IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,003

WILLIAM MICHAEL SQUIRES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

MARK E. OLIVE
Litigation Coordinator

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
Independent Life Building
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,003

WILLIAM MICHAEL SQUIRES,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

REPLY BRIEF OF APPELLANT

I.

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

The order denying Mr. Squires' 3.850 Motion was nothing more than a stamp placed on the motion itself by a court clerk, with the word "denied" hand written in the appropriate space. The trial judge did not make any factual findings or conclusions of law, did not refer to the extensive record and files in the case, nor stated any reason for his summary denial of all claims. The only record of the trial court's summary denial of all the claims presented in Mr. Squires' Motion, other than the forementioned stamp, is contained in the transcript of the brief non-evidentiary hearing which was held on the Motion--the bare recital of the claims by the presiding judge with the single word "denied" after each claim.

This Court has repeatedly held that "under rule 3.850 procedure, a

movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); see also Riley v. State, 433 So.2d 976 (Fla. 1983); Demps v. State, 416 So.2d 808 (Fla. 1982); LeDuc v. State, 415 So.2d 721. When there is a summary dismissal, those parts of the record which reveal conclusively that the movant is entitled to no relief must be appended to the denial. Fla. R. Crim. P. 3.850. Meaningful appellate review is foreclosed, absent strict adherence to these requirements.

Mr. Squires presented substantial and compelling claims to the trial court in his 3.850 Motion, many of which involved sworn factual allegations which were not "of record". See claims II, III, IV, infra. Without development and resolution of these factual allegations, it plainly cannot be said that the files and records in the case conclusively show that Mr. Squires was entitled to no relief, and the trial court's summary denial without an evidentiary hearing was reversible error. See Groover v. State, 489 So. 2d 15 (Fla. 1985); Jones v. State, 478 So. 2d 346 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

Contrary to the State's assertions in its answer brief, the movant does not have the pleading burden of showing that he will ultimately prevail before being entitled to an evidentiary hearing. Since it can never be known from paper whether Mr. Squires can in fact 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. Neither Ramsey v. State, 408 So. 2d 675 (Fla. 4th DCA 1981) nor Johnson v. State, 362 So. 2d 465 (Fla. 2d DCA 1978) place the burden on the

3.850 movant to show that he or she is entitled to an evidentiary hearing, as asserted by the State in its brief. The files and records here do not and did not conclusively show that Mr. Squires was entitled to no relief, and "the order [should] be reversed and the cause remanded for an evidentiary hearing." Fla. R. App. P. 9.140 (g).

Assuming, arguendo, that the motion or the files and records in the case did conclusively show that Mr. Squires was entitled to no relief, it was the trial court's obligation to reveal why, rather than being this Court's function to discern. Although a trial court may properly summarily dismiss a 3.850 motion under the above cited standard, it must do so in an order "specifically setting out the reasons for the denial," Brown v. State, 390 So. 2d 447 (Fla. 5th DCA 1980), and must attach to that order "a copy of that part of the files and records which conclusively shows that the the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also Arango v. State, 437 So. 2d 1099 (Fla. 1983); Demps v. State, 416 So. 2d 808 (Fla. 1982); Gonzalez v. State, 451 So. 2d 1041 (Fla. 3d DCA 1984); Walker v. State, 432 So. 2d 727 (Fla. 3d DCA 1983); Wilson v. State, 430 So. 2d 554 (Fla. 2d DCA 1983); Offord v. State, 427 So. 2d 1080 (Fla. 2d DCA 1983); Miller v. State, 427 So. 2d 1079 (Fla. 2d DCA 1983). The trial court which summarily dismissed Mr. Squires' 3.850 motion without an evidentiary hearing did not attach any portions of the records or files to its "order," did not identify which, if any, portions of the file or record refuted Mr. Squire's claims, and did not even identify the reasons for denying all of Mr. Squires' claims. This Court should thus remand.

II.

APPELLANT 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's theory of the crime, which they repeatedly explained to the jury, was that Mike Squires and one Donald Hynes together robbed a United 500 service station at gunpoint, then abducted the attendant and killed him. The State's key witnesses, Terry and Charlotte Chambliss, the only witnesses that could place Mr. Squires in the area on the night in question (there were no witnesses to the crime, nor any physical or forensic evidence), both testified that Hynes was with Mr. Squires at all relevant times on the night the offense occurred. It is now apparent that Hynes was not with Squires on the night in question, that the testimony of the Chamblisses was therefore false, and that the state knew it to be so: undersigned counsel presented with the 3.850 motion police reports which show that the authorities had taken statements from Hynes prior to the trial and had absolved him of any complicity in the crime.

The State in its answer brief misperceived the nature of the constitutional violation raised by this claim, and incorrectly based their legal analysis on the Brady v. Maryland, 373 U.S. 83 (1963), standard of review for prosecutorial suppression of exculpatory evidence. As will be discussed below, the critical nature of the testimony in question and the undisclosed evidence which proves that testimony to have been false was such that Mr. Squires could still prevail under the strict Brady standard, but he is not required to. Under the legal standard properly applied when addressing the prosecution's knowing use of false testimony, Mr. Squire's

need only show that there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375, 3383, (1983), quoting United States v. Agurs, 427 U.S. 97, 104 (1976); see also Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985); Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984). This is a far cry from the Brady "reasonable probability" standard applied by the State, (see Answer Brief, p.21), and Mr. Squires has no difficulty meeting the correct standard.

Donald Hynes made statements to the police denying any involvement in the crime for which Mr. Squires was convicted, and in fact denying even being in the company of Mr. Squires on the date in question, in direct contention with the testimony of the State's star witnesses, the Chamblisses. Hynes' statements were not disclosed to the defense. Irrespective of the results of the polygraph administered to Hynes, it is manifestly obvious that the investigating officers, agents of the State, determined Hynes' statements to be truthful: it is beyond belief that the State would not press charges against a man who, as the prosecutor argued at trial, participated with Mr. Squires in an armed robbery and then stood by and watched his codefendant "pump four shots in Jesse Albritton's head." (R. 975). Thus having determined Hynes' statement denying any and all involvement to be true, the State nevertheless not only allowed their key witnesses to testify falsely to Hynes' participation in the crime, but also argued that "fact" to the jury in both opening and closing argument. Mr. Squires alleged in his verified 3.850 motion that the State knowingly presented false testimony at his trial,

testimony which was material to his conviction, and it can thus not be said that the motion conclusively shows that he is entitled to no relief. An evidentiary hearing was therefore required. Porter v. State, 478 So. 2d 33 (Fla. 1985).

Careful steps were also taken before trial to conceal the falsity of the testimony and argument concerning Hynes. Detective George Peterson of the Tampa Police Department testified in his sworn deposition that he had never talked to Hynes regarding the instant murder, when in fact the statements that absolved Hynes of suspicion in the eyes of the police were made by Hynes to Detective Peterson, fully seven months before the above-discussed deposition.

The type of misconduct engaged in by the State here, i.e., the knowing use of false testimony, goes beyond the withholding of exculpatory evidence discussed and condemned in Brady, although the concerns expressed in Brady are necessarily present as well. See claim III, infra. The standard of review in cases where the state has knowingly presented false testimony is thus more lenient from the defendant's viewpoint than the Brady standard. This is so because the former type of conduct is "a violation more egregious than the mere passive, nondisclosure disapproved in Brady," Demps v. State, 416 So.2d 808, 810 (Fla. 1982), in that it involves the "deliberate deception of a court and jurors." Giglio v. United States 404 U.S. 150, 153 (1972).

Although Brady's "reasonable probability" standard has been modified, in Bagley, the standard to be applied when the prosecution knowingly uses false testimony, which predates and was unchanged by Brady, has not been. The State correctly assessed Bagley's modification of the Brady/Agurs standard for review of cases involving the suppression of exculpatory evidence, (see

Answer Brief, pp.19-20), but it conveniently ignored the Bagley Court's reaffirmation of the "any reasonable likelihood" standard long applied to cases involving the prosecution's knowing use of false testimony. Because "a conviction obtained by the knowing use of false testimony is fundamentally unfair," according to the Bagley Court, it "must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury." Id. at 3382 (emphasis added).

The United States Court of Appeal for the Eleventh Circuit recently addressed this identical issue in Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986), and corrected the federal district court's erroneous application of the Brady "reasonable probability" test to the prosecution's knowing use of false testimony instead of the appropriate "any reasonable likelihood" standard reaffirmed in Giglio and Bagley. Brown, 785 F.2d at 1463. Because that "case d[id] not involve mere nondisclosure of [exculpatory] evidence but knowing introduction of false testimony and exploitation of that testimony in argument to the jury," id. at 1464, the Brown court reversed the district court's denial of the writ which was premised on the erroneous application of the Brady standard.

Although Mr. Squires submits that he could and does meet the more difficult Brady standard, this is not the standard to be applied to this claim, contrary to the State's assertions, and this Court should not, indeed cannot, apply that standard to a claim involving the prosecution's use of false testimony.

III.

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

The relevant facts supporting this claim are briefly stated in claim II, supra, and incorporated herein by reference.

Contrary to the argument of the State, Mr. Squires claim that the suppression of Donald Hynes' pre-trial statements violated his due process rights in violation of Brady v. Maryland does not (but could) "rest on the fact that Hynes passed a polygraph." (Answer Brief, p.22). Regardless of the polygraph results, it is manifestly clear that Mr. Hynes made statements to the police that absolved him of any complicity in the crime for which Mr. Squires was convicted. (See discussion in Claim II, supra). It is these statements themselves which form the basis of this claim, not "the fact that Hynes passed a polygraph and that obviously, if the defense knew that, it could have seriously impeached the testimony of Terry Chambliss." (Answer Brief, p.22). The statements themselves, irrespective of the results of the polygraph, would have seriously impeached the testimony of the Chamblisses. For the same reason, the materiality of those statements to the defense cannot be denied. See, e.g., Napue, supra; Giglio, supra; Bagley, supra; Smith (Dennis) v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), grant of writ of habeas corpus affirmed after remand ___ F.2d ___, No. 85-3943 (11th Cir. Sept. 8, 1986).

There can be no question but that statements materially contradictory to the testimony of critical state witnesses are the type of "exculpatory evidence" contemplated by the due process analysis of Brady, its progenitors, and its progeny. See, e.g., Napue, 360 U.S. at 269; Giglio, 405 U.S. at 154;

Bagley, 105 S.Ct. at 3383; Smith (Dennis) v. Wainwright, supra. The due process concerns of Brady obviously focus on evidence exculpatory of the accused, and the State's argument that because Hynes' statements did not exculpate Hynes himself, (see Answer Brief, p.22), no Brady violation occurred, misses the point entirely.

Nor can there be any question but that the statements made by Hynes to police officers, including those made to the polygraph examiners, were discoverable under Florida's rules of discovery. See Fla. R. Crim. P. 3.220 (l)(ii),(2),(4). The question of the credibility of Hynes' statements is one for the jury, and the fact that the results of the polygraph exam are not conclusive and therefore not admissible under Florida law does not render the statements themselves inadmissible, contrary to the assertions made by the state in its brief. (See Answer Brief, p.22). The prosecution obviously determined the statements to be true, as Hynes was not prosecuted for first degree murder, the crime of which he would have been guilty had the testimony of the Chamblisses and the argument of the trial prosecutor been true, and it is highly probable that the jury would have made a similar assessment of Hynes' credibility.

The admissibility vel non of the results of the polygraph test administered to Hynes does affect Mr. Squires' assertion that the State withheld material exculpatory evidence. Those cases cited by the state in support of the proposition that because polygraph results are inadmissible they are not discoverable, and that consequently Hynes' statements were not discoverable, do not in fact affect the admissibility and discoverability of the statements themselves. In Carter v. State, 474 So. 2d 397 (3d DCA 1985), cited by the state, the district court of appeal for the third circuit upheld

a trial judge's denial of a criminal defendant's motion to compel discovery of the results of a polygraph exam. That court's denial was based, however, on the fact that the state had provided extensive discovery regarding the polygraph examination, withholding only the results themselves:

> [T]he defense was given a wealth of information regarding the polygraph examination. It was given a copy of the questions asked during the polygraph examination and the... answers. The defense was given a copy of the statement the [examinee] made to the polygraph examiner... The defense was also told that it was the polygraph examiner's opinion that the [examinee] was untruthful in some of her answers.

Carter, 474 So. 2d at 398. Great emphasis was also placed on the fact that the statements made to the polygraph examiner were consistent with the testimony at trial. Id. Here, by contrast, the state provided nothing to the defense regarding the highly critical statements of Hynes, statements which were clearly inconsistent with the testimony of key state witnesses.

The polygraph results would, however, have been admissible at the sentencing phase of Mr. Squires' trial, to cast a doubt on the Chamblisses' stories, and the State's 'not admissible therefore not discoverable' analysis fails completely in this aspect. All evidence concerning the facts surrounding a capital offense is admissible at the penalty phase, including evidence which casts a "lingering doubt," i.e., one not rising to the level of reasonable doubt but nonetheless 'lingering' 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.

As discussed in Claim I, supra, the records and files in this case, even if the appropriate portions thereof had been attached to the order denying

relief, do not conclusively show that no Brady violation occurred here. The allegations of non-record facts made in Mr. Squires sworn 3.850 Motion required an evidentiary hearing for the resolution of his claims, and this Court must remand to the trial court for that purpose.

IV.

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

The State was concededly correct in its assertion that the fact that the defense is ultimately unsuccessful does not render counsel ineffective. (Answer Brief p.27). However, if the defendant can identify specific unprofessional errors and omissions of counsel which provide a reasonable probability that they were the cause of the unsuccessful outcome, he will prevail in his claim that counsel rendered ineffective assistance in violation of the sixth amendment. Mr. Squires did so in his 3.850 motion.

Mr. Squires alleged in his 3.850 motion a plethora of specific errors and omissions, many of which would, standing alone, be grounds for reversal on sixth amendment grounds, but which should in addition be considered in their totality and for their cumulative effect on the outcome on Mr. Squires' trial. Mr. Squires will discuss below only those specific errors and omissions the discussion of which by the state in their answer brief requires a response.

a. Donald Hynes

As to trial counsel's failure to investigate, depose, and ultimately call Donald Hynes as a witness for the defense, it is hard to conceive of a more unprofessional and egregious error, particularly in the light of the evidence discovered by present counsel. Once again, the State places great

weight on the fact that the results of the polygraph exam administered to Hynes would have been inadmissible. (Answer Brief, p.27). This claim is not based on the fact that Hynes was absolved from suspicion after taking a polygraph, but simply on the fact that Hynes made statements contrary to the state's expressed theory of the crime and to the testimony of the state's key witnesses, statements which the authorities obviously determined to be true. It cannot be presumed from the record before this Court that counsel's fatal omission regarding the failure to call Hynes was a tactical choice. Such a determination could be made only after an evidentiary hearing.

The statements contained in the police reports appended to Mr. Squires' 3.850 motion provide ample evidence of what the substance of Hynes' testimony would have been had he been called by defense counsel. As for the State's contention that there is no evidence that Hynes would have testified had he been called, Mr. Squires would submit that he would have had no choice--because his statements in no way incriminated him, the fifth amendment privilege would not have been available.

b. Failure to suppress admissions and statements

If it is indeed, as the State here contends, "preposterous to assume" that one under the influence of chronic pain and narcotic pain killers would confess to a crime as a result thereof (Answer Brief p.28), then many courts have mistakenly engaged in such preposterousness when addressing the voluntariness of incriminating statements obtained while the accused is sick, injured, and/or under treatment. See, e.g., Beecher v. Alabama, 408 U.S. 234 (1972); Ziang Sung Wan v. United States, 266 U.S. 1 (1926); United States ex rel. Cronan v. Mancusi, 444 F.2d 51 (2d Cir. 1971); DeConingh v. State, 433 So. 2d 501 (Fla. 1983); Nowlin v. State, 346 So. 2d 1020 (Fla. 1977); Reddish

v. State 167 So. 2d 853 (Fla. 1967). The expert testimony that Mr. Squires would have presented at an evidentiary hearing on his 3.850 motion would have proved the truly 'preposterous assumption' to be that made by the state, i.e., that the effects of chronic and excruciating pain and the regimen of narcotics prescribed to treat that pain can have no effect on the voluntariness of statements obtained from the person so suffering.

c. Failure to provide any representation at sentencing

It is undeniably true, as asserted here by the State, "that an attorney may decide as a reasonable trial strategy not to pursue character-oriented mitigating evidence where there is a reasonable belief that the prosecutor may demonstrate contrary character evidence." (Answer Brief, p.29). There is absolutely no indication in the record before this Court that trial counsel's failure to present any evidence at sentencing was the result of such a tactical decision. To the contrary, the record would indicate that such was not the basis for trial counsel's abject failure-- any danger of the prosecution introducing evidence regarding Mr. Squires' 'bad character' was obviated by Mr. Squires' guilt/innocence alibi defense, which involved testimony regarding the commission of an extensive series of crimes by Mr. Squires. The State cannot merely explain away trial counsel's omissions by labelling them "strategic decisions"-- an evidentiary hearing was required to aid the resolution of such a question.

Nor can the State explain away the unreasonable attorney conduct here by attributing it to Mr. Squires' wishes: although it may be true that an attorney has "an obligation to defer to the choices of his competent client," (Answer Brief, p.29), there is absolutely no indication here that Mr. Squires made a deliberate choice to have in effect no representation at sentencing.

To the contrary, Mr. Squires requested that his counsel call certain witnesses who would have testified to his Prior record of cooperation with law enforcement authorities, but these witnesses were never called. This question too could not and cannot be resolved without an evidentiary hearing.

The numerous and detailed allegations of attorney error detailed in Mr. Squires' 3.850 motion are not refuted by the record. No portions of the record or files could have conclusively demonstrated that Mr. Squires was not entitled to an evidentiary hearing, even had they been attached to the trial court's order.

V.

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

a. This claim is not procedurally defaulted

The State argued that this claim is procedurally defaulted because not raised on direct appeal. The State did not argue that the claim was defaulted because not objected to at trial, only that it was not raised on direct appeal. Since the State's sole complaint is appellate default, Mr. Squires will respond accordingly.

At the time of Mr. Squires' conviction, courts of this state did not apply procedural default to claims of this type, and apply such a bar retroactively to Mr. Squires would be manifestly unjust and a violation of due process. At the time of Mr. Squires' trial and direct appeal, Florida law held that the taking of testimony outside the presence of the defendant was fundamental error that could be challenged on collateral attack.

The law as it existed at the relevant times was best stated in Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966). The Cole court, noting that the

question of whether counsel, with leave of the court, may waive the appearance of the defendant in a capital case had not then been decided in Florida, 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." Id. at 701 (emphasis added). This was controlling law in Florida at the time of Mr. Squires' direct appeal, as is illustrated by Capers v. State, 479 So. 2d 187 (Fla. 3d DCA 1985). The Capers court reversed a trial court's denial of a 3.850 motion alleging that the defendant's were denied their right to be present at all critical stages of their trial. The trial court's denial was based on its holding that the issue was not cognizable in 3.850 proceedings because it had not been raised on direct appeal. Although noting the current law, under which denial of the right to presence claims are no longer cognizable in 3.850 proceedings, the Capers court made it abundantly clear that prior to those recent decisions, the controlling law was as stated in Cole, supra. "In the earlier appeals," the court stated, "we declined to consider the 'involuntary-absence-from-the-courtroom' claim because it had not been presented to the trial court," Capers at 188: the only way to raise the claim at the time was through state post-conviction proceedings--

> We instead specifically invited the appellant to present the question by a motion for post-conviction relief. The earlier disposition of the issue constitutes the law of this case. . . and it is unaffected by subsequent Supreme Court decisions.

Id. (emphasis added). This Court had, during the relevant time period, also recognized the cognizability of this issue in post-conviction proceedings. Hall v. State, 420 So. 2d 872 (Fla. 1982).

In its earlier decision, Capers v. State, 433 So. 2d 1323 (Fla. 3d DCA 1983), on direct appeal, the Capers court had stated:

> [T]he court will not consider an issue never presented to the trial court, i.e., whether defense counsel's waiver of defendant's presence during the exercise of peremptory challenges was with the defendant's consent. . .**Appellant may challenge the voluntariness of the waiver by a motion for post-conviction relief.** See Johnson v. State, 267 So. 2d 114 (2nd Dist. 1972) (where the defendant raised for the first time on appeal questions which Florida Rule of Criminal Procedure 3.850 required to be first submitted to trial court, judgment of conviction would be affirmed without prejudice to defendant's right to seek post-conviction relief).

Capers, 433 So. 2d at 1324 (emphasis added). It is thus apparent that Mr. Squires could not raise this issue on direct appeal at the time his appeal was taken. Reliance on Coles was not only reasonable, but required, and effective appellate counsel would have relied on Coles and Hall and planned for that issue to be raised in a post-conviction motion rather than on direct appeal.

It would be manifestly unjust to penalize Mr. Squires for failing to raise this claim on direct appeal when the law in Florida at the time of his appeal allowed, indeed required, that it be brought in post-conviction proceedings. The federal courts do not permit the arbitrary or retroactive application of state procedural bars to frustrate the vindication of federal constitutional rights. Wheat v. Thigpen, 793 F.2d 621, 627 (5th Cir. 1986). A state procedural ground cannot be applied retroactively, Lumpkin v. Ricketts, 551 F.2d 680, 682 n.2 (5th Cir. 1976), cert denied 434 U.S. 957 (1977), as such application belies its basis as an independent and adequate state ground. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc). Use of the rule here and in this manner violates due process as it is nothing

more than a "trap for the unwary." Lefkowitz v. Newsome, 420 U.S. 283, 193 (1975). A state procedural ground is not adequate where, as here, the defendant "could not fairly be deemed to have been apprised of its existence." NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958).

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id. at 453; see also James v. Kentucky, 104 S. Ct. 1830, 1835 (1984).

Because the procedural default rule advocated by the State was not applied at the time of Mr. Squires' direct appeal, it cannot now be applied to frustrate his fundamental constitutional rights.

b. The deposition here was not properly taken pursuant to Fla. R. Crim. P. 3190 (j)

Depositions to perpetuate testimony taken pursuant to Fla. R. Crim. P. 3.190 (j) require that the party seeking to perpetuate testimony, be it the state or the defendant, apply to the court for an order allowing the taking of the deposition. Fla. R. Crim. P. 3.190 (j)(1). The application must be verified or supported by affidavits attesting to the fact that the prospective witness will be unable to attend the trial. Id. No such application and/or accompanying affidavits was filed here.

Rule 3.190 is entitled "Pre-Trial Motions," and all of its subsections deal exclusively with that subject. The application required by subsection (j) for an order allowing the taking of a deposition to perpetuate testimony is clearly the equivalent of a pretrial motion. The State argues that subsection (j) does not require application, or pretrial motion, but only allows the trial court to deny such an application when it is made less than ten days prior to the trial. (Answer Brief, p.35). The speciousness of this

reasoning is apparent: the plain meaning of the rule is that the order shall issue, upon proper application, if such application is filed after indictment but more than ten days prior to trial-- after that time, the trial court may issue an order, but may also, at its discretion, deny same. Fla. R. Crim. P. 3.190 (j)(1).

Even if the 'deposition' here at issue were properly taken under Rule 3.190 (j), the absence of the defendant while the deposition was being taken is still a violation of his constitutional rights. Subsection (j)(3) provides that if the deposition is taken upon application of the state, defense counsel and the defendant must be notified and the defendant, if in custody, produced. This Court has recognized the important constitutional safeguards provided by these notice requirements, and in fact has on occasion reversed convictions for the State's failure to comply therewith. Brown v. State, 471 So. 2d 6 (Fla. 1985); see also State v. Basiliere, 353 So. 2d 820 (Fla. 1977); State v. Dolen, 390 So. 2d 407 (Fla. 5th DCA 1980).

The fact that the Rule is silent regarding notice requirements when the deposition is taken by the defense does not mean that the defendant is not entitled to be present under those circumstances. Surely the drafters of the rule found it superfluous to require the defense to give notice to itself when taking such a deposition.

VI.

THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT 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.

Cabana v. Bullock, 106 S.Ct. 689 (1986) was decided just last year, over four years after Mr. Squires' direct appeal. Requiring that specific findings that the defendant killed, attempted to kill, or intended or

contemplated that lethal force would be used, see Enmund v. Florida, 458 U.S. 782 (1982), be made in an adequate proceeding before the appropriate state tribunal before the death sentence may be constitutionally imposed, Bullock represents a fundamentally significant change in the development of eighth amendment jurisprudence. Mr. Squires' claim that the Bullock-required findings were not made in his case is thus cognizable in 3.850 proceedings. See Witt v. State, 387 So. 2d 922 (1980).

The State's assertion that "the defendant argues that Enmund is applicable because there was a possibility that the jury believed Squires was acting in concert with another person," (Answer Brief, p.39), severely understates the case: Enmund (and Bullock) applies because the state consistently argued the participation of a confederate, and supported their arguments with testimony; because the jury, who were instructed that they need not find that Mr. Squires intended to kill in order to convict him of first degree felony murder, (R.984), could not help but believe that there was a co-participant; and because the judge found that Mr. Squires played a minor role as an accomplice in a capital felony committed by another, as evidenced by his sentencing order.

Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983), cited by the State in support of its argument that Mr. Squires' death sentence comports with Enmund because there is sufficient evidence in the record to support an Enmund finding, cannot, indeed has not, survived Bullock. The Ross court upheld a death sentence against an Enmund claim made in federal habeas corpus proceedings because it found "sufficient evidence in the record to support a conclusion that Ross contemplated that a life would be taken, intended to kill, and actually killed." Ross, 716 F.2d at 1533. This is not sufficient

under Bullock because the specific finding mandated by that court must be made by a state tribunal, rather than a federal court: regardless of the record before a federal court on habeas review, and the sufficiency of the evidence contained therein, absent a specific finding by a state court that the defendant killed, intended to kill, or contemplated that a life be taken, a death sentence cannot stand under the eighth amendment.

The State is also amiss in its argument that this Court made a sufficient Enmund/Bullock finding. This Court found on direct appeal that Mr. Squires was "personally responsible" for the killing. Squires v. State, 450 So.2d 208, 211 (Fla. 1984). "Personal responsibility" includes guilt as an aider or abettor under a felony murder situation, and is not therefore a sufficient Bullock finding. A manufacturer of defective goods may well be "personally responsible" for any deaths caused by those defects, but is surely not eligible for the death penalty. This Court's finding was no more Enmund-specific than that made by the Mississippi Supreme Court and found insufficient by the Bullock Court; i.e., "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide upon [the victim." Id. at 699. "In other words, the Mississippi court's statements represent at most a finding that. . . Bullock 'by legal definition actually killed.' Such a finding does not satisfy Enmund." Id. (citations omitted) (emphasis in original).

It is impossible to determine whether the jury or the trial judge based their sentencing decision on a finding that Mr. Squires' killed, intended to kill, or contemplated that lethal force would be used. An examination of the entire record indicates, as discussed above and in Mr. Squires' initial brief, that the trial judge found Mr. Squires to be a minor participant in a

capital felony committed by another. This is totally inconsistent with the finding expressed in another portion of the sentencing order, and it is impossible to tell whether or not the trial judge did in fact make the appropriate Enmund/Bullock finding. If this Court were to make the required finding and uphold Mr. Squires death sentence, it would run the risk of sentencing a man to death whom both the jury and the judge found not to have killed or to have intended to kill, in violation of Mr. Squires' eighth and fourteenth amendment rights. The trial court is therefore the appropriate forum for making this finding, or clarifying its previous finding, and this Court should remand for that purpose.

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 EIGHTH AND FOURTEENTH AMENDMENTS.

Caldwell v. Mississippi is exactly the type of significant change in the law recognized by Witt v. State, 387 So. 2d 922 (Fla. 1980), as appropriately raised in 3.850 proceedings. See also Adams v. Wainwright, No. 86-3207, slip op. at 8-9 (11th Cir. Nov. 13, 1986) (Caldwell is such a change in the law that it excuses procedural default and avoids finding of abuse of the writ).

This Court has only recently recognized that Caldwell does apply to the Florida capital sentencing scheme, holding in Garcia v. State, 492 So. 2d 360 (Fla. 1986), that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation," and that "[t]o do other wise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia, 492 So. 2d at 367; see also Adams, supra.

Thus, even under a statutory scheme like Florida's, where the jury is

not solely responsible for the sentencing decision, Caldwell error can occur if the jury is made "to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, ___ U.S. ___, 106 S.Ct. 2464, 2473 n.15 (1986); see also Adams, supra. As a mater of Florida law, the jury's recommendation is entitled to great weight, and may be rejected only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). A jury not informed of the great weight to be given its sentencing determination and the substantial deference to which it is entitled is necessarily made "to feel less responsible than it should for the sentencing decision" and is more likely to vote for death when life is an equally or more appropriate sentence. Darden, supra, Adams, supra.

This claim was not available to death sentenced inmates at the time of Mr. Squires direct appeal. Tedder did not provide a legal basis for raising this claim, as it dealt only with the weight to be given the jury's recommendation and not with the constitutional implications of statements that diminish the jury's sense of responsibility for the sentencing determination. The only relevant United States Supreme Court decision before Caldwell was California v. Ramos, 463 U.S. 992 (1983), which upheld a jury instruction that informed the jury that the Governor could commute a sentence of life in prison without parole. Id. at 1014. This decision seemingly sanctioned statements such as those made by the judge at Mr. Squires' trial, but the Caldwell Court clearly distinguished Ramos, which had been relied upon by the Mississippi Supreme Court in upholding Caldwell's death sentence. In the Federal courts, the novelty of this issue at time of Mr. Squires' direct appeal would be "cause" for his failure to raise it in accordance with

applicable state procedures. Reed v. Ross, ___ U.S. ___, 104 S.Ct. 2901, 2909 (1984); Adams, supra, slip op. at 23 n.5. This court should apply the same reasoning.

CONCLUSION

With respect to the remaining issues raised in Mr. Squires' initial brief, he relies upon arguments heretofore submitted.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative

MARK E. OLIVE
Litigation Coordinator

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
Independent Life Building
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

By: Larry H. Spalding
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Candance Sunderland, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, Florida, 33602, this 16th day of January, 1987.

Attorney