IN THE

SUPREME COURT OF FLORIDA

LEVIS LEON ALDRIDGE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. _____

APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF FOR APPELLANT

On Appeal from the Nineteenth Judicial Circuit,
In And For St. Lucie County, Florida

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AUTHORITIES CITED

STATUTES

CONSTITUTION

PERIODICALS

STATEMENT OF THE CASE

No death warrant was pending when Mr. Aldridge filed his Motion to Vacate Judgment and Sentence on January 2, 1987.[1] A death warrant was issued February 2, 1987[2], and execution was set for March 18, 1987.[3] On February 9, 1987, the state served a response to the motion to vacate and stay application, and to the request for a subpoena duces tecum. The court entered its Order denying, without argument, the motion to vacate the stay application, and by separate order, the request for subpoenas duces tecum that same day. It denied an evidentiary hearing, ruled all claims were barred as successive, and alternatively ruled Mr. Aldridge was not entitled to relief on the merits of the grounds raised. A motion for rehearing was filed February 24, 1987, and was also denied March 2, 1987. On March 4, 1987, the defendant filed a notice of appeal, and an application for a stay of execution pending appeal. That stay application was also denied the same day.

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1 Along with a request for issuance of subpoenas duces tecum for discovery

2 Governor Martinez also signed a death warrant for William Melvin White, scheduling his execution for the same day. Mr. White is also represented by undersigned counsel. Mr. White's execution was stayed by the trial court February 20, 1987.

3 This Court tentatively set oral argument for March 11th shortly afterward.

STATEMENT OF THE FACTS

This Court's findings of fact are reported in its opinion on the direct appeal, in Aldridge v. State, 351 So.2d 942 (Fla. 1977). To summarize:

Levis Aldridge was charged with murdering Robert Ward during the course of a robbery in Ft. Pierce, Florida on September 3, 1974. The robbery apparently occurred as Mr. Ward, the manager of Al DiVagno's restaurant, was locking up for the evening. Mr. Ward called his wife at 12:05 a.m. to indicate to her that he was about to leave. T 219-20. Thereafter, at 12:14 a.m. the police received a signal from the restaurant's burglar alarm, T 223, and upon their arrival at 12:19, they found Mr. Ward's body beside his automobile at the side of the restaurant. The burglar alarm had been activated by the opening of an office door inside the restaurant where the safe was located. T 267-68. The owner estimated that between $600 and $900 was taken in the robbery. T 307-309.

The state's case against Mr. Aldridge was wholly circumstantial. The owner of the restaurant, Al DiVagno, testified that Mr. Aldridge had worked for him for about three months in 1974, but that he had fired Mr. Aldridge in July or August for trying to "boss" the other kitchen employees. T 315-17. During the period of his employment, he knew that Mr. Aldridge had become familiar with the closing procedures and the burglar alarm system at the restaurant. T 315-16. A restaurant employee testified Mr. Aldridge had told her that he planned to "hit" the restaurant

after he was released on parole. T 504.[4] A person confined with Mr. Aldridge at the Community Correction Facility, Norman Sapp, also testified that Mr. Aldridge planned to "hold up" the restaurant after he was paroled. T 334. Two young girls testified that on the night of the robbery and homicide, they were with a man named Charles Strickland when he gave the murder weapon (a shotgun) to a man he referred to as "Levi" in the parking lot of a Ft. Pierce hotel. T 392-97, 401-05. They could not identify "Levi" as Mr. Aldridge, but one of them identified a photograph of Mr. Aldridge's car as the car into which "Levi" put the gun. T 392-95, 401-02.

According to the prosecution's evidence, two other events occurring after the robbery and homicide tended to tie Mr. Aldridge to the crime. At 1:00 a.m. on September 3, a security guard saw a car like Mr. Aldridge's leave the vicinity of a warehouse where the shotgun was supposedly hidden following the crime. T 280-85. Thereafter, at 2:00 a.m. Mr. Aldridge drove slowly past Al DiVagno's restaurant. Because this seemed suspicious to the police officers who were still at the restaurant, an officer stopped Mr. Aldridge. T 292-97. The officer found that Mr. Aldridge had several hundred dollars in cash "stuffed" in his pockets and wallet. T 295, 303, 305. Mr. Aldridge explained that he had received the bulk of the cash upon being paroled a few days earlier and invited the police officers to his hotel room

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[4] At the time, Mr. Aldridge was in a work release program at the Community Correction Facility in Ft. Pierce. T 421-22.

where he showed them a Department of Corrections receipt, as well as pay stubs from the FMC Corporation (where Mr. Aldridge was then employed), which confirmed his explanation. T 299-300.

The only other evidence presented by the state -- the testimony of Charles Strickland -- was quite clearly the most important evidence, for he pieced together the state's other circumstantial evidence. In Justice Boyd's opinion concluding there was insufficient evidence, he said Strickland's "was the only testimony of substance tying Appellant [Aldridge] to the crime -- [and was] given by a convicted felon who had purchased and possessed the murder weapon in violation of the conditions of his own parole. The witness admitted at trial that he had committed perjury by lying under oath to police in connection with statements made about this crime. He further admitted he feared being returned to prison for buying and lending the death weapon to appellant. He had compelling reasons to implicate appellant or anyone else in the crime, since his gun was proven to have been used in the killing." Aldridge v. State, 351 So.2d 942, 944-45 (Fla. 1977) (Boyd, J., dissenting).

Strickland testified he knew Mr. Aldridge because they had both been inmates at the Ft. Pierce Community Correctional Facility. T 342-43. By September 2, 1974, however, both were on parole. T 345-46. On that date, he agreed to loan Mr. Aldridge his shotgun, which he owned in violation of the terms of his parole. Id. He said that he transferred the gun to Mr. Aldridge at 7:30 p.m. in the parking lot of the Ft. Pierce Hotel. Id. Later that night, according to Strickland, Mr. Aldridge called

and told him that he had killed someone with the gun. T 352. The next day Mr. Aldridge asked Strickland to accompany him to retrieve the gun from the warehouse area where he had hidden it. Id.[5] He said that during the trip to the warehouse, Mr. Aldridge explained he had robbed Al DiVagno's restaurant but that before he could leave, the restaurant employee who was still at the restaurant "grabbed for his mask and he had to shoot him...." T 382. When Mr. Aldridge shot the man, the restaurant's door slammed, and "when the door slammed shut the [burglar] alarm went off." Id. After he and Mr. Aldridge retrieved the gun, Strickland disposed of it because he believed his illegal possession of the gun would lead to his being charged with the murder. T 357. He also admitted that when the state attorney first questioned him about the gun, he lied under oath as to what had happened to it. T 359, 371-72.

Mr. Aldridge's defense was that the state had failed to prove his guilt beyond reasonable doubt. In support of this position, counsel relied upon an alibi presented solely by Mr. Aldridge's testimony and upon the view that Charles Strickland's testimony was an incredible attempt to conceal his own role in the crime. See generally T 672-89.

Mr. Aldridge testified that on the night of the robbery and homicide he went fishing until 10:30 or 11:00 p.m., that he then went to a bar, and that he stayed at the bar until 1:30 or 2:00

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5 This was the same warehouse area in which the security guard had seen a car similar to Mr. Aldridge's car at 1:00 a.m., shortly after the homicide.

a.m. T 516-18. Upon leaving the bar, he drove toward the home of a Mrs. Fish in order to finalize the rental of a room in her house. Even though it was late, Mrs. Fish had told him she often stayed up until 4:00 a.m. T 519. On the way he drove slowly by Al DiVagno's restaurant looking for the road which would take him to Mrs. Fish's house. T 519-20. At that point he was stopped by the police. He explained he was carrying several hundred dollars in cash at the time because he had no bank account and was afraid to leave his money in the hotel room where he had been staying. T 520-21.

The defense presented no other witnesses. Defense counsel argued to the jury, however, that the evidence left too much doubt about Mr. Aldridge's guilt to convict him. Since Mr. Aldridge knew so much about the restaurant and would obviously be a prime suspect if it were robbed, counsel argued that it was illogical for Mr. Aldridge to consider robbing it -- and to connect himself to the robbery by driving by the restaurant after it had occurred. See T 677-78. He further argued that the crime scene evidence created doubt about Mr. Aldridge's participation in the crime, for Mr. Aldridge would have known that the burglar alarm had to be turned off before opening the door of the inside office in order not to alert the police to the robbery. T 679. He argued that even Charles Strickland's testimony concerning Mr. Aldridge's explanation of the circumstances of the homicide showed that Mr. Aldridge was not involved. Mr. Aldridge knew that the burglar alarm was silent and was activated by opening a door, yet Strickland testified that Mr. Aldridge told him the alarm had

been set off (apparently audibly) by the slamming of a door. T 678-79. Finally, he argued that Mr. Strickland had lied in order to conceal his role in the crime and to direct the police away from himself. T 679-87. Strickland admittedly owned the murder weapon and gave it to the triggerman, and "[w]hoever got that gun from Strickland went out there and committed this crime ...." T 681-82.

Additional evidence was presented by the State at the penalty phase of trial to show Mr. Aldridge was on parole and evidence of other previous incarcerations. T 732-738. The State also presented at the penalty phase the hearsay testimony of Detective Boyd that he interviewed Jo Ann Desmaris and her statement to him undermined Mr. Aldridge's claim of innocence. T 738-80. Mr. Aldridge had indicated he wanted to be acquitted, and waived his right to present additional mitigating evidence. The defense case at penalty phase thus consisted of counsel's announcement that "in view of the instructions received from my client, we will make no argument in mitigation of sentence," T 740. Counsel did indicate he would have called his investigator to rebut Detective Boyd's testimony recounting his conversation with Jo Ann Desmaris, except that "the statement ... was taken by our investigator who is not available." T 740.

The remaining material facts relied upon Mr. Aldridge here are set forth in the Motion to Vacate Judgment and Sentence.

A statement of the material facts developed during the intitial post-conviction proceeding is contained in the Motion to Vacate Judgment and Sentence, at pages 8-23.

A STAY IS REQUIRED BECAUSE THE DEFENDANT HAS RAISED SUBSTANTIAL ISSUES REQUIRING MORE THAN SUMMARY CONSIDERATION

This Court has the constitutional authority to stay the execution of Mr. Aldridge pending resolution, after a full and fair hearing, of the substantial issues raised in the Motion to Vacate. Art. V, Sec. 5, Fla. Const.; Sec. 922.06, Fla. Stat.; State v. Schaeffer, 467 So.2d 698 (Fla. 1985).

It is certainly altogether reasonable to stay this execution pending the resolution of Mr. Aldridge's claims before "the irremediable act of execution is taken." Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980); Dobbert v. Wainwright, 670 F.2d 938 (11th Cir. 1982). The criteria for granting a stay of execution were set forth in Sullivan v. State, 372 So.2d 938, 941 (Fla. 1979):

> When entertaining an application for a stay the factors to be considered for exercise of the Court's discretion are (i) the probability of irreparable injury if no stay is granted, (ii) the remediable quality of ultimate success on the merits. An application for stay in a capital case should be more liberally construed than one in a civil case.

Sullivan, 372 So.2d at 941. (opinion of England, Sundberg and Hatchett, dissenting) (footnote omitted). In Schaeffer, supra, this Court noted it had previously upheld the grant of a stay where the defendant showed he "might be entitled to relief." Factors (i) and (ii) obviously weigh heavily in defendant's favor since Mr. Aldridge will be dead March 18th if no stay is granted. The likelihood of success on the merits of the grounds raised is substantial, as reflected in the summary discussion below. "For

purpose of entry of a stay . . . there need only be reasonable likelihood of success on the merits." Id. at 942.

The claims raised by Mr. Aldridge were properly before the Court on a Rule 3.850 motion and the following is a summary of the legal framework applicable to the claims raised to demonstrate they are sufficiently substantial to requireplenary consideration, and require an evidentiary hearing and stay of execution.

ARGUMENT

I

MR. ALDRIDGE DID NOT RECEIVE EFFECTIVE COUNSEL RENDERING HIS CONVICTION AND SENTENCES VIOLATIVE OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

II

THE STATE FAILURE TO DISCLOSE HELPFUL EVIDENCE TO THE DEFENSE AND ITS KNOWING USE OF FALSE OR MISLEADING TESTIMONY RENDERS THE CONVICTION AND SENTENCE VIOLATIVE OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

INTRODUCTION

This is not a case the criminal justice system can be proud of. A defendant is set to go to the chair in days, his conviction and sentence obtained by the state through a trial in which all courts agree counsel functioned ineffectively. It is only because the courts have not been persuaded the defense was sufficiently prejudiced by the ineffectiveness that Mr. Aldridge's conviction and sentence stand today. But it was not

until today this Court could know the extent to which the truth in this case was actually subverted.

The motion describes previously unknown evidence of innocence: the names and inculpatory statements of other serious suspects, under-the-table deals between the prosecutor and his chief witness Strickland, and the unholy alliance between the two resulting from their attorney-client association. For the failure of the jury and court to be timely exposed to this evidence, there is plenty of fault to go around. The state committed Brady/Giglio violations by withholding evidence favorable to the defense; trial counsel defaulted their obligation to diligently seek that evidence out. Regardless of which party bears responsibility, the damage done to the defense of Mr. Aldridge, and to the truth-seeking function of the adversarial process is profound, and requires relief.

A. The Motion raises substantial Issues requiring an evidentiary hearing on Grounds I & II.

The motion details several sources of evidence, helpful to the defense, which the jury and court never had an opportunity to hear. To summarize:

> 1. The State attorney prosecuting Mr. Aldridge represented Charles Strickland on the charge for which he faced a violation of parole (at the time of the killing) for his conduct in this episode.
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> 2. Strickland was promised, or thought he was promised, transactional immunity from prosecution for any role in the killing, and on his parole violation, contrary to what the jury and court was told.
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> 3. The state did intercede on Strickland's behalf before the parole commission, while telling the jury otherwise;

4. Strickland had been diagnosed Sociopathic by a state-paid psychologist;

5. The state did not disclose to the defense evidence in its possesion that there were other serious suspects in the Ward homicide;

6. Defense counsel for Mr. Aldridge were functioning under a substantial conflict of interest because their office had previously represented Strickland on the very charge for which he faced a probation violation and was granted immunity.

1. The Brady/Giglio violations

Brady v. Maryland, 373 U.S. 83 (1963), requires the State to disclose evidence materially "favorable to an accused" which is relevant to guilt or punishment. Failure to produce such information may violate Brady "irrespective of the good faith or bad faith of the prosecution." Id. at 87. The unrefuted sworn allegations are supported by documentary evidence and show the state withheld from the defense knowledge of suspects Bickelnopt and Quillet, and Quillet's inculpatory statements. The state also failed to disclose its hopeless conflict, resulting from its previous attorney-client relationship with Strickland. Neither did the state disclose its knowledge of Strickland's sociopathy, its intercession on behalf of Strickland in his parole proceeding, and the extensive grant of immunity it gave him. These facts were material, with or without a defense request for such information. In United States v. Bagley, 105 S.Ct. 3375, 3384 (1985), the Supreme Court found:

> the Strickland test for materiality is sufficiently flexible to cover the 'no request', 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: the evidence is

> material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

(emphasis supplied).

Mr. Aldridge's defense was innocence. It is clear that under Florida law the existence of other suspects, and certainly, Quillet's statement that he "got a [white male]"[6] would have been admissible, and used to support the defense case, for "one accused of a crime may show his innocence by proof of the guilt of another." Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); See also Washington v. Texas, 388 U.S. 14, 23 (1967) ("the Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use"), and Troedel v. Wainwright, Case No. 85-3690-Civ-Kehoe, Order Granting Petition for Writ of Habeas Corpus (USDC S.D. Fla. Sep. 23, 1986).

Even Detective Boyd's hearsay recount of Quillet's circumstances and statement would have been admissible at the penalty phase. Green v. Georgia, 442 U.S. 95 (1979); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984).

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6 Mr. Aldridge was denied adequate process to investigate this and other evidence of innocence when the trial court "refused to grant the Request for Issuance of Subpoenas Duces Tecum," an action we also challenge here. There was no full and fair opportunity to develop this claim. See 28 U.S.C. 2254(d).

Two sources of evidence present more serious constitutional violations. While telling the jury that Strickland received only use immunity in the case, the documentary evidence proffered here is that Strickland's immunity was transactional. The state also had the jury believe it had nothing to do with any action taken by the parole commission on Strickland's case, when in fact the documentary evidence now shows the local Sheriff's Department actually "begged" the Commission to take no action.

It is fundamental that the state is prohibited by the fourteenth amendment from knowingly presenting false or misleading evidence to a jury. Alcorta v. Texas, 355 U.S. 28 (1953). The fair trial element of the fourteenth amendment due process clause demands that a prosecutor "refrain from improper methods which are calculated to produce wrongful conviction...," Berger v. United States, 265 U.S. 78 (1935), and "manipulation of the evidence [which is] likely to have an important affect on the jury determination." Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). Promises to a witness "if disclosed and used effectively, [] may make the difference between conviction and acquittal." Bagley, 105 S.Ct. at 3380. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendants' life or liberty may depend"). There is no question the undisclosed promises made to Strickland are material to this case. Strickland was the sole witness to tie Mr. Aldridge to the

crime. Without his testimony, the case could never have gone to the jury. The case turned on Strickland's credibility, and evidence of a far-ranging reward would have substantially undermined his credibility for:

> [t]o think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.

Washington v. Texas, 388 U.S. 14 22-3 (1967).

When Strickland testified the reward for his testimony was solely use immunity, and when the prosecutor led him to testify the State was not involved with his parole problems, it permitted false evidence to go to the jury. The state had the obligation during, or immediately after, Strickland testified, to correct that falsity. Brown (Joseph Green) v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); Smith v. Kemp, 715 F.2d 1459, 1463 (11th Cir.), cert. denied, 104 S.Ct. 510 (1983) (State must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony).

Because this claim involves the State's use of false evidence, "[a] new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury....'" Giglio v. United States, 405 U.S. 150 (1972). This less onerous standard was recently reaffirmed in Bagley, supra. Accord, Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986).

The withheld and false evidence affected also the outcome of the sentencing proceeding. See Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). It supported the only argument raised by the defense there -- residual doubt about Mr. Aldridge's guilt. This evidence is probative on that issue, and admissible. Lockhart v. McCree, 106 S.Ct. 1758. As quoted by the Court:

> jurors who decide both guilt and penalty are likely to form residual or 'whimsical' doubts ... about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases.

Id. (quoting Grigsby v. Mabry, 758 F.2d 226, 247-48 (8th Cir. 1985) (en banc)). Accord, Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1985); Smith v. Balkcom, 660 F.2d 578, 580-81 (5th Cir. 1981) (Unit B). Cf. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) ("circumstantial evidence which however strong leaves room for doubt -- might convince a jury and a Court that the ultimate penalty should not be exacted, lest a mistake may have been made.).

It is clear this claim is cognizable in a Rule 3.850 motion and that an evidentiary hearing is required. This Court, in remanding a similar claim for an evidentiary hearing has held:

> Since this challenge is based on the ground that the judgment was entered in violation of the due process clause of the Constitution, since Smith alleges he did not have knowledge of the basis for this challenge prior to final judgment, and since it is within the peculiar province of the trial court to determine whether there was a Brady violation requiring a new trial, Smith's raising of this point in a motion to vacate was appropriate.

Smith (Dennis Wayne) v. State, 400 So.2d 956, 962-3 (Fla. 1981). Accord, Arango v. State, 437 So.2d 1099 (Fla. 1983), Opinion on remand, 487 So.2d 1161 (Fla. 1986). See Brown (Joseph Green) v. State, 439 So.2d 872 (Fla. 1983).

2. The Effective Assistance Claim

> "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

United States v. Cronic, 104 S.Ct. 2039, 2046 (1984) (quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975)).

"[C]onfronted with both the intricacies of the law and the advocacy of the prosecutor," United States v. Ash, 413 U.S. 300, 309 (1973), Mr. Aldridge was left with "sleeping counsel" who if they had the opportunity, would in retrospect rather "stand mute" then attempt to try this case in the state of preparedness they were in when it was first tried. They have already been found ineffective. Now is the time to grant relief.

The newly-discovered evidence of prejudice is entirely consistent with the defense case, and would have been used by the defense had it been known. (Trial counsel would so testify if given the opportunity).[7] It is likely to have affected the outcome

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[7] Mr. Aldridge has also alleged his prior convictions, resulting from guilty pleas, were unconstitutionally obtained and that counsel failed to investigate their validity. Those convictions were relied upon heavily by the state both at the guilt and penalty phase, and thus constitute 'misinformation of a constitutional magnitude', United States v. Tucker, 404 U. S. 443, 447-9 (1972), requiring the conviction and

of both the guilt and penalty phase of Mr. Aldridge's trial, and deserves airing at an evidentiary hearing. The evidence goes to innocence and thus the core of our adversarial criminal justice system that "the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

This ground, if proven as pled, requires this Court to presume prejudice. Trial counsel's profound conflict in trying to cross Strickland, previously represented by his office and corresponding obligation to point the finger at him, hamstrung the defense. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). The state's interference with the defense by withhholding of evidence also creates a presumption of prejudicial ineffectiveness. Cronic, 104 S.Ct. 2039, 2047 n. 25; Strickland v. Washington, 104 S.Ct. 2052, 2064, 2067 (1984); Blake v. Kemp, 758 F.2d 23 (11th Cir. 1985).

This is precisely the sort of claim requiring an evidentiary hearing. This Court should enter a stay and order such a hearing to be held, and ultimately, grant relief.

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sentence be set aside. Accord, Zant v. Stephens, 462 U.S. 862, 884 (1983).

B. The effective assistance and Brady/Giglio claims should not be barred, and an evidentiary hearing on the default issue is required.

As required by the express terms of Rule 3.850, Mr. Aldridge pled with specificity sound reasons why Grounds I and II of the motion were not barred as successive. See, pp. 56-58, Motion to Vacate. Like the merits of the claims raised, these allegations too were not refuted by the state.

The factual recitation meets Rule 3.850's requirement that when a second or successive motion is filed, it may be dismissed only if

> the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure under these rules.

Compare Rule 9(b), Rules Governing § 2254 Cases.

The effective assistance claim has been raised before and determined on the merits; the Brady/Giglio claim is a new and different claim. There are legitimate reasons why both of these claims should be heard now, and several of those reasons can be fairly determined only by providing Mr. Aldridge with an evidentiary hearing.

1. The effective assistance claim should not be barred as successive

As this Court knows, federal courts utilize successor bars similar to Rule 3.850 and will not review the merits of federal habeas claims if those claims have been previously litigated,

absent a showing the second petition is not abusive. Even in such circumstances, however, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ...." Murray v. Carrier, 106 S.Ct. at 2650. A constitutional violation raises a concern over "actual innocence" if it "serve[s] to pervert the jury's deliberations concerning the ultimate question" before it. Smith v. Murray, ___U.S.___, 106 S.Ct. 2661, 2668 (1986). to demonstrate this concern, the habeas petitioner must show "'a fair probability that ... [in the absence of the constitutional violation] ... the trier of the facts would have entertained a reasonable doubt of his guilt.'" Kuhlmann v. Wilson, ___U.S.___, 106 S.Ct. 2616, 2627 n.17 (1986) (plurality opinion). A plurality of the Court would apply only the "actual innocence" requirement in the context of deciding whether to hear a successive habeas petition. Id. at 2624-27. No Justice would reject, however, the basic rationale that innocence claims are at least one type of ground appropriate for successive consideration. The "fair probability" determination of Kuhlman requires "references to all probative evidence of guilt or innocence," id. at 2627 n.17 (emphasis in original), including "'evidence ... alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial....'" Id. When analyzed in these terms, the failure of the jury and court to hear the evidence impeaching Strickland, and of

the other suspects "probably resulted in the conviction of one who is actually innocent....," and should be heard on their merits by this Court.

Solid facts specifying precisely why counsel could not have known the additional facts alleged here were pled in the 3.850 motion. The new facts were not withheld by counsel or Mr. Aldridge during the first post-conviction proceeding. Yet the trial court, without providing Mr. Aldridge any opportunity to prove these newly-discovered facts were previously undiscoverable, dismissed the motion as successive. There could have been no fair determination whether the motion is an abuse of Rule 3.850 without a hearing. See Sanders v. United States, 373 U.S. 1, 10-11, 17-18 (1983); Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982). If the circumstances precluding counsel's and Mr. Aldridge's ability to develop the facts as alleged in the motion to vacate are not sufficient to warrant an evidentiary hearing, and ultimately renewed consideration of his effective assistance claim, then Florida in effect has no forum for successive motions. See 28 USC § 2254(d). This result cannot be what this Court intended or contemplated in adopting the successor bar in Rule 3.850. Mr. Aldridge is entitled to an evidentiary hearing at least to demonstrate there is good cause for the failure to previously raise the newly-discovered facts.

2. The Brady/Giglio claim should not be barred as abusive

Ground II, the withholding and knowing use of false evidence claim, has not been previously presented. The legal theory for this claim was previously available, but the factual basis, comprised essentially of the same information detailed in Ground I, was not discovered until recently. It should be heard for the same reasons discussed above, and also because state misconduct established by the detailed supporting documentary evidence proffered here should be heard at any time by the courts notwithstanding the failure to raise the issue in an earlier proceeding. The State was at all times, including the pendency of the last motion, under an obligation to disclose the information now known, but failed to do so. See Brady. The withholding of the names of other suspects, the prosecutor's secret attorney-client relationship with Strickland, and the deal actually given him state facts supporting grounds cognizable in Florida under Rule 3.850. Smith (Dennis Wayne) v. State, 400 So.2d 956, 862-3 (Fla. 1981); Arango v. State, 437 So.2d 1099 (Fla. 1983) opinion on remand, 497 So.2d 1161 (Fla. 1986). See Brown (Joseph Green) v. State, 439 So.2d 872 (Fla. 1983). The only issue is whether the habeas Court is authorized to consider this claim in a second post-conviction motion when it was not raised in the first. The motion alleges that the facts supporting the claim could not have been discovered previously, and those allegations are sufficient to require an evidentiary hearing. Mr. Aldridge has also alleged the state defaulted on a continuing obligation -- through post-conviction -- to disclose the favorable information. These

are facts which, if proven, provide sufficient justification for the Court to entertain this claim now. There are other reasons why this claim is not barred.

During the period the first post-conviction motion was litigated, Florida law governing Rule 3.850 proceedings permitted claims to be raised "piecemeal;" that is, when Mr. Aldridge first filed his post-conviction motion, there was no bar to raising this new claim in a second 3.850 motion. McCrae v. State, 437 So.2d 1388 (Fla. 1983). It was not until 1984, well after Mr. Aldridge's claims passed through state court post-conviction, that Rule 3.850 was amended to preclude litigation of new claims in a second post-conviction motion. Retroactive application of this procedural bar thus violates the due process clause of the Fourteenth Amendment, creating no more than a "trap for the unwary." James v. Kentucky, 106 S.Ct. 1830, 1835 (1985); NAACP v. Alabama ex rel. Petterson, 357 U.S. 449, 457 (1958); Reese v. Georgia, 350 U.S. 85 (1955); Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc).

This ground should also be heard because it raises new facts raising a colorable claim of innocence as briefed above. Kuhlman; Murray.

III

MR. ALDRIDGE WAS DEPRIVED OF A FAIR AND RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL JUDGE DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING, AND HIMSELF THOUGHT THE SENTENCE WOULD NEVER STAND

The death sentence imposed upon Mr. Aldridge is constitutionally unreliable because the jurors were repeatedly told by the trial judge and the prosecutor that the sentencing decision was not their responsibility but was instead the sole responsibility of the court. ("I guess I believe in the death penalty if somebody else has to do." T. 60). See also T. 55-60, 97, 98, 100-01, 730. The trial court similarly imposed a death sentence assuming it would not stand. T. 17-18. The inaccurate and misleading statement of the jury's role (and the Court's perception of its role) in a Florida capital sentencing trial increased the likelihood the jury would recommend death, and in turn, increased the likelihood Mr. Aldridge would be sentenced to death because of the judge's duty to give great weight to the jury's sentencing recommendation. As the Supreme Court held in Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985), the Eighth Amendment requires that a death sentence be set aside when it is imposed under these circumstances.

In Caldwell the Supreme Court reviewed the propriety of a prosecutor's closing argument informing the jury in the penalty phase of a capital trial that its decision was not final because it was subject to automatic review by the state supreme court.

Id. at 2638. The Court held that such an argument constituted a "suggestion[] that the sentencing jury ... shift its sense of responsibility to an appellate court," id. at 2640, and

> 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 apropriateness of the defendant's death rests elsewhere.

Id. at 2639. When a jury has been so relieved of "'the truly awesome responsibility of decreeing death for a fellow human,'" id. at 2640, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences...." Id. Accordingly, the Eighth Amendment's "'need for reliability in the determination that death is the appropriate punishment in a specific case,'" id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)), is violated when a death sentence is imposed under these circumstances.

While Caldwell dealt specifically with an argument that diminished the jury's sense of responsibility because of the availability of appellate review, it is plain that any comment to the jury "that mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision," Darden v. Wainwright, ___ U.S. ___, 106 S.Ct. 2464, 2473 n.15 (1986), is equally violative of the Eighth Amendment. Id. See also Adams v. Wainwright,804 F.2d 1526 (11th Cir. 1986); Commonwealth v. Baker, 511 A.2d 777, 787-91 (Pa. 1986); Frye v. Commonwealth, 345 S.E.2d 267, 284 (Va. 1986).

Thus, even in a state like Florida -- where the jury is not solely responsible for sentencing -- Caldwell error can occur if the jury is made "to feel less responsible than it should for the sentencing decision." As a settled matter of law in Florida, "[b]ecause it represent[s] the judgment of the community as to whether the death sentence is appropriate, the jury's recommendation is entitled to great weight." McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). It may be rejected by the trial judge 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). Thus if the jury is not informed of the substantial deference which must be given by the judge to its sentencing recommendation, it is necessarily made "to feel less responsible than it should for the sentencing decision," Darden v. Wainwright, 106 S.Ct. at 2473 n.15, and Caldwell error can occur.

Such error did occur in Mr. Aldridge's case and requires vacation of his death sentence.

This claim should not be barred as abusive

The Caldwell claim is not barred because it is a fundamental change in the law decided by the United States Supreme Court since trial, appeal, and litigation of the first 3.850 motion. Adams v. Wainwright, 804 F.2d 1526, 1530-33 (11th Cir. 1986); Witt v. State, 387 So.2d 922, 929 (Fla. 1980). Additionally, this Court reached the merits of a similar claim in Darden v. State, 475 So.2d 217, 220-21 (Fla. 1985), on a second post-conviction motion where there was no objection at trial. This court

cannot decide to invoke a procedural bar to avoid addressing the same federal constitutional claim raised by this defendant. See Spencer, supra; Barr v. City of Columbia, 278 U.S. 146, 149 (1964), and neither can it retroactively apply the 1984 procedural bar to this pre-1984 case. See Spencer, supra.

IV

THE SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY AND JUDGE THOUGHT THEY WERE LIMITED TO CONSIDERING AS MITIGATION ONLY LISTED FACTORS, CONSISTENT WITH THE FLORIDA SUPREME COURT'S THEN-EXISTING INTERPRETATION OF FLORIDA LAW

Like many others tried during the initial years of Florida's post-Furman death penalty statute, Mr. Aldridge's death sentence was imposed by a jury and judge who understood they could consider only that mitigation explicitly listed in the governing statute Section 921.141 (1973). Both judge and jury in this case were precluded by the statute's language, interpretation, and accompanying jury instruction from considering the most compelling evidence in any death case, and certainly compelling here, that there was a lingering doubt as to Mr. Aldridge's guilt, rendering the final and irrevocable act of imposing a death sentence inappropriate.

The jury which was to recommend death[8] was first introduced to the concept of aggravating and mitigating circumstances during jury selection. T. 61. No attempt was made then to advise the jury that any aspect of the nature of the crime or Mr. Aldridge's character could be considered in mitigation, because all participants thought otherwise.[9]

At the penalty phase, the Court told the jury explicitly they could consider only factors listed in the statute in

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8 In denying relief on this ground, the trial court relied on the irrelevant (and constitutionally impermissible) fact that Mr. Aldridge requested no (statutory) mitigation be presented at penalty phase. Neither the sentencer nor this Court can be deprived of the Eighth Amendment and statutory requirement of an individualized death sentencing process. Gardner v. Florida, 430 U.S. 349, 358 (1977) ("From the point of view of society, ... [i]t is of vital importance ... that any decision to impose the death sentence be, and appear to be, based on reason."). Thus, "there can be no consent judgment of death." Goode v. Wainwright, 704 F.2d 593, 600 (11th Cir. 1983). See also Thompson v. Wainwright, 787 F.2d 1447, 1451-53 (11th Cir. 1986); Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983). State courts are in agreement. State v. Hightower, 518 A.2d 482 (N.J. Super.A.D. 1986); People v. Burgener, 714 P.2d 1251 (Cal. 1986).

9 At the state post-conviction hearing, trial counsel testified he thought he was limited to presenting statutory mitigation, and that Mr. Aldridge's death request was based, at least in part, on that understanding. T. 594-607.

mitigation. The Court read from the then-standard Florida jury instructions:

> At the conclusion of the taking of the evidence, and after argument of counsel you will be instructed on the factors in aggravation and mitigation that you may consider.

T 731.

After the State's phase two case, consisting of a presentation of a litany of prior crimes to which Mr. Aldridge had pled guilty, the State told the jury of the limitation which years later was found to be unconstitutional:

> MR. STONE: ... Has the Court instructed them as to the aggravating and mitigating circumstances yet, or is it going to do so?
>
> THE COURT: I will do that after you have completed your statement.
>
> MR. STONE: The Court is going to instruct you then in considering your advisory opinion to him, that you are to take into consideration certain defined aggravating circumstances and certain defined mitigating circumstances, then it is your -- you should return an advisory opinion of death. If you find the mitigating circumstances, if there are any, outweigh the aggravating circumstances, then you should render an advisory opinion of life.
>
> I just want to point out that there are absolutely no mitigating circumstances in this case. If you listen to what the Court says is a mitigating circumstance, there is nothing mitigating at all that applies to this particular defendant and all the aggravating circumstances apply to him.

T 741-42 (emphasis supplied).

The prosecutor then went through the statutory list of aggravating circumstances, T 742-45, concluding with a speech that the legislature had "properly set out the aggravating and mitigating circumstances," and to "listen to the Court's instructions." T 745.

The Court then instructed the jury on the statutory list of aggravating and mitigating circumstances saying:

> The aggravating circumstances which you may consider are limited to such of the following as may have been established by the evidence.
>
> You will find that some of these apply. You will find that some of them do not, but these are the --, the aggravating circumstances which you may consider if they are established by the evidence.

T 747. The Court then read to the jury only the statutory list.

After reading the aggravating factors, the Court read the statutory list of mitigating factors with this introduction:

> Should you find one or more 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:

T 749. The jury recommended death, and the trial court then recited in his findings of fact that he had considered only those factors in Section 921.141, in imposing the death sentence.[10] Had

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10 That the trial judge himself felt limited is also evidenced by his colloquy with Mr. Aldridge, identifying for him what mitigating circumstances would be available for jury consideration at the penalty phase. He read to him only the statutory mitigation. T. 605-606.

the jury and judge not been so restricted, it could have considered its residual doubt about Mr. Aldridge's role in the crime -- the weakness of the proof is outlined above -- his consistent protestations of innocence, and the impropriety of imposing a sentence of death in list of the facts of this case which involves only a felony-murder not "set apart from the norm" of murder cases.

The trial court ruled this claim was previously presented, which we do not dispute. But much has happened since the first post-conviction motion, and we urge this Court to revisit the issue.

This Court recently directly addressed the "Cooper/Lockett" problem, and granted an appellant a second resentencing, after his first resentencing had occurred without a new jury recommendation:

> In Harvard v. State, 486 So.2d 537 (Fla. 1986), we remanded for a new sentencing hearing in a post-conviction relief proceeding because Harvard's trial court believed that the mitigating factors were restricted to those listed in the statute. Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Although Lucas' original judge cannot now say what he thought section 921.141 required, the record shows that he instructed the jury only on the statutory mitigating circumstances. Our review of the record shows a scant twelve pages devoted to the presentation of evidence by both the state and the defense at the sentencing proceeding. Moreover, in arguing to the jury defense counsel stated:
>
> > As the judge will explain to you, the law is very specific in spelling out what you may consider in making your decision. You may not go outside the aggravating an

> mitigating circumstances in reaching your decision ... But you may not go outside the specifically enumerated aggravating and mitigating factors.
>
> Because we would rather have this case straightened out now rather than, possibly, in the far future in a post-conviction proceeding, we remand for a complete new sentencing proceeding before a newly empanelled jury.

Lucas v. State, 490 So.2d 943 (Fla. 1986). To an important extent, this Court's resolution of Mr. Aldridge's claim should be controlled by the forthcoming decision by the United States Supreme Court in Hitchcock v. Wainwright, No. 85-6756, which presents the precise constitutional issue presented here and by this Court's forthcoming decision in Riley v. Wainwright, Case No. 69, 953, in which it has requested additional briefing on the retroactivity of Lockett.

A. THE EMERGENCE OF LOCKETT IN FLORIDA'S STATUTE

1. Introduction: The Lockett Mandate of Individualized Capital Sentencing

Since Lockett, it has become plain 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. Lockett invalidated a statute that restricted the independent consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant individuating 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 v. Ohio, 438 U.S. at 605 (plurality opinion),[11] and has consistently demanded adherence to the Lockett principles.[12]

Therefore, today "[t]here is no disputing," Skipper, 106 S.Ct. at 1670, the force of the constitutional mandate. "What is important at the selection stage is an individualized determination on the basis of the character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

2. Florida's Response to Furman: Limiting Mitigation by Statute

The constitutional necessity of individualized sentencing in capital cases was not, however, always so clear. The nine separate opinions in Furman v. Georgia, 408 U.S. 238 (1972), "[p]redictably ... engendered confusion as to what was required

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11 All references to the Lockett decision herein will be to the prevailing, plurality opinion unless otherwise stated.

12 The Court has also found constitutional error where a statute was applied so as to preclude the independent consideration of mitigating evidence, Eddings v. Oklahoma, 455 U.S. 104 (1982); where state evidentiary rules excluded such evidence, Green v. Georgia, 442 U.S. 95 (1979); and where the proffered evidence was rejected as irrelevant, Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986). See generally Enmund v. Florida, 458 U.S. 782, 827-28 (1982) (O'Connor, J., dissenting) (summarizing the Court's decisions concerning the mandate of individualized capital sentencing).

in order to impose the death penalty in accord with the Eighth Amendment." Lockett, 438 U.S. at 599.[13] States responded differently,[14] those that chose "guided discretion" statutes were "[c]onfronted with what reasonably appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after Furman," Lockett, 438 U.S. at 599 n.7, and as a consequence some included provisions to limit the mitigating factors that could be considered. See, e.g., Lockett id.; State v. Richmond, 144 Ariz. 186, 560 P.2d 41, 50 (1976), cert. denied, 433 U.S. 915 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 889, cert. denied, 434 U.S. 878 (1977); People v. District Court, 586 P.2d 31, 33 (Colo. 1978).[15]

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13 Florida fared no better than other observers in interpreting Furman. See Donaldson v. Sack, 265 So.2d 499, 506 (Fla. 1972) (Roberts, C.J., concurring) ("I have carefully read and considered the nine separate opinions [in Furman] and am not yet certain what rule of law, if any, was announced that has the support of the majority of the Court"). The legal advisors to the Florida Governor's committee studying capital punishment expressed similar views. Ehrhardt, Hubbart, Levinson, Smiley, & Wills, The Future of Capital Punishment in Florida: Analysis and Recommendations, 64 J. Crim. L. & Criminology 2, 3 (1973) (hereinafter cited as "Ehrhardt, et al.").

14 See generally Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1699-1712 (1974).

15 One factor that influenced some states to restrict the circumstances which could be considered in mitigation was that several of the statutes stricken along with Furman had contained provisions for and lists of mitigating factors, but these "lists" were open-ended and nonexclusive. See, e.g., Delgado v. Connecticut, 408 U.S. 940 (1972). From these decisions commentators concluded that while there must be narrow categories of aggravating and mitigating circumstances, they must be exclusive so as to meet the requirements of Furman. See Note, Discretion and the Constitution-

(a) The 1972 Florida Statute

Florida was among those states that followed the "reasonable" view that Furman required restriction of mitigating factors. Prior to Furman, in March, 1972, the Florida Legislature had enacted a new capital sentencing statute which provided a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be considered during the sentencing proceeding."[16] Furman supervened and this statute was never used. In the months after Furman, a mandatory sentencing scheme was seriously considered,[17] but after intense debate over the meaning of Furman, the Florida Legislature chose the Governor's proposal, consisting of

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ality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1698-99 (1974); Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U.L. Rev. 108, 132-33 (1974); Note, Florida Death Penalty: A Lack of Discretion?, 28 U. Miami L. Rev. 723, 724 & n.12 (1974).

16 Ehrhardt & Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & Criminology 10 (1973) (hereinafter cited as Ehrhardt & Levinson). Florida's history therefore strikingly parallels that of Ohio. Both legislatures were in a similar posture at the time Furman was announced; both, as will be shown infra, reacted to Furman by making the lists of aggravating and mitigating circumstances exclusive. Ohio's history is reviewed in Lockett, 438 U.S. at 599 n.7.

17 This proposal was vigorously advocatd by the Attorney General. See Ehrhardt, et. al, at 3 & n.7; Ehrhardt & Levinson, at 12 n.28.

a modified version of the Model Penal Code.[18] The statute that emerged restricted discretion by listing certain exclusive aggravating and mitigating factors. The statute's plain terms

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[18] A detailed contemporaneous analysis of the legislative history concerning the passage of Florida's capital sentencing statute is preserved in Ehrhardt & Levinson, supra. An overview of that history demonstrates that the statute that emerged restricted consideration of mitigating factors exclusively to the statutory list. The Governor's proposal with minor changes was the one that finally passed. Of relevance here, that proposal restricted aggravating and mitigating factors strictly to those listed in the statute. The Governor's panel of legal advisors had opined that: "In order to stand any chance of satisfying constitutional requirements, statutory [aggravating and mitigating] guidelines must evidently be made obligatory rather than merely advisory, otherwise the sentence can still be imposed in a completely capricious and arbitrary manner." Ehrhardt, et al., at 5. In the "whirl-wind four day special session" of the Florida Legislature, Ehrhardt & Levinson, at 21, three proposals were acted upon. A House committee passed a mandatory capital sentencing bill, id. at 13-14. The Governor's proposal, restricting aggravating and mitigating factors to the statutory list and also providing for a three-judge sentencing panel rather than a jury, was offered and approved (unanimously) as an amendment to the House bill. Id. at 14 & n.48. The Florida Senate passed a similar bill, except that it did not limit aggravating and mitigating circumstances to the statutory list, and it also provided that the jury was to be involved in sentencing. Id. at 14-15. At the conference committee on the evening of the last day of the Special Session, a compromise was reached. The limitation on aggravating and mitigating factors was retained from the House bill, and the provision for the jury from the Senate bill was included (though only in an advisory role). Id. at 15. Accordingly, "[t]he final statute ... adopted the limitations [on aggravating and mitigating factors] of the Governor's bill." Id. at 15 n.56. Another analysis of the Florida legislative history, likewise, finds that "the bill that was enacted as the 1972 death penalty statute incorporated the House's original intention to restrict mitigating circumstances to the factors enumerated in the statutory list." Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 358 n.199 (1981).

mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist as enumerated in subsection[(5)]" and whether "sufficient mitigating circumstances exist as enumerated in subsection[(6)]"; then, "[b]ased on these considerations, whether the defendant should be sentenced to life or death." §§ 921.141 (2) and (3), Fla. Stat. (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered, the Legislature said that both were "limited to" those listed in the statute. Through an undetected transcription error in the hurried special session, the words "limited to" were inadvertently dropped from the separate subsection listing mitigating factors. See Hertz & Weisberg, at 358 n.199. Nevertheless, the statute's embodiment of the "reasonable" view that Furman required mitigation to be limited was clear, for in actually determining the sentence the jury and judge were explicitly restricted to consideration of the factors "as enumerated" in the statute. "Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations."[19]

19 Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U.L. Rev. 108, 139 (1974). The transcription error resulting in the lack of parallel language in the lists of aggravating and mitigating factors was thus apparently unnoticed or at least not seen as having any significance by the commentators at the time. It is not mentioned in the Ehrhardt & Levinson treatise contemporaneously analyzing the new statute. Instead they emphasized that the "final statute ... adopted the limitations of the Governor's bill," id. at 15 n.54, and contrasted the March, 1972 law that used a list of mitigating circumstances "only as guidelines" with the "new law" where "statutory lists of aggravating and mitigating circumstances are intended to narrow the scope of discretion in making the life-or-death decision." Id. at 17 (footnote omitted). See also Note, Discretion and the Constitutionality of the New

b. Implementation of the statute by the Florida court

The statute was first construed in the seminal case of State v. Dixon, 283 So.2d 1 (Fla. 1973), which emphasized that its primary mechanism for satisfying Furman was the itemization of specific aggravating and mitigating circumstances so as to restrain sentencing discretion. The opinion referred frequently and invariably to "the" mitigating circumstances citing the statutorily enumerated factors. For example, the court spoke of "the mitigating circumstances provided in Fla. Stat. 921.141(7), F.S.A." in describing how the sentence was to be decided. 283 So.2d at 9. The dissent likewise specifically noted the limitation on consideration of mitigating circumstances to those contained in the statute. Id. at 17 (Ervin, J., dissenting).[20]

Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1704 (1974) (describing Florida's statute as one which "control[s] the sentencer's discretion by delimiting the mitigating factors which it may consider," (emphasis supplied)); Vance, The Death Penalty After Furman, 48 Notre Dame Law. 850, 860 (1973) ("The Florida statute sets up exacting guidelines where the death penalty is applicable -- including statutory mitigating and aggravating factors").

20 See also Alford v. State, 307 So.2d 433, 444 (Fla. 1975) ("the most important safeguard provided by Fla. Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." (emphasis supplied)). This restriction to a statutory list of mitigating factors was also seen from State v. Dixon, supra, by commentators. Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U.L. Rev. 108, 129 (1974); Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1698, 1706 (1974); Comment, Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia, 1974 Ariz. St. L.J. 257, 280-81, 293-94.

Dixon's understanding of the exclusive nature of the statutory mitigating circumstances continued to be reflected in the court's opinions.[21]

This Court's next express pronouncement on the subject came in 1976. A few days after Proffitt it squarely faced the question whether the statute permitted consideration of evidence of nonstatutory mitigating factors and said with uncommon clarity that the statute strictly barred such consideration. Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). In Cooper the Florida court affirmed the exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable ... and we are not free to expand that list." Id. at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list, emphasizing that these were "words of mandatory limitation." Id. at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by Furman: "This [holding] may

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21 See Alford v. State, 307 So.2d at 444 (the statutory aggravating and mitigating factors "must be determinative of the sentence imposed"); Slater v. State, 316 So.2d 539, 540 (Fla. 1975) (quoting trial court order that the judge "considered the itemized points for consideration in aggravation and in mitigation set forth in [statute]"); Songer v. State, 322 So.2d 481, 484 (Fla. 1975) (reviewing the death sentence by "relating the statutorily enumerated mitigating circumstances to the instant case" (footnote citing statute omitted)); Henry v. State, 328 So.2d 430, 431 (Fla. 1976) (quoting trial court order that the judge "considered the itemized points for consideration in aggravation and in mitigation set forth in [statute]"); Miller v. State, 332 So.2d 65, 66 (Fla. 1976) (same).

appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. (emphasis in original).[22] Accordingly, "[t]he sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have (sic) no place in that proceeding." Id. at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list."[23] It was not until after Lockett that another view was recognized.

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22 It is relevant to note again that the legal advisory committee to the Florida Governor, whose bill eventually prevailed, had opined that "[i]n order to stand any chance of satisfying constitutional requirements, statutory [aggravating and mitigating] guidelines must be made obligatory rather than merely advisory." Ehrhardt, et. al, at 5 (emphasis supplied).

23 See, e.g., Adams v. State, 341 So.2d 765, 769 (Fla. 1977) ("none of the statutory mitigating circumstances were shown to exist" (emphasis supplied)); Knight v. State, 338 So.2d 201, 205 (Fla. 1976) ("consideration of the enumerated aggravating and mitigating circumstances support ... death" (emphasis supplied)); Funchess v. State, 341 So.2d 762, 763 (Fla. 1977) ("trial judge carefully evaluated in detail each of the mitigating and each of the aggravating circumstances set out in section 921.141" (emphasis supplied)); Barclay v. State, 343 So.2d 1266, 1270 (Fla. 1977) ("the judge ... meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute" (emphasis supplied)); Harvard v. State, 375 So.2d 833, 835 (Fla. 1978) ("The record discloses no mitigating factors recognized by the statute" (emphasis supplied)).

3. The Pre-Lockett Florida statute was unconstitutional

A state court is, of course, free to interpret state statutes as it pleases. But this Court's interpretation of 921.141 has recently undertaken a tremendous shift. See Harvard, Lucas. This cannot speak just to the future. A state court cannot unmake history by rewriting it. Thus, the "remarkable job of plastic surgery" the Songer court performed on the statute and on its own prior construction of the statute does not "serve[] to restore constitutional validity" to sentences imposed under the earlier, unconstitutional procedure.[24] Shuttlesworth v. Birmingham, 394 U.S. 147, 153, 155 (1969). For a time, this Court's decisions in post-conviction cases raising Lockett claims were consistent only in denying relief under all circumstances: The Court held on a case-by-case basis that Lockett either had or had not changed Florida's law depending upon the results that would flow from these respective conclusions.[25] It is only within the last year, after the Eleventh Circuit's en banc

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24 It is self-evident that the Florida statute as interpreted in Cooper, with its "narrowly harsh" "mandatory limitation" to an unexpandable statutory "list" of mitigating factors is indistinguishable from the Ohio statute struck down in Lockett.

25 Compare Muhammad v. State, 426 So.2d 533, 538 (Fla. 1983) (trial counsel could not be "expected to predict the decision in Lockett v. Ohio"); Jackson v. State, 438 So.2d 4, 6 (Fla. 1983) (counsel's belief that "he could not present evidence of nonstatutory mitigating circumstances ... was entirely reasonable"), with, Cooper II, 437 So.2d at 1072 ("Lockett did not change the law of Florida").

decisions in Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) and Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), that this court has directly addressed the problem.

In Harvard v. State, 486 So.2d 537 (Fla. 1986), the trial judge (who also heard Harvard's post-conviction motion) "expressly found that 'reasonable lawyers and judges ... could have mistakenly believed that nonstatutory mitigating circumstances could not be considered,'" and that "'[t]he court certainly carried out its responsibility on the basis of that premise at the time of Mr. Harvard's trial.'" Id. at 539. A divided Florida Supreme Court agreed and found Harvard's death sentence to have been "imposed in violation of Lockett." Id.[26] In Harvard, the Florida court further found "no factual dispute" concerning the allegation that Harvard's trial lawyer had also believed that Florida law precluded consideration of nonstatutory mitigating circumstances and so had failed to develop and present mitigating evidence at the sentencing hearing. It rejected a claim of ineffective assistance of counsel on these facts

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26 The court said that it agreed with the similar result reached by the Court of Appeals for the Eleventh Circuit in Songer v. Wainwright, supra, but did not explain why it had declined to grant relief to Songer when he had presented his claim in Songer v. State, 463 So.2d 229 (Fla. 1985). Harvard, 486 So.2d at 538-39. In rejecting Songer's claim the court had relied upon its original Songer opinion which "held that neither the wording of section 921.141 nor our previous decisions precluded the introduction of nonstatutory mitigating evidence." 463 So.2d at 231.

because, "given the state of the law at the time," counsel's conduct "reflects reasonable professional judgment." Id. at 540.[27]

Thus, "[a]lthough the Florida statute approved in Proffitt [may not have] ... clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 606-607 (emphasis supplied), it is no longer disputable that the statute did operate in precisely that manner. The execution of a death sentence imposed pursuant to a federally unconstitutional statute would be inconceivable.[28] This is why, having invalidated the Ohio death-penalty statute in Lockett, the Court vacated all death sentences imposed under it in cases pending here, Roberts

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27 Still more recently in an appeal from a resentencing by a judge without a jury, the court remanded for resentencing with a jury because it appeared that at the defendant's original pre-Songer sentencing in 1977 the trial judge had interpreted the law as confining the jury to the statutory mitigating factors: "he instructed only on the statutory mitigating circumstances." Lucas v. State, 490 So.2d 943, (Fla. July 3, 1986). The court's opinion recognizes that defense counsel also was apparently operating under the same restrictive belief. Id.

28 In Gilmore v. Utah, 429 U.S. 1012, 1017-18 (1976), Justice White expressed the view that no person can properly be put to death under an unconstitutional statute, even with his consent. Although a majority of the Court disagreed, it did so only because "Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the [death] ... sentence was imposed." Id. at 1013.

v. Ohio, 438 U.S. 910 (1978), and companion cases, id. at 910-911; Adams v. Ohio, 439 U.S. 811 (1978), and the Ohio Supreme Court subsequently ordered them all to be set aside, and the condemned inmates resentenced to imprisonment.

This makes sound practical sense. Picking and choosing among inmates sentenced to die under the same unconstitutional statutory regime -- upsetting the death sentences of some but not of others, as this Court now appears to be now doing -- makes no sense at all. As one Justice has pointed out:

> [I]t seems fundamentally unfair to me for one person to go to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered.

Jackson v. State, 438 So.2d at 7 (McDonald, J., dissenting).

The uncorrected application of the pre-Songer Florida statute is indeed "fundamentally unfair," for it calls into question the accuracy of sentencing decisions made during its tenure. In many cases its effect may have been subtle or invisible on the face of the record, though it operated powerfully at many levels, constraining the lawyers, the jury, the judge, and even review by this Court. Given the radical inconsistency of the then-prevailing Florida law, with the basic mandate of the Eighth Amendment as construed in Lockett, it is impossible to deny that "the risk that the death penalty will be [inflicted upon Levis Aldridge and others similarly situated[29]]

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29 In its next session after Lockett and Songer the Florida Legislature amended the capital sentencing statute to remove the "as enumerated" language that had been relied upon by the Cooper court as "words of mandatory limitation." 1979 Laws of Fla., Ch. 79-353. Thus, of the 230 inmates presently on

... in spite of factors which may call for a less severe penalty" is very high. Lockett v. Ohio, 438 U.S. at 605. The Court has emphasized that such a risk "is unacceptable and incompatible with the ... Eighth ... Amendment[]." Id.[30] Considering the consequences of erroneous decisions on a matter so grave as the imposition of society's ultimate punishment the price of rectifying the risk of error by vacating Mr. Aldridge's death sentence "would surely be well spent." Gardner v. Florida, 430 U.S. 349, 360 (1977) (plurality opinion).[31]

B. MR. ALDRIDGE'S CLAIM IS CONTROLLED BY, AND HE MUST RECEIVE THE BENEFIT OF, LOCKETT, EDDINGS, LUCAS, HARVARD, HITCHCOCK, AND SONGER.

If either the recommending jury or the judge were precluded from considering (while hearing) evidence in mitigation, resentencing is required. The trial judge must rely upon the jury recommendation which, if it is unconstitutionally derived, destroys capital sentencing reliability in violation of the Eighth and Fourteenth Amendments. The judge must also consider

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Florida's death row, 30 or fewer who were sentenced before Lockett remain pending in post-conviction proceedings. The remainder were either sentenced or resentenced after the Lockett decision was announced.

30 See, e.g., Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring) ("we many not speculate as to whether the [state courts] actually considered all of the mitigating factors. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court").

31 Cf. Turner v. Murray, ___U.S.___, 106 S.Ct. 1683, 1688 (1986) (comparing the risk of an unconstitutional sentencing with "the ease with which that risk could have been minimized").

nonstatutory mitigation, and if he or she is "precluded," the same constitutional violation is extant. Mr. Aldridge has shown that the jury recommendation was unconstitutionally obtained.

New sentencing before a new advisory jury is required. This Court has recently spoken to the effect improper jury instructions produce:

> The above-mentioned evidence [of mental problems] might very well suggest to the jury that appellant suffers from mental or emotional disturbance. Had the jury been properly instructed that it could consider this specific mitigating factor, it might not have recommended death. A jury recommendation of life is entitled to great weight and may not be overruled unless there was no reasonable basis for it. Richardson v. State, 437 So.2d 1091 (Fla. 1983). Appellant has been prejudiced by the trial court's refusal to give a proper instruction that might have led to a different jury recommendation.

Toole v. State, 479 So.2d 731, 734 (Fla. 1985). When the jury recommendation is colored by error before the jury, resentencing with a jury is required. Lucas, supra, Menendez v. State, 415 So.2d 312, 314 (Fla. 1982).

Of course, even though the jury recommendation is critical not every error in instruction requires resentencing. Adams, 764 F.2d at 1364. Errors that "preclude" or "exclude" from consideration "any information or argument in mitigation" are especially intolerable. See Barclay v. Florida, 103 S.Ct. 3418, 3430, n.22 (1983) (Stevens, J., concurring); compare Spaziano v. Florida, 104 S.Ct. 3154, 3158 (1984) ("There is no suggestion in this case that either the jury or the trial judge was precluded from considering any nonstatutory mitigating evidence.") It is not

relevant that proper evidence was introduced if the "sentencer" was instructed that the statutory "list" contained "the mitigating evidence to consider," and the evidence presented did not fit in the list, as if the jury is instructed to denigrate non-statutory mitigation. Eddings makes this clear, where the sentencing judge was presented with but believed he could not consider certain mitigating evidence:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant maitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on appeal, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 102 S.Ct. 869, 877 (1982).

Since the Florida trial judge "owe[s] ... deference to the jury's 'sentence' on the issue whether the death penalty was appropriate," Baldwin v. Alabama, 105 S.Ct. 2727, 2735 (1985), and in fact must give the recommendation great weight, Mr. Aldridge's death sentence is unconstitutional.

THIS CLAIM SHOULD NOT BE BARRED AS SUCCESSIVE

The restriction on consideration of mitigation was raised in the previous post-conviction motion, as the trial court found. It was denied on the merits by this Court. Since the initial motion, a fundamental shift in constitutional law has been undertaken, as this Court has recognized the restrictive nature of Florida's law during the time this case was tried. See Lucas

v. State, 490 So.2d 947 (Fla. 1986), and Harvard v. State, 486 So.2d 537 (Fla. 1986). Finally, it should not be barred because it raises a constitutional attack on the validity of the death penalty statute, a type of claim this Court has previously recognized is cognizable in post-conviction in Henry v. State, 377 So.2d 692 (Fla. 1979).

This Court also ordered full briefing of the issue (retroactivity of Lockett) on November 4, 1986, in Riley v. Wainwright, Case No. 69,953. See Witt, supra, and the precise issue is now pending before the United States Supreme Court in Hitchcock v. Wainwright, cert. granted, 106 S.Ct. 2888 (June 9, 1986). Mr. Aldridge should not be executed in the midst of a fundamental shift in this and the United States Supreme Court's conclusion whether Florida's death penalty statute was unconstitutionally restrictive during the time Mr. Aldridge's case was tried. See Witt v. State, 387 So.2d 922, 929 (Fla. 1980).

V

THE DEATH PENALTY IN FLORIDA HAS BEEN IMPOSED IN AN ARBITRARY, DISCRIMINATORY MANNER -- ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE CAPITAL SENTENCE DETERMINATION CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This claim presents precisely the same question that has been previously presented to and rejected by this Court. See, e.g., State v. Washington, 453 So.2d 389 (Fla. 1984) including, as the trial court noted, in this very case. For that reason, we will not burden the Court with a detailed statement of the factual allegations. For the Court's reference, however, we note

that numerous scholarly, statistical, and "qualitative" studies and research form the basis of Mr. Aldridge's claim, and that those data sources are now in published form and available for judicial notice. For that reason, we incorporate herein by reference and request that the Court take judicial notice of the following: Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Society Rev. 587; (1985) Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stanford L. Rev. 27 (Nov. 1984); Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. J. Rev. 16 (Fall 1982); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (Dec. 1981); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Hrv. L. Rev. 456 (1981); Shofner, Postscript to the Martin Tabert Case: Peonage As Usual in the Florida Turpentine Camps, Florida Historical Quarterly 161 (Oct. 1981); J. Shofner, Judge Herbert Rider and the Lynching at La Belle, Florida Historical Quarterly 292 (Jan. 1981); Bowers & Pierce, Arbitrariness and Discrimination under Post-**Furman** Capital Statutes, Crime & Delinquency 563 (Oct. 1980); Shofner, Custom, Law, and History: The Enduring Influence of Florida's 'Black Code', Florida Historical Quarterly 277 (Jan. 1977). See also Terhune, 1983 Florida Statistical Abstract (17th ed. 1983); United States Bureau of the Census, 1970 Census, General Social & Economic Characteristics, Tables 45-59, Florida 11-212: 11-235; United States Bureau of the Census, 1980 Census, General Social &

Economic Characteristics, Tables 73-82, Florida 11-98: 11-117. See, e.g., the following cases which have found or expressed race discrimination in Florida: McLaughlin v. Florida, 379 U.S. 184 (1964) (state statute prohibiting interracial cohabitation); Debra P. v. Turlington, 474 F.Supp. 244, 251 & n.13 (M.D.Fla. 1979), aff'd in pertinent part, 644 F.2d. 397, 407 & n.15 (5th Cir. 1981) (history of school segregation); Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (racial slurs); Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965) (state statute authorizing arrest of persons seeking service at "whites only" establishments); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (discrimination in classifications of police officers); Dowdell v. City of Apopka, 698 F.2d 1181, 1184-86 (11th Cir. 1983) (municipal services); State of Florida, ex rel. Hawkins v. Board of Control, 93 So.2d 354 (Fla. 1957) (admission to law school); Jones v. City of Sarasota, 89 So.2d 346 (Fla. 1956) (licensing).

Briefly, Mr. Aldridge's claim is that the death penalty has been applied in Florida in violation of both the eighth amendment and the equal protection clause of the fourteenth amendment, for it has been imposed on the basis of race and other arbitrary factors. This fact is shown by a number of independent scholarly studies, using different data bases and different methodologies, that each reach the same result: race is a determinative factor in the imposition of the death penalty, and the proffered statistical evidence showing the discriminatory impact of capital sentencing decisions by race of victim, when viewed together with

the qualitative evidence concerning the history and vestiges of race-based discrimination in Florida, meets the standards for a prima facie claim under settled jurisprudence. The victim in this case was a white male.

In McCleskey v. Kemp, 753 F.2d 877 (11th Cir.), cert. granted, 106 S. Ct. 3331 (July 7, 1986) petitioner Warren McCleskey presented the same argument to the Eleventh Circuit, which extensively reviewed the statistical evidence and scholarly studies on this issue in relation to Georgia. That case has now been submitted for review to the United States Supreme Court. McCleskey materially altered the standard set forth in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), for eighth amendment challenges to capital sentencing. The court in Spinkellink had rejected eighth amendment claims that the Florida death penalty statute was being applied in discriminatory fashion. That court had read Gregg v. Georgia, 428 U.S. 153 (1976) and its companion cases as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness -- and therefore the racial discrimination condemned in Furman v. Georgia, 408 U.S. 238 (1972) -- have been conclusively removed. The McClesky court held that "Spinkellink cannot be read to foreclose automatically all Eighth Amendment challenges to capital sentencing under a facially constitutional statute." McCleskey, 753 F.2d at 891. Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985) again presented the claim that the death penalty in Florida is discriminatorily imposed based on the race of the victim. Griffin

argued that the lower court had erred in denying a hearing on this claim. The Eleventh Circuit, citing McClesky, agreed, and remanded the case for reconsideration of whether a hearing should be held in light of the McCleskey principles. Contemporaneously with its grant of certiorari in McCleskey, the Supreme Court also granted certiorari in Hitchcock v. Wainwright, cert. granted, 106 S.Ct. 2888 (June 9, 1986) in which petitioner sought, but was denied, an evidentiary hearing on the precise claim presented here.

The allegations of the motion to vacate, together with the supporting evidence referred to therein, along with the decisions presented in Hitchcock, McCleskey and Griffin, require that a hearing be held to present the evidence, and to provide the state an opportunity to rebut the prima facie case. If there are questions to be raised regarding the studies, they should be raised at an evidentiary hearing where they may be explored with the experts. The allegations and evidence presented by Mr. Aldridge set out a prima facie case for relief and under such circumstances he is entitled to a hearing on the question at which he may prove his claim. This Court should consider this claim notwithstanding its previous rejection in light of the pnd ency of the McClesky and Hitchcock, or stay Mr. Aldridge's execution until those cases are finally determined.

CONCLUSION

For the foregoing reasons, Mr. Aldridge requests the Court:

a) immediately enter its order staying the scheduled execution;

b) order a full briefing of the claims raised;

c) after consideration, either vacate the judgment of conviction and sentence of death; or

d) vacate the order of the trial court, remand for an evidentiary hearing upon reasonable notice, with allowance for complete access to discovery; and

e) order such other relief as this Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOY B. SHEARER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by hand delivery this 6th day of March, 1987.

Of Counsel