SUPREME COURT OF FLORIDA

JOHNNY COPELAND,

Petitioner,

v. Case No. 69,428

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida

Respondent.

* * * * * * * * * * * * * * * *

JOHNNY COPELAND,

Appellant,

v. Case No. 69,482

STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * *

BRIEF FOR PETITIONER-APPELLANT JOHNNY COPELAND

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JOYCE DAVIS
1713 Kathryn Avenue
Tallahassee, Florida 72308
(904) 877-0456

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BRIEF FOR PETITIONER-APPELLANT
JOHNNY COPELAND

Preliminary Statement

In seeking a stay of execution in this case last month, we told the Court that, given the opportunity for full briefing, we could show that the conviction and death sentence here were inconsistent with established legal doctrines designed to insure even-handed and individualized justice for every defendant. The Court has given us the opportunity we sought. In turn, we make in this brief precisely the demonstration that we said we would. To summarize the key points:

- In denying Mr. Copeland a change of venue from a county seething with demonstrable hostility towards him, this Court applied an excessively rigid legal standard, inconsistent with both the federal Constitution and its own cases. (Pp. 5-21 below)

- Mr. Copeland was mentally incompetent to stand trial. Although the trial court had before it more than enough information to trigger a hearing on the issue, it did not hold one. Hence, a re-trial is required under Hill v. State, 473 So.2d 1253 (Fla. 1985). At minimum, the substantial showing that Mr. Copeland has now made on this issue entitles him to a retrospective competency hearing under Mason v. State, 489 So.2d 734 (Fla. 1986). (Pp. 22-38 below)

- In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court ruled that a capital jury's consideration of mitigating circumstances could not be confined to those on a statutory list. The jury's consideration in this case was so confined. Since this Court's decision in Sonser v. State, 365 So.2d 696 (Fla. 1978), had just upheld such instructions, and Florida's statute correcting the situation had not yet passed, Mr. Copeland was unconstitutionally denied the opportunity to present a full picture of the circumstances that militated in favor of a life sentence. (Pp. 39-44 below)

- Repeated comments by both the judge and the prosecutor that minimized the jury's role in the sentencing process unconstitutionally diminished its sense of responsibility for the present death sentence, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). On the facts here, the violation exists whether one accepts the full application of Caldwell to Florida adopted by the Eleventh Circuit, Adams v. Wainwright, No. 86-3207, slip op. (11th Cir. Nov. 13, 1986), or the more restrictive reading given by this Court in Pope v. Wainwright, No. 67,054, slip op. (Fla. Oct. 16, 1986). (Pp. 44-51 below)

- In affirming the death sentence in this felony murder case, the Court misconstrued the requirements of Enmund v. Florida, 458 U.S. 782 (1982). (Pp. 52-55 below)

- Mr. Copeland's statements admitted at trial were taken from him by the authorities in violation of his constitutional rights. Additionally, those statements were the product of his psychotic condition at the time, an independent reason why they should have been suppressed. (Pp. 55-56 below)

Procedural Backsround

Johnny Copeland, a black man with an I.Q. of 69, was convicted of the armed robbery, kidnapping, rape, and

murder of Sheila Porter, a white woman. Following a 10-2 jury recommendation for a death sentence on May 25, 1979, the Circuit Court of the Second Judicial Circuit of Florida in and for Wakulla County imposed the death sentence on September 10, 1979.

On September 13, 1984, this Court affirmed the convictions and death sentence, with two Justices dissenting. Copeland v. State, 457 So.2d 1012 (1984).

The Supreme Court of the United States denied certiorari, with two Justices dissenting, on April 15, 1985. Copeland v. Florida, 105 S.Ct. 2051 (1985).

At this point, Mr. Copeland's appointed counsel withdrew from further representation. After an exhaustive search, Mr. Copeland finally obtained counsel on October 7, 1986. Meanwhile, the Governor had signed a death warrant, and Mr. Copeland's execution was scheduled for October 21, 1986.

On October 14, 1986, Mr. Copeland filed a motion for relief under Fla. R. Crim. Pro. 3.850 in the trial court, and, on October 15, 1986, an application for a stay of execution. That same day, the trial judge, after brief oral argument, signed an order prepared by the State denying the motion. Mr. Copeland filed a notice of appeal to this Court.

Also on October 15, 1986, Mr. Copeland filed in this Court applications for a writ of habeas corpus and a stay of execution.

The Court heard oral argument and granted a stay of execution on October 16, 1986, granting at the same time our request that both sides be directed to file complete briefs, so that this Court could give the issues raised here the plenary consideration that their gravity warrants.

Arsument

I. In Reviewing the Denial of Mr. Copeland's Change of Venue Motion on Direct Appeal, This Court Applied an Excessively Rigid Legal Standard

The trial in this rape and murder case took place a few miles from the victim's home, in a rural county containing 5,878 registered voters.[1/] The interrelationships among the members of this community were pervasive -- far more pervasive, indeed, than can ever be captured on a cold record. As the trial judge stated, the victim had "extensive family connections throughout the county," and her family was "well known throughout the county." (ROA 1319-20) Indeed, one of those ultimately chosen as a juror, George Crump, Jr., knew Sheila Porter, had known her parents for 15 or 20 years, worked with Mr. Porter at the "Bottle Club," and considered the Porters to be close friends. (ROA 1497, 1503)

1/ The venire list was drawn from the list of voters registered as of March 31, 1979.

Additionally, the victim had eleven siblings. Thus, virtually every actor in this case -- and here we are thinking not only of jurors, but of court personnel, law enforcement officials, and even the initial trial judge -- was either related to the victim by blood, or knew the victim or her family.[2/] As an outsider to this insular community, Mr. Copeland was at a severe disadvantage -- a disadvantage which was worsened by the fact that the crime generated palpable racial tensions.

We urge the Court, therefore, to read this record realistically and sensitively. While we may never be able to demonstrate by nice courtroom evidence the precise degree of pressure that the jury felt as a result, for example, of the massed presence of the closest relatives of the victim -- the friends, neighbors, co-workers, and relatives of those on the jury -- sitting in the first two rows of the courtroom just a few feet away from the jury box (ROA 1916), we urge Your Honors not to be blind as justices to what you know as people.

2/ Judge George Harper recused himself because of a family connection to the victim. (ROA **34-38**) Several veniremen were excused because of connections with law enforcement agencies; one of the seated jurors was related to a county sheriff, as was the husband of another of the jurors; yet another juror was a cousin of a deputy sheriff on the state's witness list. (ROA **1431, 1522, 1523, 1524**) And, as the judge noted, all of the veniremen were "bound to be to some extent familiar with some of the **witnesses."** (ROA **1400**)

Indeed, having experienced the community atmosphere first-hand during Mr. Copeland's trial, the trial judge granted a change of venue for the subsequent trial of co-defendant Frank Smith -- even though the formal record before him was identical to the one in this case.

A. The Record Evidence of Juror Partiality

The voir dire transcript in this case reveals an extraordinarily high likelihood that an impartial jury could not have been chosen.

The jury was selected from a venire of **94** persons,3/ of whom only **66** were actually questioned. Of these **66,** one was dismissed for nonresidency, six were dismissed for child-care problems, five were dismissed after stating they were unable to impose the death penalty, and two were excused

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3/ The **94** veniremen to whom we refer are those who actually appeared in court on May **21, 1979** for jury duty. The original number of veniremen summoned in this case was **212,** consisting of **150** from the venire list of April **4, 1979** and **62** from venire list of April **5, 1979.** (These lists are annexed hereto as Exhibit A.) We are informed by the office of the clerk of the trial court that this may well have been the only occasion in the history of the county on which the summoning of a second venire was required. Of the first **150** persons summoned, **10** were listed as having moved, deceased, or "not on roll." Nine others did not answer. Of the second group of **62,** none were indicated as deceased, moved or not on roll. Six of the **62** did not answer. This left **187** veniremen, of whom only **94** came to court. The remaining half of the jury pool **(93** jurors) was excused from service by telephone request to the trial judge's chambers. The great majority of these excuses were given on the grounds that the venireman was related to the victim.

for health-related reasons. None of these veniremen was questioned as to prejudice or family connections.

Thus, the actual pool of veniremen who were questioned on issues relating to prejudice numbered **52**. Of these **52, 7** (14%) admitted to having a direct family relationship with the victim. Eleven more **(21%)** admitted a connection, relationship, or friendship with the victim or her family. Hence, more than a third of the available veniremen **(18** of **52)** admitted some direct relationship or connection to the victim.

Eight other veniremen were dismissed for admitting either a belief in Mr. Copeland's guilt or some other disqualifying prejudice in the case. Adding this number to the number of those related or connected to the victim, we find that fully half **(26** of **52)** of the available veniremen had a direct, admitted, disqualifying prejudice in the case.4/

The disqualification of **24** of those **26 "tainted"** veniremen left defense counsel with a pool of **26** "untainted" veniremen from which to choose jurors and alternates. Of the

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4/ Moreover, even these numbers are lower than they would otherwise be because the voir dire was conducted in open court, which has the effect of suppressing jurors' honest responses regarding prejudice. Had voir dire been conducted on an individual basis, the already extremely high percentages of jurors indicating bias would have been even higher. See Bronson Aff., **3.850** Ex. B, ¶¶ **38-57.**

26 untainted veniremen, four were never even asked if they knew or had a connection to the victim; thus, of the 48 veniremen fully questioned on the relationship/connection/prejudice issues, 55% (26 of 48) admitted a disqualifying prejudice. Moreover, 25 of the 26 "untainted" jurors freely admitted to having read accounts of the case, heard reports on television, and/or discussed the case with friends or family.

The picture of prejudice sketched by these numbers is brought to vibrant life by the strong direct evidence in the record showing the inflammatory atmosphere that surrounded Mr. Copeland's trial:

(1) Three separate surveys of community attitudes were conducted; each revealed strong and widespread community hostility to the accused. The comments elicited included the following:

> "Damn niggers should be hung."
>
> "Wish they would hang those niggers."
>
> "They ought to lynch those niggers."
>
> "It's a shame all those niggers come down from Tallahassee and commit crimes."
>
> "Hope they burn those niggers."
>
> "Death penalty too good for them."
>
> "They ought to cut their cocks off."
>
> "They should cut their nuts off. Ought to hang them instead of wasting tax payers! money."
>
> "They better hope they aren't set free."

"They ought to do the same thing to them as they did to her."

"Twenty years ago they would have hung 'em instead of all this crap."

"Should get the death penalty."

"People are ready to take the jail apart. They better not get turned loose."

"They ought to be hung in front of the court house."

"Hope they burn their butts."

"They'll be sorry if they're released." (Habeas Petition, Ex. A)

(2) There was extensive media coverage surrounding the trial, including 49 newspaper articles (mostly front-page) during the period between the crime in December and the change of venue hearing in March, and 26 or 27 television stories during this same period. See Bronson Aff., 3.850 Ex. B, ¶¶ 17-27.

While this factor is important, the small size of the community involved in this case meant that press coverage was not the primary mode by which members of the community formed their impressions of the crime and the defendant. As the United States Supreme Court once said of another small rural community:

> It is reasonable to assume that, without any news accounts being printed or broadcast, rumors will travel swiftly by word of mouth. One can only speculate on the accuracy of such reports; given the generative propensities of rumors, they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject

intimately affecting life within it. Nebraska Press Association v. Stuart, 427 U.S. 539, 567 (1976).

Here, as one juror stated on voir dire, "it was impossible to stop and have coffee in this county for 3 or 4 weeks without hearing" of the crime. (ROA 1537)

(3) In a random survey, the recognition rate for this case, that is, the percentage of people familiar with it, was an extraordinarily high 99%. Seventy-two percent of those surveyed expressed a prejudice which would preclude their sitting on the jury.5/

Taken together, the indications of potential juror partiality formed a cloud of doubt looming over the fairness of the proceedings in this case. Our judicial system has long been proud of its vigilance in dispelling such doubts -- in assuring that every person, no matter what his race and no matter how horrible his alleged crime -- is given the same judicious consideration on the issues of guilt and sentence as the most favored member of the community. The likelihood that the judicial system did not fulfill its aspirations in

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5/ Numerous further facts from the record documenting that the threats to juror impartiality in this case were truly extraordinary are marshalled in the affidavit of a nationally-recognized jury selection expert, Professor Edward Bronson. (3.850 Ex. B) Professor Bronson concludes that "because of prejudicial pretrial publicity creating a likelihood that the jury could not be impartial, there was every likelihood in May 1979 that Mr. Copeland would not receive a fair trial in Wakulla County." (3.850 Ex. B, ¶ 15)

this case is simply too high to permit Mr. Copeland's conviction and death sentence to stand.

B. The Federal Constitutional Standard For Chanse of Venue

It is a fundamental requisite of due process of law that an accused be tried by a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 722 (1961). Because this right is "the most fundamental of all freedoms," Estes v. Texas, 381 U.S. 532, 540 (1965) -- since it is critical to the preservation of so many of a criminal defendant's other legal rights -- the defendant is not required to prove that specific jurors were less than impartial. Rather, where an evaluation of all the circumstances reveals an environment of prejudice and hostility making it likely that decisions will not be made exclusively on the basis of the evidence presented in court, due process requires a change of venue. Rideau v. Louisiana, 373 U.S. 723 (1963). This is especially true in capital cases. See Irvin v. Dowd, supra, 366 U.S. at 728.

The defendant's burden of proof is not an onerous one. Trial courts must take strong measures to ensure that the balance is never weighed against the accused; where a defendant shows "a reasonable likelihood" that prejudicial circumstances will prevent a fair trial, a change of venue should be granted. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Tafero v. State, 403 So.2d 355, 360 (Fla. 1981), cert. denied, 455 U.S. 983 (1982).

In determining whether a reasonable likelihood of prejudice exists, courts are to be generous in the factors they examine. They must consider "whether the totality of circumstances raises the probability of prejudice." Sheppard v. Maxwell, supra, 384 U.S. at 334. Where the totality of circumstances does indicate such a probability, "identifiable prejudice to the accused need not be shown." Id.

Among the circumstances that have been considered by the United States Supreme Court are the following:

(a) Indications of inflamed community sentiment. See Murphy v. Florida, 421 U.S. 794 (1975);

(b) The extent to which the trial has become a "cause celebre" in the community. Irvin v. Dowd, supra, 366 U.S. at 724;

(c) The nature and extent of media publicity surrounding the trial, and the character of the community (size, rural vs. urban, racial makeup, etc.). See, e.g., Murphy, Sheppard, Irvin, Estes;

(d) The extent to which the voir dire transcript reveals partiality, and the length to which the trial court must go in order to select a jury. Murphy v. Florida, supra, 421 U.S. at 802-03.

The Supreme Court of the United States has generally regarded this last factor, the voir dire, as providing the clearest and best evidence of a reasonable probability of prejudice. Murphy noted that "in a community where most

veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for then it is more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it." Id. at 803. The Irvin decision reiterated that "when so many, so many times admitted prejudice, statements of impartiality [by others] can be given little weight." Irvin v. Dowd, supra, 366 U.S. at 728.

In Murphy, where only one quarter of the veniremen were excused for prejudice in a large urban area, the Supreme Court found insufficient evidence of a reasonable likelihood of partiality. In Irvin, by contrast, where 268 of 430 of the veniremen were excused on bias grounds, the Supreme Court declared that "the trial court's finding of impartiality does not meet constitutional standards." Irvin also relied on several other circumstances -- extensive media coverage and the relatively small population (30,000) of the rural community in which the trial was held.

The facts here more than suffice to bring this case within Irvin rather than Murphy. The statistical analysis set forth above demonstrates that 55% of the veniremen fully questioned on prejudice issues -- and we exclude here the many veniremen whose disqualifications were so plain that they never showed up in court for questioning at all -- were found to have a disqualifying prejudice. Since the community

in question here was far smaller than that in Irvin, so that the absolute number of veniremen from whom the jury was chosen was also far smaller,[6/] a change of venue in this case as a matter of federal Constitutional law follows a fortiori from the holding in Irvin.

As the facts set forth above amply show, this conclusion will only be reinforced by an analysis of the additional factors that the United States Supreme Court typically considers in these cases. The review of each of these factors, after all, has but a single purpose: to insure that those who are to pass on the defendant's fate form their judgments inside, not outside, the courtroom.

Since there was a reasonable likelihood that this goal could not be achieved here, the federal Constitution required that a change of venue be granted.

C. The Florida Standard for Chanse of Venue

Florida has never adopted the "reasonable likelihood" of prejudice test for change of venue developed by the United States Supreme Court in Sheppard and Irvin and applied in Murphy. But even under the test of Manning v. State, 378

6/ In Irvin, despite the disqualification of 268 jurors, there was still a pool of 162 unprejudiced veniremen from which to choose a jury of twelve. Here, by contrast, there were only 26 potential veniremen from whom the final twelve were necessarily chosen. Thus, in absolute terms, the probability of prejudice here was higher than in Irvin.

So.2d 274 (Fla. 1979), which is discussed below, the motion for a change of venue in this case should have been granted. On direct appeal, however, this Court applied a test which comported neither with the federal constitutional standard nor with Florida's own prior law.

The governing principles were long ago enunciated by this Court in the leading case of Singer v. State, 109 So.2d 7 (Fla. 1959). There, the Court said that "every trial court in considering a motion for venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by a fair and impartial jury." Id. at 14.

In this spirit, Manning v. State, 378 So.2d 274, 276 (Fla. 1979), instructed specifically that "a trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." (Emphasis added.) This "natural result" test received the explicit approval of all seven justices in Manning; although disagreeing with the majority's application of the test to the facts of the case, Justice Alderman, in a dissent joined by Justices Adkins and Boyd wrote:

> I agree with the general principles of law expressed in the majority opinion. In order to be entitled to a change of venue, the defendant must carry the burden of showing that the trial . . . would be inherently prejudicial because of the general atmosphere and state of

> mind of the inhabitants in the community. I also agree that a trial judge is bound to grant a change of venue only when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived opinions are the natural result. 378 So.2d at 278.

Subsequent to the direct appeal of this case, the Manning test was quoted and relied on by this Court in Davis v. State, 461 So.2d 67, 69 (Fla. 1984) and in Mills v. State, 462 So.2d 1075, 1078 (Fla. 1985), cert. denied, 105 S.Ct. 3538 (1985).

The opinion on direct appeal in this case, however, marked an unfortunate departure from the "natural result" standard and a return to the formulation of McCaskill v. State, 344 So.2d 1276, 1278 (1977), that a change of venue is required only if "the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom." (emphasis added) The effects of the unexplained abandonment of the "natural result" test in this case were to deprive Mr. Copeland of a change of venue to which he was constitutionally entitled -- and which his identically-situated co-defendant received -- and to create, in the words of the dissent, "disharmony in the law of the state." 457 So.2d at 1021.

This Court's puzzling departure from the established "natural result" test of Manning was unsound, particularly because the excessively rigid McCaskill test it employed instead is of the most dubious parentage. McCaskill cites as the source of its test Kellev v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968). Kellev v. State, in turn, cites two other opinions as the test's source, Sinser v. State, 109 So.2d 7 (Fla. 1959), and Collins v. State, 197 So.2d 574 (Fla. 2d DCA 1967). But neither Sinser nor Collins contains the language of the test attributed to them: Collins puts forth no test and the bedrock Sinser decision adopts an utterly opposite approach towards insuring an impartial jury:

> Every reasonable precaution should be taken to preserve to a defendant trial by a [fair and impartial] jury and to this end if there is a reasonable basis shown for a chanae of venue, a motion therefor properly made should be aranted . . . Real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to srant a chanae of venue. Singer, supra, 109 So.2d at 14.

The McCaskill decision also implies that its test finds support in Murphy v. Florida, 421 U.S. 794 (1975). But an examination of the text of Murphy reveals that it does not contain the McCaskill test either.

In short, the McCaskill standard appears to have been a creation of the District Court of Appeals in Kellev,

and to have been appropriately replaced by the Manning "natural result" standard.7/

We urge this Court to return to that standard, and to reject the orphan standard of McCaskill/Copeland. We do so for the following reasons.

First, Mr. Copeland faces the death penalty, and this Court has repeatedly stressed that uniformity in the application of rules of law is particularly essential in capital cases.8/ See, e.g., Witt v. State, 387 So.2d 922, 926 (Fla.), cert. denied, 449 U.S. 1067 (1980) (constitutionality of Florida's capital sentencing procedures is contingent upon Florida Supreme Court's role of

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7/ Even the author of Kelley, Justice Overton, has implicitly acknowledged the inutility of the formulation, by way of his dissent in this case.

8/ Such uniformity is unobtainable as long as two inconsistent standards vie in this Court's cases, and Provenzano v. State, No. 65,663, slip op. (Fla. Oct. 16, 1986), decided the same day as the stay application in this case, provides a good illustration of the confusion into which the decision on direct appeal here has plunged the law. However, a favorable decision in this case would not necessarily apply to the defendant there, because of key factual elements present here and not there, notably the statistical evidence of the extent of juror partiality and the fact that counsel here pressed for the change of venue on at least two occasions after jury selection. Copeland, supra, 457 So.2d at 1016 Cf. Provenzano, supra, slip op. at 7 (fact that counsel never renewed motion for change of venue after jury selection "creates a strong presumption" of impartiality) Indeed, Provenzano personally acquiesced in his jury panel. Id. at 6.

reviewing each case to ensure uniformity); Mallov v. State, 382 So.2d 1190 (Fla. 1979); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Second, the restrictive venue test of McCaskill to which this Court reverted in Copeland is patently unconstitutional. The constitutional "reasonable likelihood" test permits the presumption that an impartial jury will not be found when a sufficient number of jurors express prejudice or when the totality of the circumstances indicates a reasonable likelihood that such prejudice exists. The Copeland rationale, because it requires a degree of certainty of prejudice unlikely ever to be obtainable as a practical matter, is constitutionally defective. To avoid an inevitable federal attack upon this decision, it would be sensible and in the interests of judicial economy for this Court to rule that Mr. Copeland is entitled to the benefit of the Manning standard, and to prevail under it.

Third, and perhaps most decisively, it is impossible on this record for the Court to have confidence that Mr. Copeland's death sentence was imposed by a truly "impartial, indifferent" jury. Considering the totality of the circumstances -- virulent hostility against Mr. Copeland in the county in which he was tried, clear evidence that at least one-third of the available jurors had direct connections to the victim, the statement of a jury selection expert that "In all my years of study I have never seen a

recognition rate this high," and a voir dire transcript revealing that every juror ultimately chosen was thoroughly familiar with the incident and that the dismissal of half of the already-diminished jury pool was for prejudice -- there is a substantial likelihood that Mr. Copeland could not and did not get a fair trial in Wakulla County.

"With life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . ." Irvin v. Dowd, supra, 366 U.S. at 728.

11. Mr. Copeland Was Mentally Incompetent to Stand Trial[9/]

It is a requirement for the due process validity of a conviction and death sentence that the defendant be mentally competent. Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). A defendant is competent to stand trial if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and . . . he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). See Fla. R. Crim.

9/ We recognize, of course, that the question of Mr. Copeland's competency at trial and sentencing was not raised explicitly in the 3.850 motion below. But, as the Court is aware, and as the motion itself states (3.850 Motion at pp. 16-17), that document was prepared by volunteer counsel in extreme haste in the shadow of an impending execution -- which is why the motion includes a prayer for time to uncover possible additional issues. Counsel lacked the tools for making this claim until they were able to research the law and have the appropriate examination of Mr. Copeland performed; counsel then promptly asserted the claim. Particularly since the due process right asserted is such a basic one, see Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956), and since the State has been in no way prejudiced, there is no just basis for denying Mr. Copeland the right to raise the point here, in the context of his first effort to obtain post-conviction review. Cf. Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980) ("the issue of competency to stand trial clearly can be raised at any time"); State ex. rel. Deeb v. Fabisinski, 111 Fla. 454, 456, 152 So. 207, 211 (1933) (issue may be raised at any time during pendency of criminal proceedings, "whether before or during or after the trial").

Pro. 3.210, 3.211. The extensive materials now before the Court show that this requirement was not met here.

Many of these facts were not brought out at the time of trial -- but they should have been. The trial court overlooked warning signs that should have caused it to hold a competency hearing, and this failure requires a new trial. Hill v. State, 473 So.2d 1253 (Fla. 1985). At minimum, Mr. Copeland is entitled to demonstrate at a hearing his incompetency at the time of trial. Mason v. State, 489 So.2d 734 (Fla. 1986).10/

A. Mr. Copeland's Backsround

Mr. Copeland is, and long has been, mentally retarded, psychotic, and organically brain damaged. An understanding of the basis for this conclusion requires a review of his family history, which is replete with instances of physical, emotional and sexual trauma.

Mr. Copeland was born into a poor, rural family. His father, an alcoholic, suffered from delusions and psychotic episodes, the combination of which made him violent and abusive to himself and others. (Williams Aff., 3.850

10/ As a proffer of the sort of evidence that is now available for presentation at such a hearing, there is annexed hereto as Exhibit B the Declaration of Dorothy Otnow Lewis, M.D., a Professor of Psychiatry at New York University School of Medicine and a Clinical Professor of Psychiatry at the Yale University Child Study Center.

Ex. D, ¶ 11) Mr. Copeland's grandmother was also mentally ill.

His mother, Annie Lee Williams, was **16** years old at the time of his birth. During her pregnancy she was thrown off her porch by Mr. Copeland's father (who abandoned the family a few years later) and suffered severe pain and sickness throughout the course of the pregnancy. Mr. Copeland weighed **5** 1/2 pounds at birth and was very sickly; he suffered a 9-month colic from birth and was soon thereafter diagnosed with sickle cell anemia. Both conditions caused him enormous pain. At two years of age, Mr. Copeland fell into a fire-place, and the scars from the resulting burns are still visible today. (Williams Aff., **3.850** Ex. D, **¶¶ 5-6)**

When he was four, Mr. Copeland contracted polio. This induced severe fever, confined him to bed for six months, and permanently crippled him. The fever left an indelible mark on Mr. Copeland's mental state. His behavior from this point on was depressed, distant, and detached. (Williams Aff., **3.850** Ex. D, ¶¶ 7-10).

For long periods of time during his childhood Mr. Copeland went hungry; his malnourishment almost certainly exacerbated the mental problems he already had.

As a young child, Mr. Copeland suffered traumatic nightmares and heard nonexistent voices, as he still does. (Lewis Dec., Ex. B hereto, **¶ 6)** Moreover, he was prone to

staring fits, during which he mentally shut people out of his consciousness. (Williams Aff., 3.850 Ex. D, ¶ 10)

Mr. Copeland did poorly in school and was continually frustrated with his inability to keep up with the other students, who would make fun of him. His partially crippled state, a lingering effect of the polio, served further to ostracize him from the rest of his schoolmates. His school attendance became increasingly sporadic, and he dropped out completely at the beginning of the 8th grade. (Lewis Dec., Ex. B hereto, ¶ 17)

Compensating for his rejection by his mother and peers, Mr. Copeland turned more and more to the comforting presence of an imaginary "masked man" who took over his functioning at times of stress. (Lewis Dec., Ex. B hereto, ¶¶ 7-8)[11/]

Mr. Copeland witnessed and endured considerable violence during his upbringing. His mother was repeatedly beaten in his presence, first by his father and then by his stepfather. Mr. Copeland was, in turn, brutally beaten by his mother, who would tie her young son to a bedpost and

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11/ The deep psychological significance of this figure and its clear import for an understanding of Mr. Copeland's mental state at the time he gave statements to the police, went unappreciated by this Court on the direct appeal -- just one example of how the failure to conduct a competency hearing deprived the courts of information needed for full justice to be done in this case.

thrash him with an extension cord. (Lewis Dec., Ex. B hereto, ¶ 9(d)) Mr. Copeland's back remains severely scarred from this abuse.

When Mr. Copeland was six years old, an uncle tried to rape him. During his adolescence, he was the victim of sexual abuse by his father and another uncle. (Lewis Dec., Ex. B hereto, ¶9(c))

Shortly after this episode, Mr. Copeland ran a car off the road and into a tree in an attempt to commit suicide. Since this suicide attempt, Mr. Copeland has suffered from migraine headaches, dizzy spells, and periodic blackouts. On at least two occasions, such blackouts have resulted in automobile accidents. (Williams Aff., 3.850 Ex. D, ¶¶ 8-10)

B. The Information on Mr. Copeland's Mental Status Brousht Out at the Time of Trial

On January 22, 1979, Mr. Copeland's trial attorney, Clifford Davis, filed an affidavit stating that Mr. Copeland's mental condition was such that he was unable to discuss intelligently the facts of his case and was having difficulty understanding the nature and consequences of the acts with which he was charged. Mr. Davis's affidavit further informed the court that Mr. Copeland had a prior psychiatric history, and that on January 4, 1979 he had attempted suicide at the Wakulla County Jail, leaving a two-page suicide note. **(ROA *58*)**

Indeed, Mr. Copeland attempted suicide twice before trial. On the first occasion he ingested a large amount of shaving cream. (Lewis Dec., Ex. B hereto, ¶ 6) The second time, he blocked the space under his cell door with paper, set fire to his mattress, and hanged himself from a rope. (ROA 29-33) (Lewis Dec., Ex. B hereto, ¶ 7) His efforts to prepare for a third attempt were thwarted by the authorities.

In response to Mr. Davis's motion, the court continued the case and appointed Dr. Robert Wray, a psychiatrist, to examine Mr. Copeland. Dr. Wray examined Mr. Copeland nine times from early February 1979 through early May 1979, and found that, for most of that period, he was "quite psychotic and incompetent to stand trial." Dr. Wray observed that Mr. Copeland "was quite autistic, seemed to hear voices, was paranoid and believed he could fly." (ROA 424) However, following his seventh interview with Mr. Copeland, around April 1, 1979, Dr. Wray changed his evaluation and concluded that he was "non-psychotic and . . . competent to stand trial." (ROA 423) The doctor attributed the change to "incarceration, antipsychotic medication and time." (ROA 423)

As a result of Dr. Wray's initial finding of incompetency, the court appointed two additional psychologists to examine Mr. Copeland. (ROA 79, 241) Dr. Hugh Semon conducted a one-hour interview during which Mr. Copeland "remained virtually verbally non-communicative" with him.

Dr. Semon observed that Mr. Copeland's behavior appeared "very bizarre," and that he seemed "unclear as to who I was and what my purpose was with him." (ROA 401) Without evaluating any other sources of data, Dr. Semon concluded that Mr. Copeland was merely faking psychosis and was competent to stand trial.

Dr. Patrick Cook, another court-appointed psychologist, interviewed Mr. Copeland on April 11, 1979 and found that his attention seemed to wander, that his responses were quite variable, that at times it was difficult to elicit a response from him, and that he appeared not to understand even simple questions. Dr. Cook also noted instances of inappropriate behavior, such as sprawling on the floor during the interview. Dr. Cook observed that Mr. Copeland's verbal I.Q. score fell well within the range of mental retardation, and that his Rorschach responses were unproductive. Dr. Cook also found that Mr. Copeland was "able to recognize and read words at the second grade level." (ROA 404) He did not comment on whether Mr. Copeland could understand them. (See Lewis Dec., Ex. B hereto, ¶ 6) In addition, Dr. Cook found that Mr. Copeland had assumed an "I don't care" attitude. (ROA 404)

Dr. Cook stated in his report that he "could not rule out the possibility that Mr. Copeland is schizophrenic," but that he did not find Mr. Copeland to be "grossly" psychotic and did not feel that his "intellectual limitations

are such that he should be considered incompetent to stand trial." (ROA 404)

After receiving the above information, the trial judge decided, without holding a hearing or even entering a formal order, that Mr. Copeland was competent to stand trial.

Mr. Copeland took the stand during the penalty phase of the trial. His testimony was rambling, illogical, and incoherent. A typical paragraph reads:

> I have so much I really want to say, but I'm getting the shakes and I'm getting confused. You know, so, --- I know perhaps what I said ain't nothing. Perhaps it don't even make sense, 'cause see, I am, you know, but I would really appreciate it, the Judge, the jury, regardless to what happened, what type of punishment be throw upon me and the whole entire Court, I would appreciate it if you all would take it under consideration even though I was found guilty yesterday of all four charges, it was, well, I say this. (ROA 2152-53)

C. The Information on Mr. Copeland's Mental Status Available Now

Recent examinations of Mr. Copeland have revealed that he is indeed mentally retarded, psychotic and brain damaged -- and was incompetent to stand trial.

Dr. Harry Krop, a clinical psychologist, visited Mr. Copeland on October 10, 1986, conducted a psychodiagnostic interview, and administered a battery of psychological and neuropsychological tests. (Krop Dec., 3.850 Ex. H) These tests included the: Wechsler Adult Intelligence Scale - Revised (WAISR), Wechsler Memory Scale, Bender-Gestalt Test, Wray Auditory Memory Test, Aphasia Screening Test,

Facial Recognition Test, Imbedded Figures Test, and Assertiveness Quotient Inventory.

Dr. Krop observed obvious memory deficiencies regarding remote events and immediate recall. Dr. Krop also found that Mr. Copeland was functioning in the mild range of mental retardation, earning a full-scale I.Q. of **69**.

Mr. Copeland displayed significant cognitive deficiencies, an extreme deficit in psychomotor skills and achievement, poor perceptual motor functioning suggestive of organic dysfunction, and impaired judgment. His functioning on the Wechsler Memory Scale revealed significant memory deficits, particularly in the area of logical memory. For example, Mr. Copeland was able to recall an average of only two details from paragraphs that were read to him approximately 30 seconds earlier, whereas an individual of average intellectual ability should be able to recall at least ten details. Mr. Copeland's performance on this test suggested left temple brain lobe dysfunction. (Krop Dec., 3.850 Ex. H, ¶ 17)

Dr. Krop further determined, on the basis of his psychological evaluation, and background materials, that Mr. Copeland suffered an acute psychotic break after the offense, becoming unable to distinguish what was real from what was not. (Krop Dec., 3.850 Ex. H, ¶¶ 21-22)

Dr. Dorothy Lewis, on the basis of her in-depth interview with Mr. Copeland on November 12, **1986** and her

review of extensive background materials, similarly concluded that Mr. Copeland was mentally retarded, psychotic, and organically brain damaged. (Lewis Dec., Ex. B hereto, ¶¶ 6-10) She also specifically concluded that he was mentally incompetent at the time of trial. (Lewis Dec., Ex. B hereto, ¶ 7) In reaching this conclusion, she took full account of the examinations of Drs. Wray, Cook and Semon, as well as of the limitations on those examinations. (Lewis Dec., Ex. B hereto, ¶¶ 6, 7)

While Mr. Copeland was able to read words accurately, Dr. Lewis found that he was unable to comprehend their true meaning. (Lewis Dec., Ex. B hereto, ¶ 6) As is the case with many retarded individuals, Dr. Lewis found, Mr. Copeland is also extremely suggestible. (Lewis Dec., Ex. B hereto, ¶ 6) When asked why he had given different versions of the offense to the authorities, Mr. Copeland responded, "the more they told me about what happened and the more I saw in the newspaper the more I remembered."

Dr. Lewis further concluded that Mr. Copeland has been continuously psychotic since childhood, and was psychotic during the trial -- of which he has no memory whatsoever. Mr. Copeland may well have been receiving antipsychotic medication during the trial, a fact which would be relevant to his mental state at the time, and could indicate that he was still regarded as psychotic by his treating psychiatrist -- who was in all likelihood unaware that Mr. Copeland

was simultaneously consuming alcohol, marijuana, and quaaludes on a regular basis. (Lewis Dec., Ex. B hereto, ¶ 6)

Based on all of the available data, including (a) Mr. Copeland's significant retardation, (b) his inability to understand simple questions, (c) his history of severe head injuries and the evidence of severe brain damage, (d) his long-standing history of psychosis, and (e) his illogical, incoherent ramblings on the witness stand, Dr. Lewis concluded that Mr. Copeland lacked the ability to consult with his lawyer with a rational degree of understanding, and lacked a rational and factual understanding of the proceedings against him. (Lewis Dec., Ex. B hereto, ¶ 6) In short, Mr. Copeland was incompetent to stand trial.

D. Mr. Copeland is Entitled to a New Trial or, at Minimum, a Retrospective Competency Hearing

Relying on Bishop v. United States, 350 U.S. 961 (1956), this Court has recently reaffirmed that a trial court must conduct a hearing on the issue of a defendant's competency to stand trial when there are reasonable grounds to suggest incompetency. Hill v. State, 473 So.2d 1253, 1256 (Fla. 1985). In doing so, this Court, on the basis of Pate v. Robinson, 383 U.S. 375 (1966), reiterated that the burden is on the trial court, on its own motion, to make an inquiry into, and hold a hearing on, the competency of the defendant when there is evidence that brings competency into question. Hill, supra, 473 So.2d at 1257.

If the trial judge fails to hold a hearing when there is sufficient evidence to raise a doubt as to the defendant's competency to stand trial, the remedy on subsequent review is a retrial, not a remand to determine retrospectively whether the defendant was in fact competent at the time of trial. **Id.** at 1258.

In this case, there was ample evidence requiring a hearing at the time of trial. Not only had Mr. Copeland made several suicide attempts, but he had been found incompetent by the examining psychologist on six occasions. While Dr. Wray ultimately altered his conclusion, the courts have recognized in the case of judicial determinations a presumption that a person found to be incompetent continues to be incompetent until the presumption is overcome by an adjudication of competency. **See** Perkins V. Mayo, 92 So.2d **641, 644,** (Fla. 1957); Eason **v.** State, 421 So.2d 35 (Fla. 3d DCA 1982); Alexander v. State, 380 So.2d 1188 (Fla. 5th DCA 1980). Analogously, once Dr. Wray found Mr. Copeland to be incompetent, a hearing was required for him to justify the change.

Although the two supplemental examining psychologists concluded that Mr. Copeland was competent to stand trial, their conclusions were so inconsistent with their own reported findings, as well as with other evidence, that their reports intensified rather than diminished the already-existing questions.

At the first of these examinations, Dr. Semon conducted a meager one hour interview, during which he noted that Mr. Copeland "remained virtually verbally non-communicative."[12/] He noted that Mr. Copeland's behavior appeared "very bizarre," and that Mr. Copeland seemed "unclear as to who I was and what my purpose was with him." Yet he took no steps to collect further information, simply concluding instead that Mr. Copeland was faking. (ROA 401)

This Court has pointed out the professional inadequacy of such conduct, see Mason v. State, 489 So.2d 734, 737 (Fla. 1986) (when patient cannot convey accurate information about his history and is thought to be trying to mask rather than reveal symptoms, "an interview should be complemented by a review of independent data"), and the trial court should have responded by calling for a hearing to provide the missing data and to confirm or deny the charge of malingering. This is particularly so since even an acceptance of Dr. Semon's claim would not have disposed of the issue of competency. Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980) (even defendant voluntarily obstructing psychiatric process cannot be tried unless competent). Such a hearing would have

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12/ Similarly, Dr. Wray testified at trial that the reason for giving Mr. Copeland antipsychotic medication was that he was "so psychotic he could not really render a history" of the events surrounding the case. (ROA 2143)

revealed the facts about Mr. Copeland's condition that have only now begun to emerge. Knowledge of these facts at the time would have been invaluable to the trial court (and to this Court on appeal) in making an intelligent assessment of Mr. Copeland's condition.

As already described in greater detail at p. *28* above, the second supplemental examiner, Dr. Cook, in the course of concluding that Mr. Copeland was competent to stand trial, found, among other things, that his attention seemed to wander, that his responses were quite variable, that at times it was difficult to elicit a response from him, and that he appeared not to understand "even simple questions.@@ Dr. Cook also observed instances of inappropriate behavior on Mr. Copeland's part. Still, Dr. Cook wrote, although Mr. Copeland might be schizophrenic, he was not **"grossly"** psychotic. (ROA **404)** At the very least, Dr. Cook's ultimate conclusion that Mr. Copeland was competent to stand trial was in tension with his findings, and the trial court should have been alerted by this.

In light of Dr. Wray's finding that Mr. Copeland was **"quite** autistic, seemed to hear voices, was paranoid and believed he could fly," and Mr. Copeland's several suicide attempts, the highly ambiguous reports of Dr. Semon and Dr. Cook raised more questions than they answered regarding his competency to stand trial.

At this point, the trial judge had been presented with evidence at least as suggestive of incompetency as the evidence in Hill, supra. There, this Court noted that the defendant had been diagnosed by a treating physician as suffering from mental retardation. The Court further suggested that the defendant's suggestibility and acquiescence in acceptance of guilt were characteristic traits of many mentally retarded people. Furthermore, the Court noted that the defendant exhibited unusual behavior at trial, indicative of his inability to appreciate the nature of the proceedings against him. And the Court found relevant that two mental health professionals found the defendant to have an **I.Q.** of **66,** reflecting borderline intelligence and placing him in the lowest 1% of the general population. Hill v. State, supra, 473 So.2d at 1254, 1255.

In the present case, Dr. Cook diagnosed Mr. Copeland as mentally retarded, with an overall **I.Q.** of 62, and Dr. Semon observed Mr. Copeland's inability to understand "even simple **questions."** Mr. Copeland's unusual behavior was remarked by all three examiners. Dr. Wray referred in his report to Mr. Copeland's belief that he could fly. Dr. Semon characterized his behavior as "very bizarre." And Dr. Cook observed that his behavior became "quite **inappropriate."** Dr. Cook further observed that Mr. Copeland had adopted an **"I** don't care" attitude, which was not appropriate for one in his circumstances.

Thus, the fact pattern here is indistinguishable from that in Hill. Mr. Copeland is entitled to a new trial.

At the very least, Mr. Copeland is entitled to a hearing such as the one prescribed by this Court in Mason v. State, 489 So.2d 734 (Fla. 1986). In Mason, this Court noted that, at the time of defendant's trial, the trial judge possessed findings from three doctors that the defendant was competent. This Court held that, in light of the uncontroverted nature of the evidence, the trial judge was not required to conduct a competency hearing. However, the Court went on:

> Because Mason has since proffered significant evidence of an extensive history of mental retardation, drug abuse and psychotic behavior which were not uncovered by defense counsel, and because a possibility exists that this evidence was not considered by the evaluating psychiatrists . . . we must remand for a hearing on whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history. 489 So.2d at 736.

Here, as in Mason, Mr. Copeland has proffered extensive information bearing on his mental condition that was unknown to the examiners at the time of trial, and might well have affected their conclusions.

This is not a case like James v. State, 489 So.2d 737 (Fla. 1986), where the only new evidence presented was that the defendant probably had some organic brain damage. There, this Court emphasized in denying relief that the psychologist's report stopped short of stating that the defendant was incompetent to stand trial. Here, organic damage is just one of the many problems plaguing Mr. Copeland's

brain. The reports in the trial court's own file contain findings of mental retardation and psychosis. And Dr. Lewis's affidavit concludes specifically that Mr. Copeland was incompetent to stand trial. (Lewis Dec., Ex. B hereto, ¶ 7) For the same reasons, Mr. Copeland's showing of incompetency here goes significantly further than the defendant's showing found inadequate in Card v. State, Nos. 68,862, 68,846 slip op. (Fla. October 9, 1986) (letters filed by psychologists hours before scheduled execution inadequate to raise sufficient doubt as to the competency to stand trial, particularly since "neither letter concludes that Card was incompetent to stand trial").

Moreover, the attack here extends to competency at the time of sentencing as well as at the time of trial, and it is well established that competency for one purpose does not necessarily mean competency for another. Westbrook v. Arizona, 384 U.S. 150 (1966); Rees v. Peyton, 384 U.S. 312 (1966). Mr. Copeland was surely not competent to take the stand at a capital sentencing proceeding -- as his disjointed, illogical, incoherent monologue and non-responsive answers on cross-examination demonstrate.

In short, the record was rich at the time of trial, and is now even richer, with the sort of evidence of mental incompetence that has in the past led this Court to grant relief. To assure basic due process rights, the Court should grant relief in this case as well.

111. Mr. Copeland was Denied a Reliable Individualized Sentencing Determination When the Jury Was Not Permitted to Consider Non-Statutory Mitigating Circumstances

Mr. Copeland's death sentence is unconstitutional because the jury in his 1979 sentencing proceeding was instructed that the mitigating circumstances it could consider were limited to those specifically itemized in the Florida death penalty statute, Fla. Stat. § 921.141(6).

At the outset of the sentencing proceeding, the trial judge stated to the jury: "At the conclusion of the taking of evidence and after argument of counsel, you will be instructed on the factors in the aggravation and mitigation that you may consider." (ROA 2136) (emphasis added) After evidence was presented, the judge instructed the jury as follows:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence are these: . . . (ROA 2199; 480)

He then read the seven statutory mitigating circumstances to the jury.

Similarly, in sentencing Mr. Copeland to death, the trial judge restricted his consideration of the mitigating circumstances to those enumerated in the statute. **See** Lucas v. State, 490 So.2d 943 (1986) (fact that trial judge instructed jury only on statutory list evidenced that he felt himself

bound by it). His assumption that these were the only mitigating circumstances he was permitted to consider was shared by the State, which discussed only the statutory mitigating circumstances in its sentencing memorandum. (ROA 515)

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that the most fundamental Eighth Amendment requirement applicable to capital sentencing is that the process for selecting those who will die must provide for reliable individualization. Accordingly, Lockett invalidated an Ohio statute that restricted the jury's consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant circumstances concerning the defendant and his crime created the constitutionally "unacceptable risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'! Lockett, supra, 438 U.S. at 605 (plurality opinion). The United States Supreme Court reaffirmed these principles in Eddings v. Oklahoma, 455 U.S. 104 (1982).

This Court has recently held that, prior to the decision in Sonser v. State, 365 So.2d 696 (Fla. 1978), Florida's death penalty statute "could have been reasonably understood to preclude the introduction of non-statutory mitigating evidence." Harvard v. State, 486 So.2d 537, 539 (Fla. 1986) (citing Jacobs v. State 396 So.2d 713 (Fla. 1981); Perry v. State, 395 So.2d 170 (Fla. 1980); Cooper v.

State, 336 So.2d 1133 (Fla. 1976)). Accordingly, this Court ruled in Harvard that "appellant's death sentence was imposed in violation of **Lockett**," and vacated that sentence. **Id.**[13/]

The narrow issue presented here is whether the rule of Harvard will apply to jury instructions that were given after Sonser was decided in December of 1978 but before Florida amended its death penalty statute in July of 1979 to bring it into conformity with the mandate of Lockett.[14/] While Mr. Copeland was sentenced to death after Lockett and Sonser were decided, the jury's recommendation and the judge's findings were tainted by the court's continued reliance in its instructions on the language of old Fla. Stat. § 921.141(6), which confined consideration of mitigating factors in the same manner as the Ohio statute struck down in Lockett.

Simply put, Sonser had left the law unclear. The evident meaning of the decision was that restrictive jury instructions like the ones given in that case and this one were proper because -- appearances to the contrary -- they did in fact permit the consideration of non-statutory

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13/ The same issue is, of course, before the United States Supreme Court in Hitchcock v. Wainwright, No. 85-6756, cert. sranted, 106 S.Ct. 2888 (1986).

14/ Our review of the cases decided by this Court during that period suggests that such an extension of Harvard would apply at most to 8 cases other than this one.

mitigating circumstances. Indeed, the jury instructions upheld by this Court in Sonser were even more restrictive than the ones given here.15/

Plainly, once the Florida statute was amended to make explicit the Lockett holding on the possibility of considering non-statutory mitigating circumstances, all Florida lawyers and judges were on notice that instructions such as those given in this case were erroneous. But at the time the trial in this case was held, there was little basis for a Florida lawyer to re-urge a position which this Court had seemingly rejected a scant five months earlier in Sonser. And there was little point in putting on evidence which, under the plain meaning of the instructions, the jury was not permitted to consider.

It was precisely to correct this situation that the Florida legislature, soon after Sonser, amended the death penalty statute to explicitly permit consideration of any mitigating circumstances, statutory or non-statutory. 1979 Fla. Laws, Ch. 79-353.

15/ The trial court in Sonser instructed the jury that its recommendation should be "based upon whether sufficient mitigating circumstances exist as hereafter enumerated in the statute," and that "mitigating circumstances, by statute, are: [the ones listed in the statute]."

However, the amended statute did not become law until July, 1979, and was thus not applied to Mr. Copeland's sentencing recommendation, which occurred in May 1979.

Yet the non-statutory mitigating evidence that Mr. Copeland could have and surely would have presented is powerful. As discussed above, there exists extensive evidence elucidating Mr. Copeland's psychiatric and family background. (See Section III.) Mr. Copeland's upbringing was one of extreme poverty -- indeed, outright hunger -- and family instability. He also endured considerable violence during his youth, including beatings and sexual assaults by his father and uncle. A polio-induced fever at the age of four, combined with numerous head injuries stemming from beatings, automobile accidents, and suicide attempts, resulted in organic brain damage, and Mr. Copeland had suffered numerous and persistent psychotic episodes throughout his life. Finally, the fact that Mr. Copeland, although severely mentally retarded, had applied himself productively in prison learning how to read and write would have been presented to establish his potential for rehabilitation and ordered social behavior. **See** Skipper v. South Carolina, 106 S.Ct. 1669 (1986) (capital defendant entitled to show in mitigation that he had earned high school diploma in prison).

Mr. Copeland, no less than Mr. Harvard, was entitled to a full individualized consideration of all of his circumstances. He was entitled to present all available mitigation

evidence -- and even more important -- to have the jury consider it.

While no objection to the restrictive instruction was raised at trial, the unconstitutional application of the pre-amendment Florida statute constituted fundamental error, which may be corrected by this Court now. See Southwestern Insurance Co. v. Stanton, 390 So.2d 417 (Fla. 3d DCA 1980), (civil case; instruction which tends to confuse rather than enlighten a jury is fundamental error if it may have misled the jury into arriving at a conclusion it otherwise would not have reached). See also Butler v. State, 343 So.2d 93 (Fla. 3d DCA 1977) (fundamental error to impose sentence exceeding that allowed for particular crime).

By extending the Harvard rule a few months forward in time to capture deserving cases like Mr. Copeland's falling between the Songer decision and the statutory amendment, this Court will fulfill its highest function -- providing individualized justice to someone who might otherwise be denied it.

IV. The Trial Judge and the Prosecutor Impermissibly Minimized the Jury's Sense of Responsibility for Determining the Appropriateness of the Death Sentence, In Violation of Caldwell v. Mississippi

Subsequent to the decision in this case, the United States Supreme Court ruled in Caldwell v. Mississippi,

472 U.S. 320 (1985), that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.[16/] During the sentencing portion of Caldwell's trial, the prosecutor sought to minimize the jury's sense of its responsibility by suggesting that its decision was reviewable by an appellate court. The trial judge failed to correct the prosecutor's remarks and thus implicitly gave the comments his sanction. The jury then sentenced Caldwell to death. In vacating that sentence, the Supreme Court soundly condemned both the prosecutor's and the judge's actions as inimical to the constitutional requisite that a capital sentencing jury recognize "the gravity of its task and proceed with the appropriate awareness of its truly awesome responsibility." 105 S.Ct. at 2646.

In Garcia v. State, 492 So.2d 360 (Fla. 1986), this Court specifically recognized that Caldwell applies in Florida and that the failure to stress to a Florida jury "the

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16/ The State's suggestion that this claim should have been raised on direct appeal is without merit. Caldwell, a new constitutional decision of fundamental importance, was decided in 1985, subsequent to Mr. Copeland's 1979 trial and to this Court's decision on direct appeal in 1984. Thus, the claim may be heard by this Court under the principles of Witt v. State, 387 So.2d 922, cert. denied, 449 U.S. 1067 (1980). See Adams v. Wainwright, Ex. C hereto, slip op. at 8-9, & nn. 5-6.

seriousness which it should attach to its recommendation" violates Caldwell. See also Pope v. Wainwright, No. 67,054, slip op. at 7 (Fla. Oct. 16, 1986) (no Caldwell violation "as long as the significance of jury's recommendation is adequately stressed").

This Court has firmly adhered to the rule of Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) that a capital jury's sentencing recommendation should not be overturned unless the facts suggesting the opposite sentence are so clear and convincing that no reasonable person could differ. See Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983) ("It is well settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overturned unless no reasonable basis exists for the opinion."); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982).

Indeed, in declaring Florida's trifurcated statutory death penalty scheme constitutional in Dobbert v. Florida, 432 U.S. 282 (1977), the United States Supreme Court explicitly found the Tedder prescription to be a "crucial protection" of a defendant's rights, and thus an indispensable safeguard in the statutory structure. Id. at 295.

For these reasons, in Adams v. Wainwrisht, Ex. C hereto, the Eleventh Circuit recently granted a federal writ of habeas corpus to a Florida prisoner who, like

Mr. Copeland, had been the victim of the kind of statements condemned in Caldwell.

The record here is replete with instances of efforts by both the prosecutor and the trial judge to minimize the role of the jurors as to sentencing. Indeed, at certain points the trial judge plainly misstated his own role in order to allay the concerns of prospective jurors. Cf. Adams, supra, Ex. C hereto, at 11, n.8. The following exchange is illustrative:

> THE COURT: All right. Let me ask you this, Mr. Gillis. Under our law, it is the jury's duty to determine the guilt or innocence of the defendant. Also under the same law, it's the responsibility of the court to impose sentence. Now, the jury has absolutely nothing to do with whatever sentence I might impose. Now, do you understand that if you went in or were seated on this jury and you went in and there was sufficient evidence to warrant you in finding this defendant guilty as charged of murder in the first degree, and also knowing that we would have an additional hearing for the jury to make a recommendation to the court as to whether or not the death penalty should be invoked or imposed, but also knowing that whatever you might recommend is not binding upon you. In other words, you could come in and recommend mercy or recommend the death penalty or life imprisonment.
>
> Now, knowing that in spite of that, that I could invoke the death penalty, would you still be willing to find this defendant guilty if the evidence was such to warrant that?
>
> JUROR: Your Honor, if I believed by which the case was, as I said, done to where there was beyond a shadow of a doubt in my mind that the defendant was guilty, I would definitely vote guilty, but as far as the death penalty, like you said, it's in your hands.
>
> THE COURT: The only thing that you would have to do is to hear the evidence.---
>
> JUROR: Yes, sir.

> THE COURT: ---after you made a finding of guilt or innocence and at that point, if it were guilty and you had the duty to make whatever finding might be recommended or not recommended, knowing that it was my responsibility thereafter to impose sentence, could you sit as a juror in that case?
>
> JUROR: Yes, sir, I could.
>
> THE COURT: I don't think he should be excused.

(ROA **1360-62**) (emphasis added)

This was not an isolated incident. In all there were at least **14** instances (10 of which were heard by all of the jurors chosen) of misleading statements by the judge or prosecutor. For instance, the following remarks were heard by the entire courtroom.

> THE COURT: Ms. Pelham, you say you have mixed emotions about [the death penalty], I want to explain to you what the process is. . . . Now, I want to state this, that irrespective of what your recommendation is, the court has the sole discretion as to what sentence to impose. In other words, I want all of you to understand that if the evidence was such that it warranted a verdict of murder in the first degree, then if you recommended a life sentence, the court would still have the authority to invoke the death penalty. Do all of you understand that? If you have any question about that, I would like for you to make it known to me at this time.

(ROA **1391**) (emphasis added) (See ROA 1357-58, **1436-37, 2120** for other suggestions by trial judge that the jury's role was secondary.)

The prosecutor also repeatedly misapprised the jurors of their role, echoing the judge's suggestion that their advisory opinion would carry little weight. For example:

> What factors must you consider in deciding whether or not to impose this penalty or invoke, advise the Court, you know, you never invoke the Penalty. The Judse takes into consideration Your recommendations and it is the Judse that sentences the defendant. It's not the jury."

(ROA **2181-82)** (emphasis added)

> ". . . that is strictly an advisory recommendation made to the **court."**

(ROA **1372)**

> **"Of** course, you understand the judge passes sentence. All you do is give an advisory opinion to the judge."

(ROA **1512)**

> **". . .** then there's a second portion of the trial in which you make a recommendation to the Court as to the death sentence, whether or not it should be imposed. The jury doesn't impose it. All the jury does is give their opinion to the judge."

(ROA **1342)** (For other examples, see ROA **1417, 1418, 1442.)**

The judge never corrected any of these statements.

The instructions the trial judge gave to the jury failed to warn the jurors of the seriousness of their task -- much less that their decision would be given "great weight" and not overturned unless manifestly unreasonable. Rather, the judge simply reiterated what the jury had already heard:

> THE COURT: Ladies and Gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence . . .

(ROA **2135)**

Thus, the impression given to the jury in this case was highly misleading. It was repeatedly told that "all" it had to do was give its "advisory opinion" to the judge, who had "the sole discretion" as to what sentence to impose. The crucial legal significance of the jury's finding -- namely that it would be binding unless it it had "no reasonable basis" -- was obscured.

This was error even under the relatively restrictive view of the application of Caldwell to Florida taken by this Court in Pope v. Wainwrisht, supra. There, the Court wrote, "We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as lons as the significance of its recommendation is adequately stressed." (emphasis added) Id., slip op. at 7. The trial judge in Pope, in "his final instructions to the jury . . . stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make." Here, in contrast, the significance of the jury's recommendation was not stressed at all.17/

17/ The closest that the judge came to mentioning the issue was in the context of advising the jury not to be influenced to act hastily by the fact "that the advisory sentence can be reached by a majority . . . by a single ballot." In that context, he urged the jury to carefully "bring to bear your best judgment upon the issue which is submitted to you," bearing in mind its gravity. (ROA 2201) Since the trial judge had

(Continued)

Remarkably, despite this and despite the fact that the jury never heard the extensive non-statutory mitigating evidence described in Section III above, two of the jurors in this case voted for a life recommendation. Hence, this case "is not one in which the only reasonable sentence would have been death." Adams, Ex. C hereto, at 11.

To uphold a death sentence under these circumstances would not only violate Caldwell; it would violate Dobbert. "The uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger" of diminishing the jury's role. Caldwell v. Mississippi, supra, 472 U.S. at — , 105 S.Ct. at 2641-42. Mr. Copeland was entitled to a considered determination by jurors who reflected the conscience of the community and were aware that his life rested largely in their hands.

(Continued)
repeatedly misdefined the "issue," and since the jury was never told the critical fact that its recommendation would be binding unless it lacked reasonable basis, this comment was hardly "adequate" to "stress" in a "non-misleading and accurate" way the jury's role, as required by Pope v. Wainwright, Id., slip op. at 7-8. Indeed, for this reason, the identical remarks made by the trial judge in Adams, see Ex. C hereto, at 23, n.7, did not affect the Eleventh Circuit's conclusion that a Caldwell violation had occurred.

V. Imposition of the Death Penalty in this Felony Murder Case Is Unconstitutional Under Enmund v. Florida

The death sentence imposed in this case, where Mr. Copeland's liability for first degree murder rests solely upon a felony murder theory, Copeland v. State, supra, 457 So.2d at 1019, is unconstitutional under Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, the United States Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty absent a showing that the defendant killed, attempted to kill, or intended to kill.

This Court improperly found that Enmund was satisfied under the circumstances of this case:

> Although the evidence did not show that appellant shot the victim, his participation in the events leading up to the murder was substantial enough to support the conclusion that he contemplated that life would be taken or anticipated that lethal force would be used.

457 So.2d at 1019.

This argument misstates the Enmund standard. It merely restates the presumption underlying the felony murder theory. While such a presumption may satisfy the mens rea requisite for a first-degree murder conviction, it will not justify the imposition of the death penalty, which is "unique in its severity and irrevocability." Gregg v. Georgia, 428 U.S. 153, 187 (1976).

The fact that Mr. Copeland may have actively participated in "the events leading up to the murder" is

insufficient. That this is so is confirmed by the action of the United States Supreme Court in bringing up for review State v. Tison, 690 P.2d 747 (Ariz. 1984), cert. sranted, 106 S.Ct. 1182 (February 24, 1986). In Tison, the defendant was convicted of first-degree murder, armed robbery, kidnapping, and motor vehicle theft. Notwithstanding the fact that the first-degree murder conviction was based on a felony murder theory, the defendant was sentenced to death. 690 P.2d at 748. The Arizona Supreme Court held that Enmund was satisfied because the defendant (1) actively participated in the events leading to the death of the victim by assisting in her abduction, transporting her to the murder site, and providing the instrument used to kill her, (2) was present at all times during the murder, and (3) did nothing to interfere with the murder. 690 P.2d at 749.

In a sharply-worded dissent, Justice Feldman, joined by Vice Chief Justice Gordon, found the majority's holding "remarkable because there is no direct evidence that either of the brothers intended to kill, actually participated in the killing or was aware that lethal force would be used against the kidnap **victims."** 690 P.2d at 752 (Feldman, J., dissenting) (emphasis added). The dissent continued:

> To further compound the error, in drawing its inference the majority deals only with peripheral conclusions and ignores crucial facts. It decides that defendant's 'participation up to the moment of the firing of the fatal shots was substantially the same as that of Gary Tison and Greenwalt.'

> It points out that defendant 'actively participated in the events leading to death.' This is correct; no doubt defendant intentionally engaged in a dangerous criminal enterprise involving the use of deadly weapons. But no matter how the facts here are marshalled, we are faced with the Enmund rule and the facts which generated it. Enmund planned the armed robbery, transported two persons to the site of the crime, sent them into the house to commit the robbery knowing that they were armed, waited for them and drove the get-away car. 690 P.2d at 753. (emphasis added) (citations ommitted)

These words are, of course, directly applicable to the present case.

Nor could the State have made the required showing here. At trial, the prosecution put into evidence a statement by Mr. Copeland as to the events after Frank Smith had ordered the victim to kneel:

> **Q** What happened after she got down on her knees?
>
> **A** Mr. Copeland stated that he then began to plead with Frank Smith not to hurt the lady and he began to tell him to take the lady back to Wakulla County and leave her in the woods because she wasn't going to tell anyone what had happened to her. That Frank Smith then turned to him and ordered him to shut up because he was tired of hearing all this chicken shit talk---
>
> **Q** Is that a quote?
>
> **A** That is a quote, and that the Chief, namely, Frank Smith, knew how to handle things. (ROA 1691-92)

The only intent the State needed to demonstrate to obtain this murder conviction was intent to commit robbery or kidnapping -- not intent to kill. Since the State was not required to demonstrate that Mr. Copeland killed, attempted

or intended to kill, his death sentence violates the Eighth Amendment.

VI. The Statements Taken From Mr. Copeland Should Have Been Suppressed

As the Court is aware, Mr. Copeland has repeatedly challenged the admissibility of his statements to the authorities. In light of the very strong factual basis for these claims -- including a "voluntary" interview to which Mr. Copeland was transported in handcuffs and which lasted until 5:00 a.m., his repeated denial of access to counsel despite his indigency, and his mental limitations -- we continue to assert those claims here, as we will in any further proceedings.

The extensive evidence of Mr. Copeland's mental problems summarized in Section II above takes on a special significance in this context, moreover, because it demonstrates that there was yet another infirmity in the admission of Mr. Copeland's statements: they "were the product of his psychotic condition at the time." (Krop Dec., 3.850 Ex. H, ¶ 35)

In People v. Connelly, 702 P.2d 722 (Colo. 1985), the Colorado Supreme Court held that the state had failed to prove by clear and convincing evidence that the defendant had effectively waived his Miranda rights, where there was psychiatric testimony that his statements to the police were the result of his mental illness. The United States Supreme

Court has granted certiorari to consider this issue, Colorado v. Connelly, 106 S.Ct. 785 (1985) (No. 85-660).

But there is no need to await a ruling in that case. This Court has long been recognized for its enlightened solicitude for the mentally ill. Since so few people will be in a position to raise this claim -- but those few will be deserving -- and since Mr. Copeland is one of those few, the Court should exercise its traditional solicitude in this case by adopting the Connelly rule as its own.

VII. Additional Issues

We of course continue to press each of the remaining issues in our 3.850 motion. The legal basis for these claims is described in the motion, and we mention specifically here only those as to which we have additional points to raise.

A. The McClesky/Hitchcock Claim

On direct appeal, this Court rejected Mr. Copeland's claim that there is systematic discrimination in the imposition of death sentences in the State of Florida based on the race of the defendant (in this case, black) and the victim (in this case, white). Copeland, supra, 457 So.2d at 1016.

In doing so, the Court does not appear to have considered the substantial independent state constitutional basis for the claim. Not only has this Court in the past taken on responsibilities more onerous than the federal

Constitution requires, in order to insure evenhandedness in death sentencing, see Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); cf. Pulley v. Harris, 465 U.S. 37 (1985), but Florida's tradition of attempting to lead the way among the Southern states in racial matters strongly supports such an approach.

In any event, as the Court is aware, this issue is now on writ of certiorari from the United States Supreme Court to the Eleventh Circuit in McClesky v. Kemp, 106 S.Ct. 3331 (July 7, 1986), and Hitchcock v. Wainwrisht, 106 S.Ct. 2888 (June 9, 1986). Mr. Copeland has proferred extensive evidentiary support for his claim (3.850 Ex. G), and the United States Supreme Court may well hold that a hearing is required. By awaiting that decision, this Court could preserve the possibility that any such hearing would take place in the Florida courts.

B. The Electrocution Claim

The Eighth Amendment embodies "the evolving standards of decency that make for the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); Estelle v. Gamble, 429 U.S. 97, 102 (1976).

Mr. Copeland is prepared to demonstrate at a hearing -- in vivid, if not gory, detail -- that, measured by this standard, execution by electrocution, specifically as practiced in Florida, is a cruel and inhuman punishment because it involves the infliction of more pain than is, with

the technology of today, necessarily required to extinguish life.

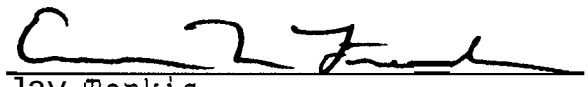
The Circuit Judge erred when, in signing the order of dismissal prepared by the State, he rejected this claim on the basis that it should have been, but was not, raised on direct appeal. Mr. Copeland argued on direct appeal that the death penalty was cruel and unusual punishment, **see** Copeland supra, **457** So.2d at **1016**. That attack necessarily embraced this one.

The Court should allow the presentation of evidence on this claim. But if it is not prepared to do so, it should at least clarify that the claim is being rejected on the merits, so that there will be no issue as to Mr. Copeland's right to pursue it in later proceedings.

Conclusion

This Court should grant Mr. Copeland the post-conviction relief he seeks.

Respectfully submitted,



Jay Topkis
Richard A. Rosen
Eric M. Freedman
Hal Neier*
Jon D. Kaplon*
Clyde H. Allison*

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) **373-3000**

YAEGER & LANG
888 Seventh Avenue
New York, New York 10106
(212) 307-6262

JOYCE DAVIS
1713 Kathryn Avenue
Tallahassee, Florida 72308
(904) 877-0456

Attorneys for Petitioner-Appellant
Johnny Copeland

Dated: November 15, 1986

* Awaiting admission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by hand to Mark Menser, Assistant Attorney General, c/o the Office of the Attorney General, The Eliot Building, 401 South Monroe Street, Tallahassee, Florida, 32301, this the 17 day of November, 1986.

Eric M. Freedman
ATTORNEY