, held that the prosecutor's knowing failure to correct false testimony relating solely to the witness's credibility, rather than to a substantive issue as in Alcorta, supra, and the instant case, also violated due process. Moreover, Napue's conviction was reversed even though the jury was apprised of other grounds for believing that the falsely testifying witness may have had an interest in testifying against him. Such evidence, held the Court, could not turn "what was otherwise a tainted trial into a fair one." 360 U.S. at 270.

Elaborating this principle further yet in Giglio v. United States, 405 U.S. 150 (1972), the Court held that a prosecutor violates due process by allowing false testimony to be given even if he does not personally know that the testimony is false. In Giglio, a principal government witness testified falsely that he had received no promises of favorable treatment from the prosecutor prior to his testimony. In fact, a promise of immunity had been made by the government prosecutor who presented the case to the grand jury, but the trial prosecutor was unaware of this promise. The Court held that the prosecutor's actual unawareness was irrelevant; he "should have known" about the promise: "[t]he prosecutor's office is an entity and as such it is the spokesman for the government. A promise made by one attorney must be attributed, for these purposes, to the government." 405 U.S. at 154.

The prosecution's use of false testimony typically involves the suppression of evidence favorable to the accused, but the fundamental unfairness and denial of due process engendered thereby stems more from the false testimony itself than from the unavailability to the defense of the evidence which would show that testimony to be false. It is the "deliberate deception of a court and jurors by presentation of known false evidence [that] is incompatible with the rudimentary demands of justice," Giglio, supra, that deprives the accused of due process, rather than the mere failure to comply with discovery requests. The deliberate use of false

testimony had been condemned long before Brady v. Maryland, 373 U.S. 83 (1967), established the principle that suppression by the prosecution of evidence favorable to the accused could violate due process. See Mooney, supra.

The standard for reversal of convictions obtained through the use of false testimony likewise predates Brady, and has survived Brady and its progeny: a new trial is required if the false testimony could in any reasonable liklihood have affected the judgment of the jury. Napue; Giglio, supra; U.S. v. Agurs, 427 U.S. 97, 102 (1976). Unlike those cases wherein the denial of due process stems solely from the suppression of favorable evidence, in cases involving the use of false testimony "the Court has applied a strict standard. . . not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking process." Agurs, supra, at 104.

Although the Agurs Court modified the standard established by Brady for determining when the prosecution's suppression of favorable evidence mandates reversal, it left untouched the standard to be applied when the prosecution knowingly uses false testimony. Recently, in U.S. v. Bagley __U.S.__, 105 S.Ct. 3375 (1985), the Supreme Court again visited the issue, and, while arguably modifying the Brady/Agur materiality standard for reversal when favorable evidence is suppressed by the prosecution, left untouched the standard to be applied when false testimony is used. Quoting with approval the "well established rule that 'a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable liklihood that the false testimony could have effected the judgment of the jury,'" Id. at 3382, quoting Agurs, 427 U.S. at 103 (footnote omitted), the Court reasoned that "this rule may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id.

Not only can the use of false testimony affect the jury's decision as to guilt

or innocence, but it can also affect the sentencing decision. In Smith v. Wainwright, 741 F.2d 1248 (11th cir. 1984), the Eleventh Circuit recognized the affect that evidence presented at the guilt/ innocence phase of a capital trial could have on the jury's sentencing decision. That case addressed a claim of ineffectiveness of counsel grounded on trial counsel's failure to impeach a critical state witness with a prior inconsistent statement. Not only could have such failure "affected the outcome of the guilt/innocence phase," held the Smith court, but "it also may have changed the outcome of the penalty trial":

> As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of capital trial, we stated:
>
> > The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt-- doubt based upon reason-- and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt-- this absence of absolute certainty-- can be real.
> >
> > The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unaminity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremediable penalty of death.
>
> Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981). . . In this case, use of [witnesses'] prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Smith v. Wainwright, 741 F.2d 1248 (1984).

Appellant has no difficulty meeting the standard: there is every likelihood that the false testimony presented here affected the jury's decision. Since the only testimony linking the Appellant to these crimes, other than his own inconsistent and contradictory statements to other people, was that of the Chamblisses, there is no question that Donald Hynes' testimony - especially since it also would have served to corroborate the Appellant's testimony about Fowler - would have changed the outcome of the guilt phase. As it was, jury deliberations lasted approximately 3 hours. (R 1016).

Even if Hynes did not appear as a witness, for either the state or the defense, during the guilt phase of defendant's trial, the police report of Detective Peterson, which contains Donald Hynes' polygraph results, would have been admissible during the penalty phase to cast doubt on the Chamblisses' story - and could have resulted in a mercy recommendation if used and argued properly. All evidence concerning the facts surrounding the capital offense is admissible at penalty phase, including evidence which casts a "whimsical doubt," i.e., a doubt that does not rise to the level of reasonable doubt but lingers nonetheless after a verdict of guilt. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B. 1981); Smith v. Wainwright, Supra; Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984).

The critical nature of the Chambliss testimony raises a substantial probability that its absence would have affected the outcome of Appellant's trial and/or sentencing proceeding. When it can be shown that the state knowingly used false testimony in obtaining Appellant's conviction, his conviction and sentence must fail as violative of due process. An evidentiary hearing is required to properly present the extensive non-record facts upon which this claim is based, and the court's summary denial of Appellant's motion without an evidentiary hearing must be vacated.

CLAIM III

PETITIONER WAS DEPRIVED OF DUE PROCESS WHEN THE STATE SUPPRESSED MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND, AND HIS CONVICTION AND SENTENCE THEREFORE VIOLATES THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); U.S. v. Bagley, 105 S.Ct 3375 (1985). This claim is clearly cognizable in a motion for post-conviction relief in Florida. Arango v. State, 467 So.2d 692 (Fla. 1985); Ashley v. State, 433 So.2d 1263 (Fla. 1st DCA 1983); Press v. State, 207 So.2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So.2d 618 (Fla. 4th DCA 1966): Wade v. State, 193 So.2d 459 (Fla. 4th DCA 1967). This is the type of issue which requires an evidentiary hearing for the proper development of the extra-record materials which were withheld from the defense, and the trial court therefore erred in summarily denying this claim. See claim I, supra.

A. The Withheld Evidence

The exculpatory evidence which was withheld falls into three categories: Facts relating to Donald Hynes, fingerprint evidence, and ballistics evidence. Each will be discussed separately below.

1. Donald Hynes

The facts relating to Donald Hynes are fully discussed in Claim II, supra. The critical testimony of Terry and Charlotte Chambliss as it regarded Donald Hynes, and the state's argument which was based on that testimony, was patently false. Materials uncovered by undersigned counsel, materials not available at trial or on direct appeal, indicate that Donald Hynes was not involved in the murder of Jesse Albritton, was not with the Appellant on September 2nd, and that the extremely incriminating testimony of the State's key witnesses was therefore false. It also appears that the information exculpating Hynes of any involvement in the instant crime was never revealed to defense counsel. An

evidentiary hearing was required to properly develop the facts relating to this claim.

2. Fingerprints

Tampa Police Department and Hillsborough County Sheriff's Office reports indicate that good usable fingerprints were lifted at the United 500 Station, prior to Mr. Squires becoming a suspect. Several possible suspects' prints were compared to "the crime scene prints," thereby eliminating those individuals from suspicion and further investigation. (PC. 190, reference to four suspects' prints; PC. 191, reference to suspects Bobby Beasley and Cedrich Brown; PC.192, reference to suspect Greg Beasley). It is also apparent that these reports were not available to the defense at trial or on direct appeal.

Nonetheless, State witnesses and Assistant State Attorney Benito allowed the definite false impression to be conveyed to the jury that no good prints came from the United 500 gas station, despite defense attorney Edwards' attempt to establish the facts about whether prints were found at the crime scene:

> Q: Did they dust for prints at the station?
>
> A: Yes, sir, they did.
>
> Q: Did they dust the particular drawers involved where the cigarettes were located?
>
> A: Yes, sir, I told them to dust everything.
>
> Q: The doors, panels, et cetera; is that correct?
>
> A: Yes, sir.
>
> Q: To your personal knowledge, were any latent prints lifted from that scene?
>
> A: There were some latent lifts. The outcome, I don't know. I don't know if they were partials or smudges that they lifted. Whatever they lifted they could.
>
> Q: They could have been good prints that they lifted; is that right?
>
> A: Yes, sir. I don't have any information about the prints they had or anything about identification.

Q: Is there an I.D. technician from the Tampa Police Department here today?

A: Not that I saw in the hallway, no, sir.

Q: Being that you are an experienced detective and you are familiar with the crime lab being there, do you normally have the I.D. technicians come in to trial if they have found latent prints?

A: Sometimes they don't.

Q: What will be the purpose when they would not come?

A: Evidently the State didn't call them.

Q: Well, could that possibly be because the prints did not match the particular defendant that was charged?

A: I found, Mr. Edwards, that the State calls the I.D. technicians even if the prints don't match. There are numerous reasons why they don't call them. You know, I can't tell you personally why they haven't been called, but I have been in Court when the prints did not match and the I.D. technicians were there.

Q: Let me ask you this: You, being one of the investigating detectives, were you informed by any personnel, without going into what they told you, about anything about prints from any of the I.D. technicians?

A: No, sir.

Q: Would it be, again in your opinion as a professional detective, that if there were something pertinent as to pertaining to the prints you would be notified as being one of the investigating detectives?

A: Except in this case, Mr. Edwards. I was the detective that responded to the scene. The report was written up as an armed robbery, abduction, possible abduction which homocide does not handle. That is handled by the Robbery Bureau.

Q: Okay. But later on, after the body was found, it then became a homocide, is that correct, sir?

A: Very true, sir.

Q: Apparently this homocide originated from the 500 station, United 500 station?

A: True.

Q: So, at that time, you would be involved in it, would you not, sir?

A: No, sir.

Q: In other words, once a case is determined to be a robbery, if they find a hundred bodies out there, Mr. Fletcher doesn't come into it anymore?

A: No, sir. Like I said, the originating report was abduction-robbery, possible abduction. The body was found in another jurisdiction. Therefore, the body and the homocide would be handled by that jurisdiction. The abduction and robbery would be handled by the Tampa Police Department.

Q: All right. It is not a fact that in this particular case you supposedly had cooperation between the Sheriff's Office and the Tampa Police Department?

A: Certainly, we always do.

Q: Now if, in fact, Tampa Police Department has found anything pertinent as pertaining to prints or any other technical evidence that might be beneficial to any law enforcement agency, would they not notify such?

A: Certainly.

Q: Do you know whether or not the Tampa Police Department notified the Sheriff's Office here in Hillsborough County about anything pertaining to prints in this case?

A: No, sir, I have no personal knowledge of it.

(R.472-5).

It should be noted that contrary to state witness Fletcher's testimony, no witness was called by the state with reference to usable fingerprints being found at the scene.

In fact, State Attorney Benito's redirect examination of witness Fletcher falsely conveyed the impression to the jury that in this case, no usable prints were obtained at the crime scene:

Q: Detective Fletcher, are you aware that sometimes prints are lifted that turn out to be of no value whatsoever?

A: Yes, sir. A lot of times.

(R.476).

Benito finally drove the point home in closing argument as follows:

> These fingerprints, Detective Fletcher told you about the fingerprints. Sometimes you can lift fingerprints that are of no value.

(R.967).

3. Ballistics

At trial, Detective Nelms testified as follows:

Q: Did you get any revolver from him, sir?

A: No, sir.

Q: Did anybody get any revolver from Mr. Mike Squires as far as the Sheriff's Office is concerned?

A: No, sir. He told me he knew where it was and who had it but he wouldn't tell us.

Q: So you are saying there has never been a revolver taken from Mr. Squires, as far as you know and test fired?

A: I know that there has been weapons taken from Mr. Squires but not in this particular case.

Q: Well, why were the weapons taken from him then?

A: When he was on Carrollton, Georgia.

Q: Do you know whether or not any weapons, any revolvers, .38's or whatever that were taken from him were test fired by the Sheriff's Office here?

A: Taken from him?

Q: Taken from him, yes, and test fired and compared with ballistics?

A: No, sir.

Q: You don't know about this?

A: No, sir.

Q: Could it be then that Mr. Peterson or Mr. Feltman might have dome that then with the police department?

A: That is possible.

Q: And you wouldn't know about it?

A: That is entirely possible. We worked together for

several weeks and then we both carried on independent investigations.

(R 528-9).

However, Nelms' own police report, dated January 11, 1981, reports as follows:

16 NOV 80.

Writer and Lt. Staunko were shown the Smith and Wesson snub nose .38 revolver with which Squires shot the Carrolton PD. The weapon was a 5 shot, model 37, nickle plated, 2" revolver, SN J303252. This weapon was to be transported to the state lab in Atlanta GA to be examined by Lab techs.

* * *

Writer and Detective. Staunko observed a 12 gauge Remington automatic shotgun with polychoke, that had also been used in the shooting incident at Carrolton. The shell casings found at the scene were that of .00 buckshot. Per Lt. Hosey, the .38 revolver will be test fired and the projectiles transported to Tampa for comparison with the projectiles removed from the victim.

(PC.193). It is apparent that either this report was not available to the defense at trial or on direct appeal, or counsel was ineffective for failing to raise it.

B.Prejudice and Materiality

The most recent opinion of the United States Supreme Court addressing the standards to be applied when so-called Brady evidence is suppressed, Bagley, supra, held that reversal is warranted when: 1) the prosecution failed to disclose evidence "favorable to the accused," and 2) there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different.

As to the first inquiry, any evidence relevant to the credibility of a key government witness is every bit as material as exculpatory evidence directly related to a substantive issue. Bagley, supra; Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972). "Such evidence is 'evidence favorable to the accused,' so that, if disclosed and used effectively, it may make

the difference between conviction and acquittal." Bagley at 3380 (citations omitted). As the Napue Court held, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id. at 269; see also Giglio, 405 U.S. at 154.

The witnesses whose testimony would have been subject to impeachment here by the suppressed evidence were critical witnesses for the state. As discussed in Claim II, supra, the state's case was based on the theory, supported by the Chamblisses' testimony, that Donald Hynes was the Appellant's accomplice in the crimes. Detective Peterson's testimony that he never questioned Hynes in connection with the Albritton offenses was carefully orchestrated to avoid conflicting with the Chamblisses' testimony and thereby destroying the Hynes/accomplice theory. (see claim II, supra). Had the evidence of Hynes' non-involvement and non-presence on the day in question been made available to trial counsel, counsel could no doubt have utterly destroyed the credibility of the Chamblisses through impeachment.

The unchallenged testimony of Detective Nelms discussed above could also have been effectively impeached had the police reports been revealed to the defense prior to trial. The fact that Nelms's testimony did remain unchallenged provides additional evidence that trial counsel never saw the police reports. While the facts surrounding the testing of a .38 revolver taken from Mr. Squires may have been a minor aspect of this case, the usefulness to the defense of being able effectively to impeach Nelms is immeasurable. Nelms was an essential state witness; his untruthfulness on the witness stand would have substantially impaired his credibility - had the police report been available to trial counsel.

Without the factual development afforded by an evidentiary hearing, it is difficult to completely determine the substantive import and extent of the withheld

evidence. It is apparent that the existence of good comparison prints found at the crime scene which matched neither the victim nor the defendant would have been useful to the defense. However, since defense counsel never had the opportunity to review the police reports (his "fishing expedition" questions to witness Fletcher make that abundantly clear), he was unable to exploit the absence of Mr. Squires' prints at the scene. Instead, the state intentionally allowed the jury to believe, by the state, that no usable prints were found. The files and records here did not show conclusively that there is no reasonable probability that the outcome would have been different here had the withheld evidence been made available to the defense, and the trial court therefore erred in denying this claim without an evidentiary hearing.

Even if it is determined that there is no reasonable probability that the jury's verdict as to guilt or innocence would have been different if the suppressed evidence had been disclosed to the defense, there still remains the very real probability that the evidence would have resulted in a different outcome as to the sentencing phase of Petitioner's trial. See Smith v. Wainwright, 741 F.2d 1248 (11th cir. 1984); Claim II, supra. This claim cannot be fully developed and judiciously resolved without an evidentiary hearing, and this Court must remand to the trial court for that purpose.

CLAIM IV

MR. SQUIRES WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS CONVICTIONS AND SENTENCE OF DEATH THEREFORE VIOLATE HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. Squires alleged in his 3.850 Motion that he was denied the effective assistance of counsel with regard to both the guilt-innocence and the sentencing phases of his trial. The trial court summarily denied this claim without an evidentiary hearing, making the bare finding that "Mr. Squires was furnished

effective assistance of counsel." (PC. 962). This Court has repeatedly recognized that a hearing is necessary on claims of ineffective assistance of counsel because facts necessary to the disposition of this type of claim would not appear on the record. O'Callaghan v. State, 461 So.2d 1354, 1355-56 (Fla. 1984); Vaught v. State, 442 So.2d 217, 219 (Fla. 1983); Jones v. State, 1056, 1062-63 (Fla. 1984).

In Strickland v. Washington, 104 S.Ct. 2052 (1984), the Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 2065. A person convicted of a crime is entitled to relief where his trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and those deficiencies resulted in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." Id. at 2068. The Court added that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."

The files and records in this case did not conclusively refute Appellant's contention that his trial was not a "reliable adversarial testing process" as required by the Sixth Amendment at either the guilt-innocence stage or the penalty phase and the trial court's summary denial of his 3.850 motion was thus error.

THE GUILT/INNOCENCE PHASE

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an

attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence, Smith v. Wainwright No. 85-3943, slip op. (11th Cir. Sept. 8, 1986); for failing to raise objections, to move to strike, and to seek limiting instructions regarding inadmissible, highly prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983), cert. denied ____ U.S. ____, 79 L.Ed.2d 195 (1984); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper jury argument, Vela, 708 F.2d at 963.

Even if counsel provides effective assistance at trial in some areas, counsel may still be ineffective in his performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Even a single error by counsel may be sufficient to warrant habeas corpus relief. Nelson v. Estelle 642 F.2d 903, 906 (5th cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland, supra.

Counsel's performance at the guilt-innocence phase was unreasonably and prejudicially deficient in a number of respects:

1. Failure to locate and use Donald Hynes

Had defense counsel located and subpoenaed Donald Hynes to testify on behalf of the Appellant, the state's entire theory of the case would have crumbled. As early as August 1981, Mr. Squires asked counsel to locate and talk to Donald Hynes. (PC. 194-95). On September 28, 1981, during a defense deposition of Detective Peterson, Tampa Police Department, (PC. 144), Hynes is referred to by the deponent as having been around defendant and Ed Fowler (an alleged co-defendant) during the relevant time period - and as having been at the Chambliss home around September 7. During another deposition on October 21, 1981, this time of Detective Nelms, Hillsborough County Sheriff's Department (PC. 222), Hynes' name again came up in connection with the Albritton offenses. The critical role Hynes would play became even more obvious on January 13, 1982, after the two Chambliss depositions were taken. Despite his relevance, apparently no one from the Public Defender's office ever interviewed Hynes.

His Department of Corrections files show that at all significant times, Hynes' location was known to the State; the witness could easily have been found because he was on parole from February 5, 1980 until he was arrested January 14, 1981 for having "aided an escaped prisoner" (Squires) - a charge later dropped - and rearrested on July 24, 1981 for "grand theft", for which he was convicted on February 9, 1982 - and put on probation. (PC. 109-20). Although trial counsel was not aware of the extent of the exculpatory information that Hynes could have provided, i.e., that he was not involved in the offense nor with the Appellant or the Chamblisses on September 2nd (see claims II, III, supra), surely he was aware, or surely should have been, that Hynes possessed some sort of useful information. The fact that the State put on testimony and argued that Hynes was both an eyewitness to and a participant in these crimes, yet never charged him with any of

these offenses, would have put reasonably effective counsel on notice that the testimony of Donald Hynes was the key to the entire case. Minimal investigation would have made it apparent that the State was deliberately and desperately attempting to assure Hynes' unavailability at trial: despite a substantial prior criminal record, he was given probation for grand theft, on February 9, 1982, less than a month before defendant's trial, through the Hillsborough County State Attorney's office.

Department of Corrections files indicate that during the course of the investigation of the "aiding escaped prisoner" charge, Hynes was given a polygraph test, which he passed. (PC. 110). No copy of the polygraph report appears in the Public Defender office files (see claims II, III supra). More interesting is the date of Hynes apparent meeting with Mr. Squires in Tampa as stated in official files: September 3, 1980. Charlotte Chambliss, however, testified at Mr. Squires' trial that Hynes was with the defendant on August 26th or 27th, and again the next day, as well as on the night of September 2nd. Her husband corroborated her testimony on this point. Terry Chambliss in fact reported that defendant had allegedly intended to "teach Hynes how to rob." (R. 603). As noted above, this testimony by the Chamblisses was also given at their respective depositions on January 13, 1982 - which would have given defense attorney Edwards ample time to seek out and interview Hynes prior to defendant's trial on March 1. No such interview ever took place, and no reasonable explanation for this fatal omission is apparent from the record. Appellant submits that had he been available at trial, Donald Hynes could have totally corroborated his own alibi testimony, and that his presence would have deprived the State of its spectral (and absent) "co-defendant". Prejudice can be established from Hynes' responses to the polygraph examiner's questions and the official summary of the examination, (see PC. 164-69, and discussion, claim II). A plenary evidentiary hearing was clearly necessary to resolve this claim.

2. Failure to Suppress Appellant's Admissions and Statements

The medical records attached to Appellant's 3.850 Motion (PC. 232-668), indicate that his purported admissions to Nelms, Peterson, Seimer, Dayton, and possibly Fain would have been excludable had counsel filed and pursued pre-trial motions to suppress and had presented the medical evidence at a hearing. Appellant was convicted by a combination of the Chamblisses' direct testimony and his own statements. Had the latter not gone to the jury, there would have been little evidence on which to base a conviction - especially in light of defendant's alibi.

Trial counsel presented no testimony (because he filed no Motions to Suppress) concerning the effects of either the various medications used to alleviate Mr. Squires' pain, or the chronic pain itself. This inexplicable failure is unreasonable attorney conduct, as these effects would have cast serious doubt on the Appellant's ability to make voluntary statements and admissions.

a. Statements to Law Enforcement Officers

Two serious constitutional issues were presented by the Appellant's discussions with Detectives Nelms, Peterson, and Feltman (who was involved in the investigation but did not testify at the trial): the formal validity of any waiver by the Appellant of his Miranda rights, and his physical condition at the time the various statements were made.

Mr. Squires was involved in a shoot-out with Georgia police on November 11, 1980; during the course of that incident, he received serious leg and foot wounds, which resulted in infection and ultimately required amputation of his left leg. All of the relevant alleged admissions and statements made by Appellant to Nelms, Peterson, and Feltman took place between November 16, 1980 and February 17, 1981, during which time he was being regularly treated for his chronic pain with narcotics and sedatives. During this period, bullets remained embedded in his flesh, and his broken bones were distorted, as shown by X-ray.

The Public Defender's office file reflects that Mr. Squires' medical records

were never obtained or examined by experts to determine whether he was competent to waive his Miranda rights during the period in question. Appellant pled detailed allegations regarding his painfully debilitating injury and the regimen of mind numbing narcotics administered to control that pain in his 3.850 motion (see PC. 37-40), and was prepared to prove those allegations and present expert testimony regarding the effects of the chronic pain and constant medication at an evidentiary hearing. All police conversations with Mr. Squires during that period were taped; there are no notes at all in the Public Defender's office files reflecting that anyone there ever listened to those tapes, tapes which could, if introduced and judiciously considered at an evidentiary hearing, prove that Appellant was medicated, or in pain, or sedated, or otherwise unable to validly waive his Constitutional rights at the time of his questioning.

The expert testimony that could have been presented at a plenary evidentiary hearing could have shown the debilitating effects of Appellant's chronic pain and constant medication and its effects on his ability to validly comprehend and waive his Miranda rights. The effects of chronic pain, as Mr. Squires would have experienced it, include manifestations of depression, loss of judgment and impaired reasoning ability, weakness of motivation, despair, hopelessness, periods of panic, and even death wishes. (see PC. 40, 669-99). The various side-effects of this type of prolonged suffering are incalculable; they very likely could have rendered any rational waiver of constitutional rights totally impossible - and all statements and admissions "involuntary." None of this, however, was ever explored by trial counsel and consequently was never properly developed at a pre-trial suppression hearing.

It is inconceivable, in light of the pivotal role played in Mr. Squires' trial by these various "admissions," that no suppression motion was ever filed, nor any hearings held at which testimony could have been taken to establish the facts (medical and otherwise) surrounding the various statements. Even aside from the

medical records, the deposition of Detective Nelms suggests that at least the initial conversation in November 1980 may well have been suppressible as involuntary. Detective Nelms testified that when he first arrived in Carrollton, Georgia, he was unable to talk to Appellant at all because of the latter's physical pain, and therefore did not see him until the next day (when defendant was on pain killers) (see PC. 200).

Had trial counsel properly challenged the voluntariness of these statements, the trial court could well have found them excludable. The physical condition and treatment of the accused are relevant factors in determining the voluntariness of a confession. If the accused has suffered wounds in the perpetration of the crime, in the course of his apprehension, or otherwise, any resulting pain has been recognized to play a part in the willingness to confess. U.S. ex rel. Cronan v. Mancusi, 444 F.2d 51 (2nd Cir. 1971), cert. denied 404 U.S. 1003 (1972). The illness of an accused may also be considered in determining the voluntariness of any statements made during the course of that illness. Ziang Sung Wan v. U.S., 266 U.S. 1 (1926).

Similarly, when the accused had received medical treatment, the voluntariness of his confession may be influenced by the effect of drugs. In Beecher v. Alabama, 408 U.S. 234 (1972), among the factors considered by the Court in finding the confession inadmissible was the fact that the accused was "in a 'kind of slumber' from his last morphine injection" administered to ease the severe pain resulting from a bullet wound to his leg inflicted during his apprehension. Id. at 238; See also Reddish v. State, 167 So.2d 858 (Fla. 1964). Any use of drugs to induce the accused to confess will be viewed as a form of coercion. See Townsend v. Sain, 372 U.S. 293 (1963).

This Court has frequently addressed the voluntariness issue in similar contexts. In Nowlin v. State, 346 So.2d 1020 (Fla. 1977), this Court held that before incriminating statements may be presented to the jury, they must be shown to

be voluntary. In Nowlin, the defendant was questioned by the police while in the hospital, and made several incriminating statements. The court found that the defendant made the statements "under circumstances which appear . . . to raise some questions of on whether the statements were voluntarily given," Id. at 1022, and held that before such statements could be admitted into evidence either in the case-in-chief or for impeachment purposes, the Fourteenth Amendment required the trial court to make an initial determination of voluntariness once the defendant objected. Nowlin, supra, citing Jackson v. Denno, 378 U.S. 368 (1964). In such a proceeding the State has the burden of proving voluntariness by a preponderance of the evidence. Brewets v. State, 386 So.2d 232 (Fla. 1980).

In making a determination of voluntariness, the court must look to the "totality of the circumstances." Applying this principle, this Court held, in Reddish v. State, 167 So.2d 853 (Fla. 1967), that the admission into evidence of defendant's confession was reversible error. The facts of Reddish bear marked similarity to the case before the bar: the defendant there was hospitalized at the time the confessions were obtained; he had been given blood transfusions, and had also been administered both codeine and demoral thirty-five minutes before the State's interrogation. Only one doctor testified as to the effects of the drug and this testimony "left much to be desired on the . . . impact of the accumulated dosages on the man's mental capacity to give a free and voluntary confession that could send him to the electric chair, within the constitutional standards." Id. at 861-62. More recently, in DeConingh v. State, 433 So.2d 501 (Fla. 1983), this Court held that based on the totality of the circumstances, the defendant's statements were not made freely and voluntarily when defendant was both hospitalized and administered thorazine and valium prior to the police interrogation.

In the case at bar, we know that the Appellant was under treatment and in pain for a period of approximately six months, during which time he was almost

continuously taking narcotic medication - and during which time all the incriminating admissions and statements were made. No evidence was ever presented in any form indicating either the influence that narcotics (such as codeine) or the chronic pain itself would have had on defendant's capacity to waive his Miranda rights and/or make voluntary statements. Nor has any evidence ever been offered as to why trial counsel inexplicably, indeed incredibly, failed to develop the facts presented for the first time in Appellant's 3.850 motion and challenge the voluntariness of these statements.

Trial counsel similarly did not explore the specifics of the Miranda warnings given to the Appellant, if any, on each and every occasion on which he was questioned by law enforcement officers. His questions at trial and during depositions did not in any serious or meaningful manner address the Miranda issue. The 3.850 court's summary denial of this part of the claim alone, disregarding for these purpose the numerous other instances of unreasonable ineffectiveness of trial counsel presented by Appellant's 3.850 motion, without an evidentiary hearing was manifest error. An evidentiary hearing must be had to properly resolve this issue.

b. Statements to Polygraph Examiner

No motion to suppress was ever filed - and therefore no evidentiary hearing was ever held - in connection with the admission of Mr. Squires's statements to polygraph operator Al Dayton. Trial counsel did object to the testimony of this witness (R 543) but only during trial; after a short proffer by the State and no other inquiry by the trial court, the judge ruled that Dayton's testimony was admissible. (R 545).

Dayton testified that he spoke with Appellant on February 16, 1981. Again, no inquiry whatsoever was made as to Appellant's physical condition as that time; had any such inquiry been made, it would have been revealed that Mr. Squires was in great pain and on medication, and about to sign a consent for amputation at the time of this questioning. In addition, the "admissions" made by Appellant to Dayton

and ultimately conveyed by Dayton to Detective Nelms in defendant's presence, were part of the "post-test" (See PC. 710-11), and therefore inadmissible as polygraph test results. There is no evidence of Miranda rights being read prior to this latter portion of the test. In fact, Dayton testified in deposition that Miranda rights were not given at that time. (PC. 713). Again, since no pretrial suppression hearing was held on this issue, the trial court was not apprised of all the surrounding circumstances: because no post-conviction evidentiary hearing was held either, the 3.850 court was equally uninformed. Trial counsel knew of Dayton's testimony 3 1/2 months before Appellant's trial, since he had taken a deposition on 10/21/81; nonetheless, he filed no pre-trial motion, objected only during the trial, and never investigated or produced the substantial evidence of an unknowing waiver and involuntary statement.

c. Statements to Correctional Officers and Inmates

The Appellant was arrested by the Florida authorities on escape charges on December 25, 1980. His sixth amendment right to counsel had therefore attached at the time of that arrest. Smith (Jimmy Lee) v. Wainwright, 777 F.2d 609, 619 (11th Cir. 1985). Appellant's encounters with Correctional Officer Rex Seimer and fellow-inmate Robert Fain, and the statements made in connection therewith, took place after that date, after his sixth amendment right to counsel had already attached.

The admission of statements elicited from the accused by confidential informants acting under pay of or promise of reward by the state after the accused's sixth amendment right to counsel has attached violates the sixth amendment. U.S. v. Henry, 447 U.S. 264 (1980); Massiah v. U.S., 377 U.S. 201 (1964). Because the admissibility of Appellant's statements was never tested in the appropriate pre-trial suppression hearing forum, facts indicating that either of these witnesses was an agent of the state were not developed or adduced at trial, although such indications would have been apparent to reasonably diligent

counsel.

1.) Rex Seimer

No motion to suppress was ever filed and no evidentiary hearing was ever held in connection with the admissibility of Mr. Squires' statement to Department of Corrections Guard Rex Seimer, nor did trial counsel object to this testimony at trial. However, since Seimer was an employee of the State, it should have occurred to trial counsel that Seimer may have been acting as a "state agent" in soliciting admissions from the defendant. Mr. Squires' own testimony at trial (see R.905) supports that his statements to Seimer were the result of Seimer's questioning of him. Seimer's own statements show that he was well aware of and interested in obtaining the reward that had been offered in connection with the case. The admissibility of these statements also was never tested in the appropriate pre-trial evidentiary forum, and again, the statements were never examined in light of Mr. Squires' medical condition at that time (see above).

2.) Robert Michael Fain

Mr. Fain, a prison inmate, testified as to a conversation he had with defendant at Hillsborough County jail in February 1981, in which defendant allegedly admitted his participation in the murder and in fact, took credit for doing the actual killing. During Fain's pre-trial deposition, the witness testified as follows:

> Q: Other than what you allege Mr. Squires told you down at the jail, what do you know about any incident of a man being killed from a gas station?
>
> A: What do you mean?
>
> Q: Are you saying that all you know about this situation is what Mike Squires told you?
>
> A: That's it.

(PC. 727).

At trial, however, Fain admitted that the police had told him about the wounds

found on the victim:

> Q. Okay. Again, tell me now where he told you that this particular victim was shot at?
> A. Okay. Once under the shoulder.
> Q. Once under the shoulder?
> A. Right, with the shotgun, and then once right between the eyes, from my understanding from the way the PD explained it at point blank range. Then once behind the ear and once in the back of the head someplace and that is four.

(R.598).

Trial counsel unreasonably failed to capitalize on this inconsistency. More importantly, Fain's testimony at trial suggests that he, like Seimer, may have been acting as an agent of the state in soliciting admissions from Mr. Squires. However, since no pre-trial Motion to Suppress was filed, no evidentiary hearing was ever held on this question - nor, again, on the issue of medical competence.

Prejudice

All of the statements and admissions allegedly made by Mr. Squires between November 1980 and mid-February, 1981 were crucial to his conviction. Their suppression would clearly have changed the result, as they were the only evidence other than the testimony of the Chamblisses-- which we know no was false-- connecting the Appellant to the crime. In light of what the medical records in fact show, trial counsel's failure to seek out the records and file Motions to Suppress (or at least provide testimony at trial based on them) constitutes prejudicial ineffectiveness of counsel.

Even if suppression had not been granted, persuasive medical evidence - which we know from the records was available - should also have been introduced by trial counsel as part of his substantive defense case. Such medical evidence would have corroborated Mr. Squires' testimony as to why he made the various admissions to law enforcement personnel in the first place, i.e., to get to Tampa where he felt he would get better medical care (see R. 843-4, 48-9). In addition, had the jury been convinced by expert testimony that Mr. Squires' mind was clouded by pain and

narcotics, they would have had to minimize the various (contradictory) statements and admissions made by him. The unreasonable omissions of trial counsel as regards Appellant's statements are in and of themselves, without regard to the numerous other deficiencies alleged by Appellant in his 3.850 motion, sufficient to create "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different," Strickland, and Appellant has thus made a sufficient showing of prejudice under Strickland.

It is not entirely clear, however, that under the circumstances extant at his trial Appellant need make the required Strickland showing of prejudice. "Where. . give rise to a presumption of prejudice, he will prevail." Smith (Jimmy Lee) v. Wainwright, 777 F.2d 609, 616 (11th Cir. 1985), citing U.S. v. Cronic, 104 S.Ct. 2039, 2046 n.20 (1984). The "circumstances... giv[ing] rise to a presumption of prejudice" in Smith were trial counsel's unreasonable failures to move to suppress confessions which provided the primary evidence against the accused and the only evidence which the state needed to convict him. Id. at 616-17. "Because Smith's trial counsel failed to move to suppress the confessions," the court held, "the state's case was not subjected to the meaningful adversarial testing which is required under our system of justice." Id. at 617. The circumstances here are remarkably similar, and should likewise give rise to a "presumption of prejudice."

3. Failure to Effectively Impeach and Cross Examine State Witnesses

a. Charlotte Chambliss

During the trial, Charlotte Chambliss testified that the Appellant came to her home on August 26 or 27, stayed a few hours, left, returned the next day with Hynes (who then left), stayed for a few days, left for a day or so, and finally returned on September 2, 1980, late at night, again with Hynes. (R. 549-52). Appellant's contention was that he first went to the Chambliss home on September 4, 1980, left on the 6th, and then returned on the 7th, on which date he

and Hynes robbed the Thoni station, after which the two of them went to the Chambliss home late at night on September 7, 1980. Appellant presented documentation of the Thoni robbery of September 7, 1980, in the form of police reports, with his 3.850 motion.

During her deposition in January, 1980, Charlotte Chambliss was questioned by trial counsel as follows:

> Q: But he never mentioned anything about a robbery of a station, a United 500 or a market or anybody being kidnapped or anything like that; is that right?
>
> A: He did at one time say he and Hynes had hit that gas station on Waters, Thoni's.
>
> Q: Thoni's?
>
> A: Uh-huh. All he said was -- he laughed and said, "We blubbed it up." I am sorry. That was prior to then. I am very sorry. That was back with Donald Hynes in the very beginning. It wasn't after he came back the second time; it was the first time.
>
> Q: So, that was probably on the 2nd, right, up here. Okay. Did he talk about any other robberies? Let me ask you: Any other robberies pertaining to a gas station or anything of that nature?
>
> A: No.

(PC. 754-55) (emphasis added).

The state subsequently followed up on this line of questioning:

> Q: Back in August, August 26, 1981, do you recall a conversation that Mike had with Terry about teaching Donald Hynes something?
>
> A: Uh-huh.
>
> Q: What was that, ma'am?
>
> A: He had said that he was going to have to teach him to make a living from robbing because he couldn't get a job, and this is what I was referring to when they were talking about the Thoni's station. I don't know if I mentioned that to you.
>
> Q: Okay. The conversation that you heard about them robbing the Thoni's gas station --
>
> A: He and Hynes came back to our house laughing about

it.

Q: -- was that prior to September 2?

A: Yes, sir.

Q: The night they pulled up on September 2, 1980, there was no conversation at that time about hitting a Thoni's, was there?

A: No, sir. There was no mention of, you know, robbery or anything of that sort, just the few comments that I caught about, you know, that there were no witnesses left and this sort of thing.

Q: And the conversation about them pulling off a Thoni's robbery had occurred earlier?

A: Yes, sir, before the 2nd.

Q: Now --

A: That was just a couple of days after he came to town.

(PC. 760-61) (emphasis added).

Trial counsel never used this inconsistency to impeach Mrs. Chambliss at trial, although in fact it would have served to confirm Appellant's story: that everything the Chambliss's testified happened on the night of September 2, 1980 in fact happened on the night of September 7, 1980.

Detective Nelms during his deposition on October 21, 1981, told defense attorney Edwards that he had talked to Charlotte Chambliss. During that conversation, Charlotte told him that she didn't like Ed Fowler and wouldn't allow him around her house. (PC. 223). At trial, however, the witness testified that she did not know Ed Fowler (R.557). Trial counsel unreasonably and inexplicably failed to exploit this important inconsistency.

b. Detective Peterson

Charlotte Chambliss testified during her deposition and at trial that she knew the September 2 date for certain because she kept a diary which had been lost (PC. 762). When questioned by defense counsel Edwards about the diary, Mrs. Chambliss told him that Detective. Peterson had asked her to pin down the

dates, but never asked for the diary (R.567). In light of the critical importance of dating the events as to which the Chambliss' testified, it is inconceivable that a seasoned detective did not request the diary as evidence. It is even more inconceivable that trial counsel failed to use this crucial information in his cross examination of the witness.

Defense attorney Edwards had in his file a memo from another assistant Public Defender, one Bruce P. Cury, who was present at a conversation between Peterson and the defendant in June of 1981. (PC. 771-72). During that conversation, Peterson acknowledged that he knew defendant had not committed the murder. Once again, trial counsel fatally and unreasonably failed to use this information at all in his examination of Peterson: had he done so, he could have substantially weakened the state's case by virtually destroying Peterson's highly incriminating testimony.

Peterson testified that Mr. Squires told him, in one of their several conversations about these offenses, that Fowler had told Mr. Squires the site of the murder was an overgrown orange grove. (R.761-62). Although the photographs which Mr. Squires saw showed the victim's body lying among overgrown weeds, Peterson implied that only someone personally familiar with the scene and the events would know about the orange grove. However, a newspaper article appearing in the Tampa Tribune the day after the body was found -- September 4, 1980 -- reported that the body was found in an orange grove (PC. 773-74). Trial counsel again inexplicably and unreasonably failed to use this information for impeachment of Detective Peterson, a critical witness for the state. Competent and effective defense counsel would surely have done so.

Prejudice

The Eleventh Circuit Court of Appeals, in Smith (Dennis) v. Wainwright, No. 85-3943, slip op. (11th Cir., Sept. 9, 1986), recently addressed an ineffective assistance of counsel claim premised on trial counsel's failure to impeach a critical state witness with a prior inconsistent statement. Because "[a]vailable

evidence would have had great weight in the assertion that [the witness's] testimony was not true," and that "evidence was not used and the jury had no knowledge of it," the Smith court found that there was "a reasonable probability" that, had trial counsel properly impeached the state's witness with his prior inconsistent statement, the result would have been different, and that the Strickland prejudice standard had thus been met. Smith, supra, slip op. at 5, citing Strickland, 104 S.Ct. at 2052.

4. Failure to Reasonably and Adequately Investigate, Prepare, and Present Alibi Defense

a. Failure to Diligently and Adequately Develop Credit Card Receipt Evidence

The Public Defender's office undertook representation of the Appellant in June 1981, after his efforts to retain private counsel were unsuccessful (R.1058). Immediately thereafter, the Appellant advised that office of his proposed "alibi defense," which required that he carefully trace his whereabouts from late August through September 7, 1980. Mr. Squires requested that his attorney obtain receipts for gas he had purchased in various states during that period, all of which purchases had been made with three stolen credit cards, belonging to Petit, Lott, and Bitner. These receipts were critical for two reasons: as evidence of the Appellant's presence in certain cities on the relevant dates, and as an aid to him in recalling the people with whom he'd had contact during that period, people who could corroborate his alibi.

Trial was scheduled in October 1981 for January 15, 1982 (R. 1065), then continued to February 9, 1982, (R.1067) and ultimately continued again (R 1070) until March 1, 1982, on which date the trial did in fact commence. The Public Defender office files reveal, however, that subpoenas for the credit card records and written inquiries thereon went out on February 3, 1982; some of the critical documents were only being received by the defense team during the trial (see PC.

779-86). In fact, trial counsel even misled the trial court on this matter-- at a hearing on February 9, 1982, seeking a continuance of the trial scheduled for that day, Edwards advised the judge that one reason for his motion was the fact that "We have already issued subpoenas to have the credit cards here or copies of them and they have not arrived." (R.1070) (emphasis added). As indicated by the record, however, they had not arrived because the inquiries had only gone out six days before, well after the earlier scheduled trial date.

Without the early assistance of the credit card receipts to refresh his memory, the Appellant was unable to provide his attorney with all the information available to support his alibi before the trial commenced. Since the trial, Mr. Squires has recalled numerous other persons who would have been of assistance in corroborating his defense (see discussion below), and was prepared to present such evidence at a post-conviction evidentiary hearing. In light of the complicated nature of the Appellant's alibi and the extensiveness of his travels - all of which defense attorney Edwards knew in the summer of 1981, well before the trial - the failure of the Public Defender's office to move quickly to obtain these documents fatally weakened the presentation of Appellant's alibi at trial and therefore constituted prejudicial ineffectiveness of counsel.

At the beginning of the defendant's testimony, Attorneys Benito and Edwards stipulated that there was no dispute that Appellant had used the stolen credit cards in question and that the signatures (albeit using false names) were indeed his signatures. This stipulation occurred during a bench conference and was never announced to the jury (R.787). The authenticity of Appellant's signature on the various receipts was nonetheless questioned by Benito without objection during his cross-examination of Mr. Squires, despite the stipulation and without objection by defense counsel:

> Q. At that time, you were using the credit card of a man by the name of Petit?
> A. I was using three credit cards. A. F. Petit, James

F. Bitner and David L. Locke.
Q. You are the only person that can testify that you were using those credit cards, isn't that correct?
A. That I was using them? No, sir, I am not the only one.
Q. Who else can tell us that?
A. The Sheriff's Department in Carrollton County, Georgia. They confiscated all three cards from me.
Q. But you are the only one testifying today that you used the card, right?
A. I am the only one testifying that today, yes, sir.
Q. Mr. Petit doesn't know you were using that card, does he?
A. Yes, sir, he does know.
Q. He did back then?
A. I don't know if he knew at that time.
Q. Did he lend you the card?
A. No, sir, he didn't loan it to me.
Q. Mr. Locke didn't know you were using his card back then, did he?
A. he reported it as being stolen.
Q. But he didn't know you were using it, did he?
A. I am not sure.

(R.855-6). Assistant State Attorney Benito again attacked the authenticity of the stipulated signatures, again without objection by defense counsel, during his closing argument:

> Just look at this board with all of these credit cards all over it [referring to Defendant's Exhibit 20, R 1271, which consisted of a map and credit card receipts for each location where defendant had purchased gas during the relevant time period]. This isn't a case. The case comes out of his mouth.

(R.972) (emphasis added).

Early on, Appellant asked his attorney to obtain a handwriting expert to verify his signatures on the credit card receipts; Edwards never did so. Without either a strong statement to the jury that the signatures were valid or a handwriting expert to testify to that fact, the state was able to suggest that their authenticity was questionable - a serious blow to Mr. Squires' entire case.

b. Failure to Seek Continuance When Critical Witnesses Became Unavailable

It was absolutely essential to the establishment of the Appellant's alibi that certain credible witnesses appear on his behalf; two such witnesses were Charles

Barr and Gwendolyn Chambers. On the day of trial, neither Barr nor Mrs. Chambers were present in Tampa. Their absence was critically contributive to Appellant's conviction, since the state was able to cast doubt on Barr's testimony (taken only over the telephone and read to the jury), and to suggest that Curtis Chambers (Gwendolyn's nineteen year old son, who did appear) was lying at defendant's request. (See State's closing argument at R. 965-6). Appellant was prepared to show, at an evidentiary hearing on his 3.850 motion, that Charles Barr's live testimony would have been virtually unattackable. Defense counsel never asked for a continuance, or otherwise took action to ensure their availability, and the apparent result was that Appellant's alibi defense was not believed by the jury.

1) Charles Barr:

Mr. Barr's father-in-law was ill at the time of defendant's trial; the man later died. Barr's testimony was introduced by way of a telephonic deposition, taken in the trial judge's chambers during the trial itself, and read to the jury almost immediately after it was taken. Incomprehensibly, attorney Edwards did not seek to have Appellant present during that deposition. It is apparent from the entire proceeding that Barr had not been properly prepared for direct testimony or cross-examination, an elementary aspect of criminal trial preparation, and consequently the state was able to cast serious doubt on the accuracy of Barr's recollection, and thus to thwart defendant's alibi.

Barr was prepared to testify at an evidentiary hearing on Appellant's 3.850 motion that he is and was indeed positive as to the date he fixed defendant's car in Dothan, Alabama. (See PC. 787-89). It is apparent than no one from the Public Defender's office assisted him in any way to prepare for his testimony, and the result was devastating to the presentation of Appellant's alibi defense. Had Appellant been present during the telephonic deposition (or had Barr testified in person), he could have assisted his attorney in helping the witness to recall the critical dates and thus prepare him for testifying.. Edwards never consulted with

Mr. Squires as to the proper questions to ask, and Barr's testimony was thus easily subjected to the State's attack.

2) Gwendolyn Chambers:

Curtis Chambers (now deceased), who testified he was with the Appellant and Ed Fowler in Bowden Junction, Georgia, from the evening of August 28th until the morning of August 30th (R.729), a critical portion of the alibi time frame, was an abysmal witness. The nineteen year old was painted by the state as a young man who "hero-worshipped" defendant Squires and would lie for him. (See R. 965-6).

Witness Chambers' mother, on the other hand, who could have testified that Appellant arrived at her home on the night of August 28th, that she entered the hospital with an ear problem on the 29th, and that Appellant and her son came to visit her in the hospital on the morning of August 30th, would have been unimpeachable. Mrs. Chambers was in the hospital again in March of 1982 during the trial. Defense counsel made no effort to have her present at trial (there is no subpoena in the file), to have the trial continued so she could appear, or otherwise to perpetuate her testimony. The state advantageously used her failure to appear both in cross-examination (R. 864) and in closing argument (R. 965), and totally destroyed the efficacy of her son's testimony.

c. Failure to Develop and Use Critical Evidence Provided by the Accused

Mr. Squires provided numerous "leads" to his attorney early in case preparation which would have, if adequately investigated and developed, substantiated his alibi. Much of this information was ignored by trial counsel, and Appellant was and is prepared to show at an evidentiary hearing that witnesses who could have at the time and will now testify as to his whereabouts on the critical alibi dates were never contacted by his attorney. (See, e.g., PC. 790-806, affidavits of Premeaux family).

INEFFECTIVENESS AT PENALTY PHASE

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. at 190. In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare mitigating evidence for the jury's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, ____ U.S. ____ (1984), 81 L.Ed.2d 358, 104 S.Ct. 3575, adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, ___ U.S.___, 85 L.Ed2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, ____ U.S. ____, 82 L.Ed.2d 874, 879, 104 S.Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, ____ U.S. ____, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Young v. Zant, 677 F.2d 792, 797 (11th Cir. 1982); Holmes v. State, 429 So.2d 297 (Fla. 1983). Mr. Squires' trial counsel did not meet these constitutional standards.

This Court and the federal courts have repeatedly recognized the importance of uncovering, investigating, and presenting "humanizing" mitigating evidence to the capital sentencing jury. In O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), this Court granted a stay of execution and remanded the case for an evidentiary hearing where there were allegations made in a 3.850 motion that trial counsel conducted an

inadequate investigation into mitigating circumstances for sentencing. The Court there examined allegations that trial counsel never had a mental status examination of his client performed, did not contact the defendant's family, and did not discover physical and psychological difficulties experienced by the defendant during his childhood. Id. at 1355. In contrast to O'Callaghan's trial counsel, Appellant's trial counsel conducted no investigation into mitigating circumstances for sentencing, much less an inadequate one.

In King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct. 1051 (1984), adhered to on remand, 748 F.2d 1402 (11th Cir. 1984), the Eleventh Circuit vacated a sentence of death imposed by a Florida court because of trial counsel's failure to adequately investigate the existence of mitigating circumstances. The same action was taken in Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct. 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984). In Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Eleventh Circuit held that trial counsel must thoroughly investigate, prepare, and present a full mitigation defense in capital cases, stating:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Tyler, 755 F.2d at 743 (citations omitted).

Despite the recognized importance of this sort of evidence, trial counsel conducted no or grossly inadequate investigation, and presented no evidence at sentencing. In essence, there was no penalty phase to Mr. Squires' trial, only pro

forma attorney argument and a majority jury recommendation of death after 5 to 10 minutes of deliberation. (R.1031).

Appellant would have proven at an evidentiary hearing on his 3.850 motion that his trial attorney never discussed the penalty phase of a capital trial with him in any timely or meaningful way. Any suggestion on the record that Appellant did not want any evidence introduced in mitigation on his behalf is simply not true. Mr. Squires did want his attorney to use evidence of his having cooperated with law enforcement on numerous occasions during his previous incarcerations. (See PC. 820-21). In fact, William Beardsley, who could have testified regarding the Appellant's assistance in solving and prosecuting several crimes to which he was a witness, was apparently subpoenaed for trial and attended, but was never called to testify. William Whitacre, an Assistant State Attorney in Orlando, also would have been available on this issue: Appellant had provided his attorney with copies of Whitacre's letters on his behalf (PC. 822-23), but Whitacre was not used either.

Any hesitancy on the part of the Appellant to assist his attorney in the development of this type of "humanizing" mitigating evidence, or any suggestion that the Appellant actually hindered this type of investigation can be attributed to trial counsel's failure to explain the nature and effect of the bifurcated capital trial. Trial counsel did not inform the Appellant that his innocence was no longer an issue at the sentencing proceeding until that sentencing proceeding was already underway. (See R.1035). Given the fact that the sentencing proceeding commenced almost immediately after the jury returned their guilty verdict, it would be understandable that an uninformed defendant might well believe that his guilt or innocence was still being litigated and therefore that the presentation of evidence on mitigation would detract from his innocence defense. Had Appellant understood the nature of the bifurcated proceeding, he would have played a more active and insistent role in assisting his attorney to investigate and present background mitigating evidence. Some effort to humanize the defendant and to explain his

obviously extensive criminal record would have given the jury grounds to find non-statutory mitigating circumstances. Appellant alleged in his 3.850 Motion, and was prepared to prove at an evidentiary hearing, compelling facts relating to his early childhood and adolescence which would have mitigated against the jury's recommendation of death had they been presented at sentencing. (See PC. 60-64).

Even if it could be shown that Appellant attempted to restrict his attorney's investigation into his family background, this would still not excuse the total failure which occurred here. The Eleventh Circuit, in a case where the capital defendant ordered his attorney to foregoe penalty phase investigation, explained why such limitations imposed by the defendant do not totally absolve counsel for the capital defendant from his responsibility to investigate and present mitigating circumstances at sentencing:

> The reason lawyers may not "blindly follow" such commands is that although the decision whether to use such evidence in court is for the client, Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983) (lawyer not bound by client's counseled decision not to rely on insanity defense), cert. denied, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984), the lawyer must first evaluate potential avenues and advise the client of those offering possible merit. Here, Solomon [trial counsel] did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a matter of deference to Thompson's wish. Although Thompson's directions may have limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. . . . We conclude that Solomon's failure to conduct any investigation of Thompson's background fell outside the scope of reasonably professional assistance.

Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); see also Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1980) (defendant's "instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyer's failure to investigate the intoxication defense.... Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-

informed advice.")

More recently, in Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986), trial counsel had testified at an evidentiary hearing in the district court that "he made little effort to produce mitigating evidence because Thomas had stated that he did not want to take the stand and did not 'want anyone to cry for him.'" Id. at 1324. The district court nevertheless granted habeas relief on petitioner's ineffective assistance of counsel claim, and the Eleventh Circuit affirmed, holding that

> [a]lthough a capital defendant's stated desire not to use character witnesses and refusal to testify limits the scope of required investigation. . . the record supports the district court's decision that counsel's failure to investigate and present mitigating evidence fell below an objective standard of reasonableness under prevailing professional norms.

Id. (citations omitted).

The facts in mitigation which are now available, and the facts and circumstances of the attorney conduct which prevented these facts from being presented to the jury, are numerous and complex, and cannot be fully and adequately developed without an evidentiary hearing. The 3.850 court's summary denial of this claim without a hearing was manifest error.

Appellant detailed numerous other specific errors and omissions of trial counsel in his 3.850 motion, errors affecting counsel's performance at both the guilt and penalty phases of his trial. (see PC. 45-49, 54-59, 64-71). Space limitations prevent the precise repetition of each and every specific error alleged in his 3.850 motion in this brief. Unlike the major errors discussed above, the various other errors of counsel factually outlined in Mr. Squires' Motion to Vacate may not each by themselves support a finding of constitutionally deficient legal representation; however, Mr. Squires would submit that taken together and considered for their combined impact on the guilt/innocence and sentencing portions of his trial, they add up to gross ineffectiveness of counsel, which is "reasonably likely" to have affected the result. These errors in their cumulative impact

resulted in a total failure of effective representation during the guilt phase and a total lack of viable defense strategy during the penalty phase.

An evidentiary hearing was required because the facts and records did not conclusively show that counsel was effective. The trial court's failure to hold such a hearing or make and meaningful and informed findings on this issue was error. This Court must remand for an evidentiary hearing.

CLAIM V

CRITICAL TESTIMONY WAS TAKEN IN MR. SQUIRES' ABSENCE, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Defense counsel took the telephonic deposition of witness Charles Barr during the trial, with the specific intention that the deposition would be read into the record (and to the jury) in lieu of Barr's live testimony. The deposition itself, therefore, was actually trial testimony. Nonetheless, Mr. Squires' was not present, nor did his attorney seek his presence. As a direct result, Mr. Squires' was unable to assist counsel in the examination of this witness.

During the course of the trial, it was stated that crucial defense witness Charles Barr - the only subpoenaed witness who could place Appellant someplace other than Tampa on September 2, 1980 - was not going to be available at trial. It was therefore stipulated by the State and defense counsel that a telephonic deposition would be taken during a court recess, the resulting testimony to be read to the jury and into the record when the trial recommenced. (R.686).

Appellant was not present during the deposition. There is no evidence that his presence was requested by his attorney. Although he was, of course, present when the testimony of witness Barr was read to the jury, he at that point could provide no assistance whatsoever to his counsel in the course of questioning the witness, or in response to answers.

Witness Barr was somewhat uncertain in his deposition as to the date on which he met the Appellant and repaired his Camaro. Barr would have testified at an

evidentiary hearing on Appellant's 3.850 motion that he is, upon proper reflection, certain that the date was September 2, 1980. (See PC. 787-89). Had Appellant been present during this critical portion of his trial, he would have assisted his attorney to help witness Barr recall the date in question. Since the State used Barr's deposition uncertainty about the date to great effect during closing argument, there can be no question that Appellant's absence during the taking of this testimony was prejudicial and therefore resulted in an unconstitutional conviction and sentence.

The 3.850 court, in denying this claim wrongly analogized what occurred at Appellant's trial regarding Barr's testimony to a deposition to perpetuate testimony taken pursuant to Fla. R. Crim. P. 3.190 (j). Because that rule does not expressly provide for the defendant's presence when a deposition is taken upon application by the defense, the court reasoned that Appellant's presence during the telephonic deposition of Barr was not required. (PC. 28-30).

Under the rule of criminal procedure referred to by the 3.850 judge, a deposition to perpetuate testimony may be taken only upon order of the court obtained via a pretrial motion. Fla. R. Crim. P. 3.190 (j)(1). The record contains no motion or order. The first indication that the witness would not be available does not appear until well into the trial, when the state and the defense stipulated to the telephonic deposition and the immediate presentation of the transcript of same to the jury. This is clearly not the procedure contemplated by Rule 3.190 (j); a deposition taken under that rule is taken pursuant to an orderly process which gives the defendant and the deponent an opportunity to review the testimony before it is presented to the jury.

Even if the court's analysis of Rule 3.190 was correct, it completely ignored the operative federal constitutional guarantees.

The absence of the Appellant during testimony at his capital trial without an express record waiver was fundamental error implicating constitutional rights. In

Francis v. State, 493 So.2d 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 Fla.R.Crim.P. 3.180 and the Fourteenth Amendment, the Court found that defendants have a constitutional right to be present during jury challenges as well as a right created by Florida Rule of Criminal Procedure 3.180(e)(4). Such a right must be knowingly and intelligently waived on the record 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. Bustemonte, 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 (1938).

Francis, 413 So.2d at 1178.

Francis is one of a long line of cases which hold a that a defendant has a Sixth and Fourteenth Amendment right to be present during all critical stages of trial. Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1984); Hall v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). "One of the most basic of rights guaranteed by the Confrontation Clause is the accused's rights to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. U.S., 146 U.S. 370 (1892). It is beyond question that the taking of testimony during a capital trial is a stage of trial at which this Sixth Amendment guarantee is operative. 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 v.

Wainwright, 685 F.2d 1227, 1260 n.49; Walker v. State, 284 So.2d 415 (Fla. 2d DCA 1972) (resentencing defendant without defendant's presence constituted fundamental error); Cole v. State, 181 So.2d n. 698 (Fla. 3d DCA 1966).

As in Francis, there is certainly no record waiver in this case of Appellant's right to be present. 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 (1966). The Appellant here was absent during the testimony of a critical witness, and there is no evidence of misconduct which would justify his absence. Henry v. State, 94 Fla. 783, 144 So. 523 (1927). This case is not like State v. Melendez, 244 So.2d 137 (Fla. 1971), where the defendant freely and knowingly waived any objection after his absence from the courtroom, and subsequently acquiesced and ratified his counsel's selection of a jury during that absence. In any event, it is extremely doubtful that principles of "acquiescence" and "ratification" even apply to circumstances such as those sub judice, where testimony is taken in the defendant's absence.

As stated above, a defendant has an absolute right to be present at all stages of a capital trial, especially when testimony is being taken. Francis v. State, 413 So.2d 1175 (Fla. 1982); Proffitt v. Wainwright, 685 F.2d 1277 (11th Cir. 1982); Fla.R.Crim.P. 3.180. This 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). In Fails v. State, 60 Fla. 8, 53 So. 612 (1910) the Court held that a defendant has a right to and must be present during a capital trial.

The Court in Cole v. State, 181 So.2d 698 (3d DCA 1966) noted that whether counsel, with leave of court, may waive the presence of the defendant in a capital case has not been decided in Florida. The court further noted that there were

cases that held in effect that a defendant may waive his presence in a noncapital case, but the waiver must be personally made. In order for a waiver to be binding on a defendant it must be made in his presence or by his express authority or be subsequently acquiesced in by him. The Court held that "if the appellant's right to be present was waived without his knowledge and consent or acquiescence it would be such a denial of appellant's rights under the laws of Florida as to render the judgment vulnerable to collateral attack." Cole, 185 So.2d at 701.

In State v. Melendez, which involved a noncapital trial, this Court addressed

> counsel's waiver of defendant's presence during the jury selection process and said that where a defendant has counsel, constructive knowledge of the proceedings may be imputed to defendant but that this doctrine only applied to those cases in which upon defendant's reappearance at his trial, he acquiesces or ratifies the action taken by his counsel during his absence. In Melendez, we explained that upon Melendez's reappearance, the trial judge carefully questioned him as to his knowledge and understanding of his right to be present, and he freely ratified the actions of his counsel in selecting the jury.

Francis v. State, 413 So.2d 1175 (Fla. 1982).

The Eleventh Circuit has repeatedly held that the defendant's right to be present at a capital trial is so fundamental that it cannot be waived. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). In Hall the state contended that the defendant was not absent during any critical stages of the trial and that therefore his absence did not violate any of his rights. The Eleventh Circuit stated:

> We are concerned about two matters: (1) the circumstances surrounding Hall's absence during the trial court's discussion with the jury concerning items of evidence during the jury's deliberations, and (2) the effect of our recent holding that a defendant may not waive his presence in a capital case announced in Proffitt v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698. Precedent in this circuit suggests that Hall's absence during discussions with the jury may constitute error. United States v. Benavides, 549 F.2d 392 (5th Cir. 1977). We read

> Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial.

Hall, 733 F.2d at 775.

The Eleventh Circuit Court has also held that "Until the Court expressly overrules its decisions in Diaz and Hopt, however, we are bound by the rules established in those cases" that a capital defendant's right to presence is nonwaivable. The Court did indicate that if there were to be a departure from that rule it would be predicated on the knowing-and-voluntary-consent requirement established in the noncapital context through Illinois v. Allen, 397 U.S. 337 (1970), and Johnson v. Zerbst, 304 U.S. 458 (1938) (which established the standard).

Appellant is aware that this Court has recently ruled on the issue of voluntary waiver of a defendant's presence in a capital case in Johnson v. Wainwright 463 So.2d 207 (Fla. 1985). The Johnson court specifically distinguished Francis by stating that Johnson voluntarily excluded himself from the courtroom without voicing an objection while in the presence of his attorney who was making the request in the open courtroom. The Court rightly pointed out that in Francis the proceeding took place in the absence of the defendant and without the express consent of the defendant.

In the instant case the defense attorney implicitly waived the defendant's right to be present at the deposition which was knowingly being taken in lieu of live testimony. There is no record waiver by the defendant, no acquiescence, nor any ratification in open court. The judge did not question him as to his knowledge and understanding of his right to be present as in Melendez. If there was a waiver, it was only by counsel, and it clearly was not a proper or knowledgeable one by defendant.

Appellant has raised this issue in connection with his claim of ineffectiveness of counsel as well. (See claim IV, supra). The Eleventh Circuit, in Johnson v. Wainwright, 778 F.2d 623 (11th Cir., 1985) recently held as follows:

> We cannot fault the defendant for failing to assert an objection when his attorney - the individual on whom he depended to preserve his rights - arranged for him to be removed from the courtroom.

Id. at 628.

In the case at bar, therefore, Appellant's absence during the taking of critical testimony constitutes fundamental error and results from a failure of his own attorney to preserve his fundamental rights.

CLAIM VI

THERE WAS INSUFFICIENT EVIDENCE THAT MR. SQUIRES KILLED, ATTEMPTED TO KILL, OR INTENDED OR CONTEMPLATED THAT LETHAL FORCE WOULD BE USED, AND THE IMPOSITION OF THE DEATH PENALTY THEREFORE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Enmund v. Florida, 458 U.S. 782 (1982), was decided by the United States Supreme Court on July 2, 1982, less than two months after Mr. Squires' death sentence was imposed. In essence, the Enmund case held it to be a violation of the Eighth and Fourteenth Amendments to sentence someone to death who neither killed nor attempted to kill, nor intended or contemplated that lethal force would be used, even though such an individual might be guilty of First Degree Murder under State law (as a principle, or under an aider or abettor felony murder statute).

The murder of Jesse Albritton took place during the course of a robbery and kidnapping. Although the indictment (R.6-7) charged premeditated murder, as well as kidnapping and robbery, the case was argued and submitted to the jury on alternative theories of premeditation and felony murder (R 992-4), as is permitted under Florida law. Knight v. State, 338 So.2d 201 (Fla. 1976). The verdict for first degree murder does not reflect whether the jurors found him guilty of premeditated murder or guilty of felony murder.

The evidence at trial concerning Appellant's role in the robbery, abduction and murder of Jesse Albritton consisted of confessions or statements about the crimes Appellant allegedly made to a number of people. For example, State witness

Robert Fain testified that Appellant admitted personally firing the shots that killed Jesse Albritton. (R.589-590). At the other end of the spectrum, Detective Jerald Nelms of the Hillsborough County Sheriff's Office testified for the State that Appellant told him he was not at the exact place where Jesse Albritton was shot, but was close by. (R 513). (In a previous statement to Nelms, Appellant allegedly had said he was present when Albritton was shot, but had waited by the car while a man named Ed Fowler and another person shot Albritton. (R.512-13)).

In his written order giving reasons for imposing the death sentence, Judge Leon found, along with four other aggravating circumstances, that the capital felony was committed while defendant was engaged in the commission of a robbery and kidnapping. (R.119). In his discussion of aggravating circumstances Judge Leon stated that Mr. Squires murdered Jesse Albritton. (R.123). However, in his findings in mitigation, the court referred to Mr. Squires' testimony that he had not personally shot the victim, and concluded:

> Evidence based solely on the defendant's own testimony supports the contention that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(R.124).

At the end of the Order Judge Leon summed up as follows:

> THEREFORE, this Court finds that five aggravating circumstances exist, and that one mitigating circumstance exists.

(R.125).

Well after this Court affirmed Appellant's conviction, and in so doing, rejecting the claim that this death sentence violated Enmund, the United States Supreme Court decided Cabana v. Bullock, 106 S.Ct. 689 (1986). Bullock made it clear that a death sentence cannot stand unless specific findings that the defendant himself killed, attempted to kill, or intended to kill be made in an adequate proceeding before the appropriate state tribunal. No such finding was

made here, neither by the trial court nor by this Court on direct appeal.

A. No Proper Jury Finding

It is not possible to know the theory upon which the jury convicted Appellant-- there was a general verdict. The state repeatedly stressed to the jury the felony murder option, at voir dire and in trial argument (see, e.g., R.342-346, 388-89, 935-37, 992, 994, 1006). At one point the prosecutor argued to the jury that if the jurors believed (as the sentencing judge apparently did in finding the mitigating circumstance under discussion) Squires' confession that he helped rob and kidnap Jesse Albritton, but did not pull the trigger, then felony murder fit "like a hand fits into a specially made glove." (R.936). As in Bullock, "neither the jury's [general] verdict of guilt nor its imposition of the death sentence reflects a finding that [Mr. Squires] killed, attempted to kill, or intended to kill." 106 S.Ct. at 695.

B. The Trial Court's "Finding" Was Insufficient

The trial court's sentencing order did not make the requisite Enmund/Bullock finding. Although the judge wrote that Appellant himself killed Jesse Albritton, this was contradicted by his finding in mitigation that Appellant played a relatively minor role as an accomplice in a capital felony committed by another. Therefore, one cannot conclude from this record that the court found beyond a reasonable doubt that Appellant killed, attempted to kill, or intended to kill, as required under Enmund and Bullock.

The finding in mitigation in the Order was unqualified. There is no evidence that the sentencing court did not accept Mr. Squires' testimony as ultimate fact; in finding the mitigating circumstance of relatively minor participation as an accomplice, the court indeed appears to have accepted Mr. Squires' testimony. One should bear in mind that the only evidence as to what part Appellant actually played, if any, in the robbery, abduction, and shooting of Jesse Albritton came from his purported statements. There was no physical evidence or eyewitness

testimony to refute his "admissions" that his participation was minimal. For this reason, there is no reason to conclude that the sentencing judge necessarily believed Mr. Squires' more inculpatory admissions rather than his less inculpatory ones.

At best the sentencing order was ambiguous. This Court has said on previous occasions that "the trial judge's findings in regard to the death penalty should be of unmistakable clarity," Mann v. State, 420 So.2d 578,581 (Fla.1982), a requirement which the sentencing order herein fails to meet. In Mann the court could not determine from the record whether the trial judge found certain mitigating circumstances to be present, and refused to speculate as to exactly what the judge found. It cannot be determined here exactly what the judge meant by his order, and the record is even less clear as to the Appellant's degree of involvement in the crime.

This is of critical importance where the finding in itself could prevent the death penalty. Ambiguity regarding one of several aggravating circumstances is unacceptable, but a death sentence can survive the striking of one such circumstance. When ambiguity exists regarding the existence (or absence) of a fact which would in and of itself absolutely preclude imposition of death, no amount of ambiguity is tolerable.

C. This Court's Findings

Because the trial judge's sentencing order was at best ambiguous, and the record contained contradictory evidence as to the Appellant's intent and degree of involvement in the murder, this Court's holding on direct appeal that "both the record and the sentencing order indicate that the defendant was personally responsible for the murder of Jesse Albritton," Squires v. State, 450 So.2d 208, 211 (1984), is not a constitutionally sufficient Enmund/Bullock finding either. If the trial judge's finding was insufficiently specific and unconstitutionally ambiguous under Enmund and Cabana, which Appellant submits that it must be, this

Court's affirmance of that finding must fail for the same reasons. Moreover, a finding of "personal responsibility" is a far cry from a finding that the accused himself killed, attempted to kill, or intended or contemplated that life would be taken.

It is clear then that no sufficient specific finding of actual participation or individual intent was made at any level of the Appellant's prior proceedings, and his sentence of death therefore must fail. No such finding beyond a reasonable doubt can legitimately be made, given the state of the evidence. The insufficiency is shown by the ambiguity in the trial court's findings. Because "the question whether the defendant killed, attempted to kill, or intended to kill might turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record," Bullock, 106 S.Ct. at 689 n.5, such findings are more appropriately made by the trial court, and because the trial judge himself was unable to make a consistent specific finding, this Court must vacate the sentence.

CLAIM VII

THE PENALTY PHASE JURY INSTRUCTIONS, REINFORCED BY IMPROPER PROSECUTORIAL VOIR DIRE AND ARGUMENT, UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S.Ct. 2633 (1985), AND THE THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Court instructed the jury at the penalty phase that its "duty [was] to advise the Court as to what punishment should be imposed ... [The] final decision as to what punishment shall be imposed is the responsibility of the Judge." (R 1028). The instructions did not, however, inform the jury that the sentencing judge must grant great deference to the life recommendation of the penalty phase jury, or that in fact such overrides are seldom affirmed by the Florida Supreme Court. See, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Radelet, Rejecting the Jury, 18 U.Cal., Davis L. Rev. 1409 (1985).

These misleading instructions which minimized the jury's role were bolstered by Assistant State Attorney Benito's remarks, both during voir dire, at the very beginning of trial, and during his closing argument in the penalty phase, the very end. (See R.347 [twice]; R.1020).

The misinstruction at issue here was an error of constitutional magnitude for the reasons articulated in the recent case of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). The Court in Caldwell held that prosecutorial argument which tended to diminish the role of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's decision would be automatically reviewable by the Mississippi Supreme Court. Because the prosecutor failed to point out that the jury's decision would be reviewed with a presumption of correctness by the Mississippi Supreme Court, the United States Supreme Court held that the jury was erroneously lead to believe that the ultimate responsibility for the death sentence lied elswhere. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the prosecutor's improper and misleading argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated the death sentence. Caldwell, 105 S.Ct. at 2645, citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The dimunition of jury responsibility which occurred here is far more egregious than that in Caldwell. Here, the information received by the jury came with the imprimatur of the court, through its penalty phase instructions, whereas in Caldwell the information was provided merely by counsel in argument. Moreover, this misleading instruction was reinforced by the same type off prosecutorial argument condemned in Caldwell, further minimizing the jury's sense of responsibility. As in Caldwell, it cannot be said that the misleading instructions and arguments here had no effect on the sentencing decision, Id., and Appellant's death sentence was therefore imposed in violation of the eighth and fourteenth

amendments.

CLAIM VIII

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. SQUIRES' DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

The jury in Mr. Squires' sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of the Florida Supreme Court following Mr. Squires' trial have made clear, the law of Florida has never been that a majority vote was necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So.2d 521 (Fla. 1982); Harich v. State, 437 So.2d 1082 (Fla. 1983) However, Mr. Squires's jury was erroneously told that, even to recommend a life sentence, its verdict must be by a majority vote. These erroneous instructions are also the type of misleading information condemned by Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) (see claim VII, supra), in that they "create a misleading picture of the jury's role." Id. at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

There is no question that error was committed by the charge in this case. The Court instructed: "Your decision may be made by a majority of the jury. The fact that a determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case cannot be reached by a single ballot should not influence you to act hastily..." (R. 1031). As in Harich, supra, the

incorrect instructions here were not ameliorated by the single passage accurately stating that a six to six vote is a recommendation of life (R.1039): immediately after that correct statement of the law, the court again incorrectly informed the jury that "when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed..." (R.1031-2) (emphasis added). The erroneous impression thus created in the minds of the jurors was enhanced by references during jury voir dire to a majority being necessary for the advisory verdict. (See e.g. Benito at voir dire, R.347, and similar references during Benito's closing argument, R 1024).

As a matter of state law, Appellant's jury was erroneously instructed. Although the record does not reflect the actual vote, it is entirely possible that the jury's three hour deliberation was attributable to what they believed was a deadlock, i.e. a six to six vote which is under the law a recommendation of life. Appellant thus may well have been sentenced to die only because his jury was misinformed and misled. Such a procedure violates the Eighth and Fourteenth Amendments, for it creates the substantial risk that a death sentence was imposed in spite of factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S. at 605. Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction may have encouraged Mr. Squires' jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643. A clear and present danger was created by the instruction that one of the jurors changed his vote to death in order for a majority verdict to be reached -- not because of equivocation as to the appropriate penalty but because a

belief that a majority vote had to be reached. It is akin to the giving of an "Allen charge" to the jury in a penalty trial, for it erroneously tells the jury to reach a majority verdict where there is no need to do so. It falsely pressures the jurors to reach a verdict. A verdict on life or death should not be the product of such pressure and mistake but should be the result of independent and unhampered deliberations. Because the challenged instructions were the type of misinformation condemned by Caldwell because it "creates a misleading picture of the jury's role," Id. at 2646, the defendant need not show prejudice: under Caldwell, the state must show that the challenged jury misinformation had "no effect" on the sentencing decision. Id.

CLAIM IX

BY SENTENCING MR. SQUIRES TO DEATH BASED UPON A STATUTORY AGGRAVATING CIRCUMSTANCE SUBSUMED IN THE CONVICTION FOR FIRST DEGREE MURDER, THE TRIAL COURT FAILED TO GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, UNCONSTITUTIONALLY PLACED HIM TWICE IN JEOPARDY, AND ALLOWED FOR AN AUTOMATIC DEATH PENALTY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Florida's felony-murder law, Sec. 782.04(1)(a) of the Florida Statutes, permits a person who perpetrates or attempts to perpetrate certain enumerated felonies, including robbery and kidnapping, to be convicted of first-degree murder when a human being is killed by that person or by one of his co-actors in the felonies, regardless of the presence of absence of premeditation. The only conclusion consistent with the trial court's finding in mitigation that Mr. Squires was a minor participant in a homicide committed by another person (see claim VI, supra) is that the court believed the defendant to be guilty not of premeditated murder, but of a felony-murder perpetrated during the robbery and kidnapping of Jesse Albritton.

Florida law also permits the fact that a murder occurred during the course of certain enumerated felonies, including robbery and kidnapping, to be used as an

aggravating circumstance which will support a sentence of death. Sec. 921.141(5)(d), Florida Statutes (1981). The court that sentenced Mr. Squires to death found as an aggravating circumstance that the homicide of Jesse Albritton was committed while Mr. Squires was engaged in the commission of a robbery and kidnapping. (R 118-119).

Appellant was convicted of first degree murder, but it is impossible to tell upon which basis the jury found him guilty. The jury was instructed upon both theories, and the prosecution repeatedly urged the jury to accept the felony murder as well as the premeditated murder theories. In Florida, the usual form of indictment for first degree murder under section 783.04, Florida Statutes (1977), is to "charge murder. . . committed with a premeditated design to affect the death of the victim." Barton v. State, 193 So.2d 618, 624 (Fla. 2d DCA 1958). Such an indictment, by longstanding Florida practice, charges felony murder as well as premeditated murder, despite the apparent absence of felony murder language in the body of the indictment. Lary v. State, 104 So.2d 352 (Fla. 1958). That is why the jury was questioned during voir dire regarding felony murder, why the prosecutor repeatedly argued that theory to them, and why the judge appropriately instructed them that they could return a verdict on felony murder.

The trial judge's sentencing order indicates that the verdict was based a felony murder theory: in that order Judge Leon found, along with four other aggravating circumstances, that the capital felony was committed while defendant was engaged in the commission of a robbery and kidnapping. (R 119). Moreover, the "defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." (R.124).

In any event, when a jury is instructed upon alternative grounds, "it is impossible to say under which clause of the statute the conviction is obtained." Stromberg v. California, 283 U.S. 359, 368 (1931). Thus, as a matter of fundamental federal constitutional law, we must assume for the purposes of the

present analysis that the first degree murder conviction in this case was based upon the finding that a robbery and/or kidnapping had occurred.

The finding of aggravating circumstances to support a sentence of death must entail a process which genuinely narrows. An aggravating circumstance must have some independent objective criteria upon which one can distinguish a particular defendant who has received the death penalty from another who has not. "Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." Zant v. Stephens, 103 U.S. 2733, 2743 (1983). As noted by the Eighth Circuit court of Appeal in Collins v. Lockhart, 754 f.2d 258 (8th Cir. 1985), "we see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function." Id. at 263. In a felony murder situation with robbery as the underlying felony, the Collins court noted:

> Every robber murderer has acted for pecuniary gain. A jury which has found robbery murder cannot rationally avoid also finding pecuniary gain. Therefore , the pecuniary gain aggravating circumstance cannot be a factor that distinguishes some robbery murders from others. In effect, a robber murderer enters the sentencing phase with a built-in aggravating circumstance. . . . The state has no need to show any additional aggravating circumstances at the sentencing phase. . . . The duplication in this case is a consequence of how the state of Arkansas has chosen to define capital felony murder.

Id. at 264-65.

As in Arkansas, the Florida legislature has decided to define capital felony murder in such a way as to have one of its elements the commission of a robbery or a kidnapping. To then allow the underlying felony conviction to be utilized as an aggravating circumstance a) makes the death penalty automatic, in violation of the eighth amendment, b) fails to distinguish one capital felony murder from another, and to genuinely narrow the class of persons eligible for the ultimate penalty of death, in violation of the eighth amendment, and c) violated double jeopardy

provisions by punishing a defendant twice for the same conduct.

CLAIM X

THE DEATH PENALTY IS IMPOSED IN FLORIDA ON THE BASIS OF IMPERMISSIBLE, ARBITRARY, AND DISCRIMINATORY FACTORS, INCLUDING RACE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant's claim that the death penalty is imposed in Florida on the basis of impermissible, arbitrary, and discriminatory factors, such as race of the victim, and that consequently his sentence violated the eighth and fourteenth amendments, was summarily denied. The claim is properly raised in post-conviction proceedings. Stewart v. Wainwright, 11 F.L.W. 508 (1986). While Appellant asserts and incorporates herein the factual and legal allegations contained in Issue X of his Rule 3.850 Motion, and assigns as error the trial court's denial, he recognizes this Court's prior rulings, See, e.g., State v. Henry, 456 So.2d 466 (1984), the issue is presented here in order to preserve it.

CONCLUSION

For the foregoing reasons, Mr. Squires respectfully requests that this Honorable Court vacate the conviction and sentence of death or, in the alternative, remand the cause for an evidentiary hearing and findings of fact.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Litigation Director

Office of the Capital Collateral
Representative
Independent Life Bldg.
225 W. Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

BY: _____
ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. MAIL to Candace M. Sunderland, Assistant Attorney General, Department of Legal Affairs, 1313 Tampa St., Suite 804, Park Trammel Building, Tampa, FL 33602, this 5 day of November, 1986.

Attorney