IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 70471

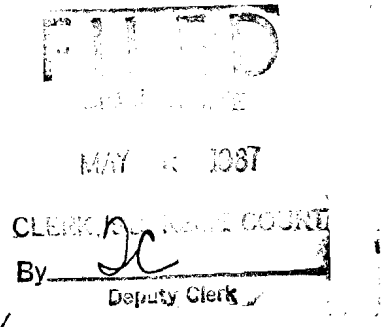
JOHN MILLS, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.




APPEAL FROM DENIAL OF POST-CONVICTION RELIEF,
MOTION FOR STAY OF EXECUTION, AND
MOTION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Litigation Coordinator

JAMES C. LOHMAN
Staff Attorney

DAVID MILFORD
Staff Attorney

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

COUNSEL FOR APPELLANT

Last Tuesday, Mr. Mills filed a Rule 3.850 motion in the trial court and provided copies to this Court. The trial court scheduled a hearing last Friday, and a limited evidentiary hearing was conducted Friday and Saturday. The trial court accepted proposed orders, signed the State's, denied all relief, and denied a stay.

This Court should stay Mr. Mills' execution, examine the record and grant relief, for no other reason than the State's embarrassingly duplicitous actions regarding the star witness at trial, co-defendant Michael Fredrick. As is apparent just from the post-conviction record, the State improperly routinely met with Fredrick and prepared him for testifying, omitted critical parts of what he had said before, and sat absolutely silent in court while witnesses testified at odds with what they just told the State in the state attorney's office. The State has demonstrated that it will argue the opposite of what it has been told is the truth in this case and will hide the truth from fact-finders.

This is not hyperbole. It is demonstrated by the record. One example will illustrate the point. The State had no murder evidence against Mr. Mills except the words of two co-defendants. No physical evidence linked Mr. Mills to the crime. Mr. Fredrick gave police a series of statements denying involvement in the offense before he implicated himself, Mr. Mills, and a third co-

defendant, Ms. Fawndretta Galimore. This implicating statement came May 8, 1982. On May 8, Fredrick also said he entered the Lawhon trailer with Mr. Mills, and he went into another room and stole the shotgun used in the killing. By and on May 8, and by the time of trial, then, Mr. Fredrick had given innumerable inconsistent statements regarding the offense. However, the statement the State wanted at trial was the May 8th "good" statement, and Fredrick would be prosecuted for first-degree murder if he did not testify to it.

Defense counsel, after observing Fredrick's demeanor on the witness stand, commented to the jury that Fredrick appeared to have been coached to give the correct statement. The State told the jury that it was not coaching, but the "ring of truth," that colored Fredrick's testimony:

> [R]emember carefully Michael Fredrick's testimony, not just what he said, ladies and gentlemen, but how he said it. Was he sure of himself? I suggest he was.
>
> Was he strong? I suggest he was.
>
> Was he shaken by an hour's worth of cross examination? I suggest he wasn't. And do you know why? Because Michael Fredrick is telling the truth this time.
>
> You know, an old friend of mine, an attorney, always seemed that his witnesses were just a little better than the normal run of witnesses. I couldn't ever figure out what it was, so I asked him one day, why is it. And Mr. Williams said to me: "The truth makes a good witness, truth. Not preparation, not constructed lies, but

truth." And it dawned on me at that time that I have known that from the beginning. I was taught that as a little boy. And I think Michael Fredrick finally learned a lesson that most people in society learn as little children at their parents' knees.

You can't tell one lie, you have got to tell 100 lies to cover up for your first lie. And you can't be convincing when you tell a lie because you have got to think of what your next lie is going to be and what your last lie was. How can you be convincing? You can't. There is only one way to be convincing. There is only one way to be strong. There is only one way to be sure. It is to tell the truth. Then you don't have to do anything but remember what happened. You don't have to fabricate, you don't have to plan ahead, you don't have to watch out for the pitfalls behind. You just tell what happened as you remember it. And that's the beauty of truth. And that's the lesson that most children learn early in life, and that is the lesson that Michael Fredrick didn't learn until after his arrest. And I'm afraid it is a lesson that Boone Mills hasn't learned to this day.

Compare Michael Fredrick's testimony right alongside with what Boone Mills tells you. Which one of those two had that ring of truth?

. . . .

You know, it was pointed out to you on cross examination that Michael Fredrick was pitiful when he was arrested. He was a pitiful liar. He was a pitiful witness. He couldn't keep it straight. He couldn't think fast enough. He is not the most intelligent person in the world. He certainly isn't, and he is certainly not intelligent enough to be able to create a fabric of lies that would withstand cross examination by an extremely able attorney for an hour, an hour.

> The judge is going to tell you that you can take into account not only what Michael Fredrick, but you can also take into account the way he acted on the stand. Was he calm? I suggest he was.
>
> Was he strong? Yes.
>
> So when you go back there and you compare what Boone Mills told you today and what Michael Fredrick told you on Wednesday, please carry your mental image back with you, your mental image of Michael Fredrick sitting there on the stand for close to four hours, I think. Three and a half certainly. Take that image back with you and when the judge tells you that you can take into account how he acted, remember how he acted. And then think of Boone Mills.

(R. 1502-1505).

> Ladies and gentlemen, I think most everything has been said. Mr. Randolph said Michael Fredrick was coached. Michael says, I think is the name that he said, is coached, well-coached. He said he was a well-coached witness. But, you know, you remember that he had reference to two previous statements made by Michael Fredrick. He had them in his hand, Mr. Randolph did, when he was cross examining Michael Fredrick. Two previous statements.
>
> Michael Fredrick stood up for an hour of cross examination. Was there anything in what he said that struck any of you as being ludicrous? . . . Ladies and gentlemen, when you go back and you deliberate, and you think about this, take with you not only your memory of the words that were spoken, take with you your memory of the witnesses as they spoke from the stand. Take with you the way Michael Fredrick testified.
>
> You know, coaching doesn't help a person be stronger. Coaching doesn't help a story ring true. Only truth, only truth.

(R. 1625-1626).

Now we know that there was not only coaching, there was studying. The prosecutor prepared a seventeen-page typed script with questions and crucial answers typed right on the page, rehearsed Mr. Fredrick before trial, and gave the typed script to Mr. Fredrick to study in his cell as he waited to testify. The full script is now in the record. Ex. 11. It was not disclosed to counsel pretrial or during trial. Some of the more salient answers that Fredrick was to give, gave, and which were heavily used during closing, are the following, taken straight from the script:

> --Did you ever see the defendant again
> --When (Saturday)
>
> --Who drove the truck
>
> --Was the camper on it at this time
>
> --How long did you stay in the Mill's house
>
> --Why did you leave the house (Boone said let's go)
>
> --What happened as you left the house (Boone went back and got the shotgun)
>
> . . . .
>
> --How do you know it was him if you've never seen him before in your life
>
> --What happened (Boone went inside)
>
> --How long was he inside
>
> --What happened (Boone beckoned)

--What did you do

--Describe what you saw when you entered the house

--Boone on phone
--Lawhon at table
--Cake on table with knife

--Using the diagram, would you please show the jury where everyone was inside the house

--What happened after you got into the house

--What did you do

--Did Boone Mills say anything to you

--What
--What did you do
--Was there anyone else in the trailer
--Had Mr. Lawhon been saying anything

--Take what you want, don't hurt me!

. . . .

--What was Boone Mills saying to him

--Who made the decision as to what would happen next

--What was that decision

--What did you do (Go outside)

--Why (Boone told you to)

. . . .

--What happened at that point

(Boone throws him keys, says drive)

(Lawhon gets in passenger side into middle)

(Defendant gets in passenger side, climbs into back)

. . . .

--Was there much conversation in the truck up to this point

--Where did y'all go (Abandoned air strip)

. . . .

--What did Mr. Lawhon do (Tremble and shake)

. . . .

--What did Boone Mills do

(Tied Lawhon)
(Reached for tire iron)
(Hit Lawhon in the back of the head)

. . . .

--What happened then

--Which way did they run (To right)

--What happened (2 gun shots)

. . . .

--Describe how Boone Mills looked as he came out of the woods

(Bloody shirt)
(Blood in the middle)

. . . .

--What did he say (Go clean the house out)

. . . .

--When was the first time you had seen that shirt (That day)

. . . .

--Where was the shirt when you first saw it
(On seat of truck)

. . . .

--When was the first time you realized that
he had it on (When he came out of the woods)

--After he got rid of the shirt, where di
y'all go

--Explain to the jury what happened when you
got back to the Lawhon house

--Both went in
--Boone had the shotgun
--Cleaned the house out

. . . .

--What did y'all do with the items (Truck)

Fredrick script, Ex. 2, 11. Mr. Fredrick testified last Friday that he was supposed to give the answers that were on the script; the prosecutor testified that he expected to get the answers. It is difficult to discern whether Mr. Fredrick punctuated his answers as directed ("DON'T HURT ME!", said the victim, according to the script).

The Court is invited to compare the script with the trial testimony. Although there is some ad libbing, the basic structure of the script is strictly adhered to, during direct examination and each written answer requested is given. Closing argument by the prosecutor focused heavily on the answers provided -- the answers that appear on the script.

Rehearsing and coaching are common. Telling a witness what the answer should be, it is to be hoped, is uncommon. It is disturbing here because Fredrick had given many different answers, and his credibility was the issue for resolution. The State did not, for instance, coach him to say he got Mr. Lawhon's gun, not Mr. Mills. That is not in his script. They did not coach him to say he drug the body into the bushes, which he had earlier said. He was taught to say the right thing as he sat in his jail cell awaiting his debut. The defense was not told.

This and other revelations justify a closer look at the case, and the granting of relief. This brief discusses those issues upon which evidence was taken, as well as the claims denied based on procedural considerations. Not all the issues raised below are included in this brief. However, all matters raised in the 3.850 motion and memorandum are specifically incorporated here. All facts and bases for relief heretofore raised are asserted here. No claim raised below is omitted.

## ARGUMENT

### I.

### A STAY SHOULD ISSUE SO AS TO ALLOW A FULL AND FAIR HEARING ON THE CLAIMS PRESENTED.

In Claim I, Mr. Mills wished to present evidence illustrating that conducting an evidentiary hearing in this case

under warrant denied due process of law. That claim is specifically incorporated into this brief. In this argument, Mr. Mills presents other reasons for having been denied a full and fair hearing on the claims upon which the Court agreed to hear testimony.

A. THE LOCAL STATE ATTORNEY'S OFFICE SHOULD HAVE BEEN DISQUALIFIED.

The motion presented allegations of misconduct concerning members of the state attorney's office. Mr. Kirwin and Mr. Harley were subpoenaed as witnesses. Mr. Fredrick had executed an affidavit submitted by CCR stating he had been promised and threatened by the State pretrial, that he had rehearsed his testimony and studied his script, and that he lied about a critical piece of evidence (a shirt). He was brought to the Wakulla County Jail by Court order after the Rule 3.850 motion was filed.

The State, through Assistant State Attorneys Harley and Hankinson, had Mr. Fredrick walk, shackled hands to feet, forty-five yards to the courthouse from the jail, walk upstairs, and go into a room with them on Thursday, April 30, 1987. They did it again before he testified on May 1, 1987. Unrevealed until very late in the evidentiary hearing, Fredrick told these state attorneys that he had in fact lied about the shirt in 1982 in depositions and at trial.

By the time Mr. Fredrick testified last Friday, after two interrogations by Harley and Hankinson, he said he had not read or sworn to the affidavit submitted by CCR. He did, ultimately, testify that most of the matters laid out in the affidavit were true.

Harley was subpoenaed as a witness to discuss his misconduct. After being subpoenaed, and in his capacity as a state attorney, he interrogated Fredrick twice, along with the assistant state attorney who handled the post-conviction hearing. Mr. Mills requested that the local state attorney be prohibited from acting as witness and advocate, especially since it would be the judge's decision regarding credibility that would determine the outcome of the proceedings. The motion was denied.

Thus, Hankinson represented the State and had twice interviewed Fredrick before the hearing in the company of Harley, a subpoenaed witness, and a state attorney. Two state attorneys testified about their own conduct, while another state attorney from their office questioned them, and argued about their credibility. Thus, three prosecutors, all from the office, presented the defense of that office, as advocates and witnesses.

The judge's failure to dismiss the local state attorney's office from the case denied Mr. Mills a full and fair hearing. As witnesses, the local state attorney's office should have had no power to bring Mr. Fredrick to their offices. They had no

right to try and get him to say that the things he wanted to testify to were not true, and they should not have again prepared him for testimony. As Harley testified, he tried to get Fredrick to "remember" differently. A fair hearing on the claims of State misconduct was not allowed because of the continuance of State misconduct.

B. COURT LIMITATION OF DEFENSE ACCESS TO CLIENT.

Mr. Mills had experts who he wished to have testify at the post-conviction hearing with regard to one of the claims upon which evidence was allowed -- ineffective assistance at sentencing. He had pled that "[t]he story of Mr. Mills' life is one of unique and compelling pathos," Motion, p. 126, that racial discrimination was rampant in the county and that

> [T]he prosecutor played on the fears and prejudices of the rural white jury, fixating on Mr. Mills' religious beliefs and misrepresenting Mr. Mills' faith as racial hatred. Defense counsel did nothing to challenge the state's hate-mongering and failed to present the jury with any information that would have allowed them to see Mr. Mills' piety as a good thing rather than as a threat.

Motion, p. 140. To demonstrate this ineffectiveness, counsel wished to call two imminently qualified expert witnesses. They were present and needed to speak with Mr. Mills in order to testify properly. The Court would not allow those experts to

speak with Mr. Mills, thereby denying him a full and fair hearing on one of the few claims allowed. The Court also would not allow a psychologist to speak with Mr. Mills before testimony. Counsel assured the Court that no matters that had been testified to would be discussed, so "the rule" would not be violated.

The State, in the presence of state attorney witness, Harley, spoke with Fredrick twice. No such amenity was extended to defense counsel's witnesses, who wished and needed to meet with Mr. Mills and counsel, but were not allowed. A full and fair hearing was denied.

## II.

### A STAY IS APPROPRIATE IN ORDER TO CONDUCT AN EVIDENTIARY HEARING ON THOSE CLAIMS WHICH THE COURT DENIED WITHOUT THE TAKING OF EVIDENCE.

The trial court summarily denied all but three of Mr. Mills' seventeen (17) claims for relief, signing the order prepared by the State (but for a typo on page 5), and based upon "the cases cited by the State in its memorandum of law and the precise wording of Fla. R. Crim. P. 3.850." The Court erred and an evidentiary hearing is proper on all the claims pled.

### A. INEFFECTIVE ASSISTANCE OF COUNSEL AT GUILT/INNOCENCE.

In its memorandum of law, the State argued that all claims were barred. In its motion to dismiss, however, the State agreed

that Claim III, that trial counsel was ineffective at guilt/innocence, warranted evidentiary development. See Motion to Dismiss, p. 11. The State agreed before the trial court in argument that evidence should be taken on Claim III of the Motion. The Court would not allow one.

As all agree, the credibility of the star witnesses -- Fredrick and Galimore -- was the issue at trial. Mr. Mills pled that because of attorney ineffectiveness, the following was not revealed at trial:

a) Defense counsel should have investigated to discover that Fredrick was under medication, was hallucinating and having flashbacks, and had received treatment in jail, specifically anti-psychotic medication.

b) Counsel should have revealed to the jury that Mr. Fredrick was changing his story after May 8, 1982, and that he was repeatedly questioned by and made statements to police and the state attorney after May 8, 1982. This was contained in pretrial depositions.

c) Counsel should have known that the condition of Fredrick's plea was that he provide the version of the offense which was contained in his May 8, 1982, taped statement, rather than earlier/later versions of the offense. Counsel unreasonably failed to attend Mr. Fredrick's "entry of plea" proceeding, where this condition was explicitly stated.

d) Counsel should have known that the State argued in a motions hearing that Mr. Fredrick was equally culpable with Mr. Mills, and that the State's position was that Mr. Fredrick got the shotgun.

e) Counsel should have revealed to the factfinder that Fredrick first told police that he, not Mills, found and stole Mr. Lawhon's shotgun, initiated its use against Lawhon, and that he helped drag the body in the bushes.

f) Counsel should have revealed to the factfinder that police were offering "to help" Fredrick and that Fredrick believed he would be treated lightly.

g) Counsel should have revealed to the factfinder that Fredrick was not prosecuted for unrelated offenses after being charged here, and after he testified.

h) Counsel should have revealed that Fredrick refused at first to disclose any information to him during deposition about the purported finding of a shirt two days before the deposition, and that Fredrick later said the finding came after the first deposition.

i) Counsel failed to reveal to the factfinder that what Fredrick classified as his "lies" during testimony, he had earlier referred to as his "forgetfulness" during depositions.

j) Counsel unreasonably failed to adequately investigate and prepare for, and to actually conduct, effective cross-

examination of the State's witnesses.

Mr. Mills pled that there was a reasonable probability that but for the unreasonable, tactical omissions of counsel, the result would have been different. An evidentiary hearing was necessary, and agreed to by the State.

B. PROSECUTOR'S CLOSING ARGUMENT.

In Claims IX and X, Mr. Mills alleged that the prosecutor's closing arguments were unconstitutional, that they rendered the proceedings fundamentally unfair, and that that had some effect on the conviction and sentence. Mr. Mills also argued that trial counsel was grossly ineffective for failing to object, in violation of the sixth, eighth and fourteenth amendments.

The arguments were egregious. Among other things, a classically prohibited "golden rule" argument occurred. See Claim X. The prosecutor argued that his investigation was thorough and that he had discovered the truth, that Mr. Fredrick was telling the truth, he mocked Mr. Fredrick's religion and improperly injected race into the proceedings, and condemned Mr. Mills for his friends. No finding of "strategy" for failing to object was made so as to insulate ineffectiveness -- no resolution of the claims occurred at all. Evidence should have been taken.

C. IMPROPER WILLIAMS RULE PROCEDURE.

Mr. Mills alleged in Claim VI that counsel was ineffective for allowing his client to be prosecuted for purported bad character. As the prosecutor argued without objection: "You should know them by their friends" (R. 1854) (prosecutor's closing argument).

Mr. Mills was prosecuted for having friend Major Hines, who the State said was an ignorant black man who could not understand the word "Caucasian." Mr. Mills was tried for being a Muslim, who called white people "caucasians" or "crackers" or "devils," and for purportedly hating white people. Mr. Mills was tried for being a "criminal," and for purportedly hating. This "evidence" fell into a diatribe at argument, which rendered the proceedings fundamentally unfair, in violation of due process. Furthermore, it cannot be said that this misconduct had no effect on the sentence, a clear violation of the eighth amendment requirement of reliability in capital proceedings.

Florida evidence law is (and was at the time of trial) precise with regard to the admissibility of evidence of the accused's criminal "character" or commission of bad acts other than those charged:

> (1) Character Evidence Generally. Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a

particular occasion, except:

(a) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.

. . . .

(2) Other Crimes, Wrongs, or Acts.

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Sec. 90.404, Florida Evidence Code.

This is a statement of the rule of Williams v. State, 110 So. 2d 654 (Fla. 1959). Before evidence of a defendant's

extraneous bad or criminal acts may be introduced, the following should occur:

a. There must be a demonstrated connection between the defendant and the collateral occurrences; and

b. The probative value of the evidence must be weighed against its prejudicial effect. Section 90.403. If the evidence is deemed admissible after this analysis, the jury should be given a cautionary instruction at the time the evidence is introduced, and in final jury instructions, if requested.

The procedure in paragraphs 4 and 5 above was not followed in this case. Severely prejudicial and nonprobative evidence was introduced by the State in-chief without objection, without defense counsel requesting cautionary instructions, and without any court weighing of "probative vs. prejudice."

The Florida Supreme Court has recently reaffirmed the strength and validity of the Williams rule:

> The trial court properly ruled that this incident was not Williams rule evidence and was, therefore, inadmissible. There is no doubt that this 1973 incident was devoid of the requisite similarities which would have made the evidence relevant, thus fitting it within one of the exceptions to the rule of exclusion set forth in Williams. See Drake v. State, 400 So. 2d 1217 (Fla. 1981). When such irrelevant evidence is admitted it is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So. 2d 903, 904 (Fla.., cert. denied, 454 U.S. 1022 (1981).

As we explained over a half a century ago:

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925).

. . . .

The properly admitted evidence produced at trial against Keen was sufficient to support a jury verdict of guilty. However, it would be legedermain to characterize the evidence as overwhelming; the real jury issue presented in this trial centered on the credibility of Shapiro versus the credibility of Keen. While an improper question by a prosecutor may, in light of the overwhelming evidence of guilt and the nature of the question, be considered a harmless error, see, e.g., Straight, 397 So. 2d at 909, the focus of harmless error analysis must be the effect of the error on the trier of fact:

> Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. . . . The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

State v. DiGuilio, 491 So. 2d 1129, 1138-39 (Fla. 1986).

. . . .

Recently, in Robinson v. State, 487 So. 2d 1040 (Fla. 1986), we were faced with a situation similar to the one sub judice. During the penalty phase proceedings, the prosecutor was allowed to ask various defense witnesses questions concerning crimes that Robinson had allegedly committed subsequent to the offense at issue and that Robinson had never been charged with. In finding this so prejudicial as to require resentencing before a new jury, we stated: "Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this case as well. It is noteworthy that the improper questions at issue in Robinson were asked during the penalty phase, wherein a character analysis of the defendant is contemplated and the rules of evidence are related. In contrast, the prosecutor's question sub judice was posed during the guilt phase of Keen's trial, where proof of the particular crime charged is the standard that the law requires.

Because the prosecutor improperly placed prejudicial information before the jury which had no relevance except to show Keen's bad character and propensity for violence, Keen's right to a fair trial was compromised. In our system of criminal justice, one of the primary functions of the judiciary generally, and of this Court in capital cases specifically, is to ensure that the rights of the individual are protected. Harmful and prejudicial error having occurred below, we reverse and remand for a new trial.

Mr. Mills' rights to due process and fair trial were violated. Trial counsel should have reacted but unreasonably sat silent. It cannot be said beyond a reasonable doubt that the

impermissible evidence did not taint the verdict and sentence.

D. NO FAIR TRIAL DUE TO RACIAL ATTITUDES AND BIAS.

On direct appeal, Mr. Mills' attorney argued before this Court that he could not and did not effectively litigate the question of venue, because he had no money, insufficient resources, and insufficient time. In Claim XI, Mr. Mills argues that his counsel did not effectively marshall the resources he had and ineffectively presented the venue issue, a claim upon which evidence should have been taken.

Claim XII, however, shows the persistent and debilitating prejudice that existed but was not presented in 1982, and shows the very real impact it had. Mr. Mills was not allowed to present this "in fact" due process violation.

As Mr. Randolph argued before this Court:

> COUNSEL: Well, I'm saying, I understand what the court is saying regarding making a general statement. Certainly, I think that from the review of the hearing before the judge I told him basically what I needed the money for. And that was to get the expert who I identified and what he would basically testify. But I'm saying that I couldn't actually . . . you don't have the data and statistical data that would I would have been able to put into the record regarding the necessity of that public opinion survey because he didn't give me the money.

THE COURT: Okay. You didn't know the facts then. You couldn't make a proffer of the facts.

COUNSEL: I did not know everything that he would have said, no sir. And I'm saying. . . .

THE COURT: Basically, what you're [sic] argument is is that you were denied sufficient funds to make a proper investigation to represent your client.

COUNSEL: Essentially, sir, that's exactly what I'm saying.

App. E.

A bit has been discovered, however, about the actual courtroom atmosphere and community hostility. The atmosphere surrounding this trial prevented the trial from being fair. As counsel for the co-defendant notes, in vivid detail, fear enveloped the participants, even white participants:

1. My name is Gordon B. Scott. I reside and practice law in Quincy, Florida.

2. I have been practicing law for nineteen (19) years and have been a member of the Florida Bar for nineteen (19) years.

3. I have worked on over eighty (80) capital cases.

4. I represented Michael Tyrone Fredrick in Wakulla County Circuit Court Case #82CF-50. Michael pled guilty to 2nd degree murder in return for his testimony against John Mills, Jr.

5. The atmosphere in Wakulla County surrounding this case was extremely

intimidating and frightening to me. The case had a tremendous amount of notoriety. In my nineteen years of practice, I have rarely, if ever, experienced a community as inflamed as that in Wakulla County concerning this case. Mr. Lawhon, the victim's father, was well known in the community and was talking to everyone in the area and it was my opinion his actions poisoned the community.

6. The atmosphere surrounding the case can best be described as a lynch mob mentality. For example, I was told by people in the Wakulla County Sheriff's Office that guns and ammunition had been bought to kill Michael Fredrick, John Mills, Jr., Fawndretta Galimore, and me.

7. Glenn Lawhon, father of the victim in this case, submitted a letter that was included in Mr. Fredrick's pre-sentence investigation that scared me to death. I was extremely concerned about my physical safety and would not go into or out of the Wakulla County Courthouse without adequate security precautions.

8. In my opinion, there was absolutely no way a fair and impartial jury could have been empanelled in Wakulla County in this case. I cannot understand how or why the case was tried there given the pervasive prejudice in the community. This is particularly true in light of the fact that the victim was white and the defendants were black.

App. HH.

A neutral observer of the proceedings recognized the prejudice permeating the proceedings. As Alfred Bea states:

1. My name is Alfred Bea. I live in Tallahassee, Florida.

2. I covered the murder trial of John Mills, Jr. for the Tallahassee Democrat. I

was in court every day of the trial and observed most of the trial.

3. I was surprised that the Mills trial was held in Wakulla County. It seemed like he would not be able to get a fair trial there.

4. I was also surprised that no black persons were seated on the jury and saw no reason why this should have been so.

5. There was a great deal of hostility towards me as a newspaper reporter in the Wakulla County Courthouse.

6. The judge conducted a portion of the jury selection in his chambers. When I tried to enter, I was stopped by the bailiff and not allowed in. During a recess, I saw Judge Harper and told him I thought I should be allowed in chambers to observe the proceedings. He did allow me in, but reluctantly, it seemed to me.

7. The large courtroom was crowded with spectators. There were upwards of 75 people in the courtroom every day of the trial and the audience was overwhelmingly white.

8. I received threats during the trial. Most notably, the victim's father, Rev. Lawhon, threatened me and threatened to burn down the Tallahassee Democrat office. I was told he called the paper and made the same threat. He accused me of trying to bring about a mistrial through my coverage. He was primarily worried about the trial being moved from Wakulla County because of too much publicity. Other people in the audience expressed the same concern and made negative comments to me.

9. I have covered murder cases before but have never seen such a hostile trial atmosphere.

10. It seemed like the outcome was a foregone conclusion and the proceedings were more a matter of going through the motions.

11. Because of widespread familiarity with the case in the community, the prominence of the Lawhon family, and the black-on-white racial aspect of the case the trial should have been moved. It was virtually impossible to try the case fairly in that location.

App. GG.

Mr. Randolph, Mr. Mills' attorney, was required by the trial judge to have a police escort to avoid violence in the community. Mr. Lawhon, the victim's father, reportedly attempted to influence the proceedings. He gestured from a witness room, harassed spectators, and caused sufficient ruckus to require the judge to move the family back away from the jury. Apps. GG, EE and R 1313.

The courtroom was a microcosm of racial bias in America. Fred Allan, a resident of Wakulla County at the time of the trial, saw what happened:

1. My name is [redacted] I am 75 years old. I currently live in Crawfordville, Florida.

2. I am retired from my own business in scrap iron and metal in New Jersey. I left Florida in '42, but came back to Florida, to Wakulla County, in 1979. I've lived here since then.

3. I am not related to John Mills, Jr. I do not know John Mills, Jr. I am not a friend of his or his family. I do know about him because I watched the 1982 trial where he

was convicted of murder and other crimes. I went every day and watched the whole trial. I didn't see the sentencing. My wife went with me most days, but didn't see all of it because it went real late some days and she couldn't stay.

4. A large crowd watched the trial. They was about forty people that really stayed day in and day out. Other folks just came and went all the time. I remember that around 100 people were there toward the end of the case. I don't believe it was a half a dozen blacks that were there on any day. Most the white people sat behind the father, mother and wife of Mr. Lawhon, the man who was killed. Some blacks appeared to be scared to sit near a white person. I'm not. I sat where I wanted to sit.

5. I went to watch the trial because I wanted to see how the jury was selected. They had quite a few blacks to choose from. They had some blacks that I thought would qualify, but they turned all of them off. All of the blacks was excused.

6. I don't think John Mills, Jr. got a fair trial. The odds was against him and his lawyer, Roosevelt Randolph. They didn't have nothing on the jury but white.

App. II.

Other observers saw it too. As [redacted] relates:

I remember there was a petition that was signed by a lot of black people who believed that John couldn't get a fair trial in Wakulla County. I don't know what happened to that petition.

4. I went to as much of the trial as I could. There were never more than six black people there, but there were at least 30 white people there the day I was there. I remember seeing Sheriff Harvey, Glenn Lawhon and his wife, and Shirley Lawhon all sitting

in the courtroom.

6. I believe that it's common knowledge in Wakulla County that Glenn Lawhon is very good friends with Judge Harper.

App. JJ.

Willie Mae Gavin states:

1. My name is Willie Mae Gavin, and I reside in Crawfordville, Florida. I am Michael Fredrick's mother.

2. Mike was arrested in early May 1982, and questioned about the Lawhon case.

. . . .

5. Some time before Mills' trial, Mike was moved to the Leon County Jail for a week or so. I asked his lawyer to look into this and find out why, and he told me there had been threats that people in the county wanted to break into the jail and kill Mike and Boone Mills. My little daughter, who was in about the second grade at the time, heard white children on the school bus say, If I could get my hands on Michael Fredrick, I'd kill him myself."

6. I tried to go to John Mills' trial. A white deputy stopped me at the door and told me I couldn't even go in the trial. He said, "You can't go in there while the trial is going on. Period." I had not been subpoenaed at that time. The deputy told me, "Mike wouldn't want you there."

7. I asked Mike's lawyer, Mr. Scott, what kind of sentence Mike would get. He said it was hard to say, being in Wakulla County and all. He said he didn't know -- it could be 25 or 30 years or it could be as little as one year if Mike did good in prison.

8. The morning of the day Mike was

sentenced, I met Mr. Scott at the courthouse, and he said he was sorry, that the judge had changed his mind and was going to give Mike a lot more time than we had thought. He said, "Mrs. Gavin, I'm sorry. The judge changed his mind this morning. I'm real sorry, and Mike is very upset about it." He told me that Rev. Glenn Lawhon had talked to Judge Harper in the judge's office that morning.

9. The Lawhon family was there in the courtroom when Mike was sentenced. Mike asked them to forgive him for the agony he put them through.

10. I've heard on at least two occasions that Rev. Lawhon and Judge Harper are some kind of kin, but I don't know for sure.

11. I believe it would be impossible for John Mills or my son to receive a fair trial or sentence in Wakulla County. Everybody around here is either a friend or some kind of relation to the Lawhon's. A lot of people around here went to the church that Rev. Lawhon pastored. It would really be hard for any black person to get a fair trial in Wakulla County for killing a white person.

App. L.

Rachel Donaldson, Mr. Mills' sister, states:

13. When Boone was arrested for this crime, I was really shocked. I don't think he'd ever hurt anybody. It's just not a thing he could have done.

14. I went to the whole trial, every day, all day. There were always a lot of white people there, some days about 25 or 30 but some days up to 100. There were never more than six or eight black people there, including me. Rev. Glenn Lawhon and his wife and Shirley Lawhon were there every day, too, right in the courtroom. All the white people

sat near them. None of the white people would sit near or with me.

15. Before the trial, black people in Wakulla County knew Boone couldn't get a fair trial. We had a petition that people signed saying so. My mother and I took it to Roosevelt Randolph but I never heard anything else about it.

16. I know that it wasn't a fair trial. There wasn't even one black person on the jury.

App. V.

The community was well aware of the fact that Mr. Mills could not receive a fair trial. Everyone has similar stories about the case, as a recent petition illustrates. The following true stories are representative. Herbert Donaldson remembers:

10. After John was arrested on this murder, a white man named [redacted] said to me that John should be hanged for doing that. I told him that was my wife's brother and not to talk like that around me. We exchanged words about it for several minutes. Later, I told Roosevelt Randolph about it and I also told Mr. Randolph that I would be happy to come and testify about that in court. Mr. Randolph never mentioned it to me again.

11. Wakulla County is very racist. It would be impossible for a black person accused of killing a white person to get a fair trial there. Because blacks in Wakulla County knew that, we got up a petition to have the trial moved. My wife and her mother took the petition to Roosevelt Randolph but I never heard anything else about it.

12. I went to as much of the trial as I could. I know it was not a fair trial.

App. W.

Clayton Lewis knows also:

> 1. My name is Clayton Lewis, and I reside in St. James, Florida.
>
> 2. In the late 1960's and early 1970's, I lived for several years near Sopchoppy, Florida, in the area known as Buckhorn. While I lived there, I came to know John Mills, Jr. and his family very well.
>
> . . . .
>
> 3. ...I knew then and I know now that there was no way he could get a fair trial in Wakulla County. Besides it just being a real racist county, where any black person accused of killing a white person is sure and certain going to be found guilty.

App. Z.

Mr. Randolph unreasonably did not spend the time, money, or resources to properly investigate the prejudice in the community and he did not make a proper record of the bias and inflamed passions in the courtroom, swirling around the judge, jury and witnesses. If he had, he could have amply demonstrated that a fair trial was impossible. In the last few days, and with very little effort, fifty-one affidavits have been obtained by Wakulla County residents attesting to the bias at the time of trial. The fifty-one affidavits relate:

> 1. I live in Wakulla County and remember the 1982 trial of John Mills, Jr.
>
> 2. I believe now and believe then that it was impossible for him to receive a fair trial. People in the community were prejudiced against him, and he was accused of killing a member of a prominent white family.

Wakulla County has a history of race discrimination, particularly when a black person is accused of committing a crime against a white person. John Mills' trial should have been moved to another county so that he could have received a fair trial.

3. I would have said this in 1982 but no one asked me.

The following individuals signed this affidavit:


App. KK.

As affiants have sworn, the Lawhon family is and was a prominent white family in the community. They wanted the trial to be held in Wakulla County, and exerted influence to make that happen. See, e.g., App. GG. Judge Harper and the victim's

father were, at the time of trial, close enough associates that Mr. Lawhon used the judge and the clerk of court as personal references in his application for an insurance license. Mr. Lawhon also listed as his personal reference Mr. James Thompson, who is former Speaker of the Florida House of Representatives. App. LL.

This information was available upon proper investigation. The atmosphere at trial was so pervasively biased that it cannot be said that it had no effect on the conviction and sentence. Certainly there is a reasonable probability that but for the atmosphere, the result in the case would have been different. The atmosphere violated Mr. Mills' fourteenth amendment right to due process and equal protection, the unreliability inherent in the judge and jury decisions violates the eighth amendment, and counsel's failure to provide a proper record on the issue was a violation of the sixth amendment. An evidentiary hearing should have been held.

E. STATE THROUGH CO-DEFENDANT VIOLATED MR. MILLS' RIGHT TO COUNSEL.

Mr. Mills alleged that Ms. Galimore was a State agent and a co-defendant. See Claim V. As such, she communicated with Mr. Mills and kept her ears open while he was in jail and after his right to counsel had attached. Through hope of reward or through threat, she provided the State with purportedly incriminating

statements made by Mr. Mills to her, and those statements were introduced against him in a devastatingly inflammatory manner at trial -- she testified, inter alia, that Mr. Mills hated Caucasians, that they would trick her, that they were the devil, etc. The case which governs this prosecutorial violation of Mr. Mills' sixth amendment to counsel is United States v. Henry, 417 U.S. 264 (1980). Mr. Mills claimed the substantive violation occurred, and that counsel was ineffective for not moving to suppress. Evidence was not, but should have been, utilized to determine this claim.

F. ABSENCE FROM THE COURTROOM.

In Claim VII, Mr. Mills pled that he and his attorney were absent during critical proceedings. No evidentiary hearing was allowed.

Mr. Mills was absent during pretrial proceedings. Mr. Mills was absent during a change of venue motion (R. 344), proceedings in chambers regarding the presence of television cameras in the courtroom, motions in limine, a discussion about Mr. Mills' letters being delivered to the state attorney, argument on whether a witness can say that Mr. Mills had said "We ought to do some robbing, knock off some houses, knock off some Caucasians," whether Fredrick's habit of carrying a gun was admissible, and his pimping, arson and drug dealing (R. 1052-82), and during

pretrial hearings at which the State told the judge that there was evidence that Fredrick was equally culpable in the crime. App. Q. Counsel was not present at that last hearing.

Mr. Mills did not waive his presence. He certainly did not waive his lawyer's presence. Crucial evidentiary matters were discussed, and concessions made by the State, that later proved crucial. For example, unknown to Mr. Mills and counsel, because of their absence, the State knew that Mr. Fredrick had said he took Lawhon's gun, he knew a killing was going to happen, and he furthered that purpose. In the presence of Mr. Mills and his counsel, the State said just the opposite.

Mr. Mills had an absolute right to be present at all stages of his capital sentencing proceeding. His presence was not waived by him and he was prejudiced. This violates his sixth, eighth and fourteenth amendment rights. Counsel's absence was a per se violation of the sixth and fourteenth amendments.

## III.

### THE SENTENCING JURY WAS MISINFORMED ABOUT THEIR CRITICAL FUNCTION, AND MR. MILLS' RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED.

The State's attacks on the credibility of present counsel for Mr. Mills reached true silliness here. In its Memorandum of Law in Support of Motion to Dismiss, the State said:

> On page (48) Mills (CCR) represents to this court that "The jury is the sentencer in Florida because the recommendation is entitled to great weight". This is a direct and absolute falsehood. Spaziano v. Florida, 468 U.S. 447 (1984); Copeland v. State, supra. Again, the State must recall CCR's allegations of State misconduct and question CCR's own conduct.

Actually, the quote comes from page 61 of the motion, and the word "sentencer" is in quote marks: "The jury is 'sentencer' in Florida because the recommendation is entitled to great weight." This is what Adams v. Wainwright, 804 F.2d 1506 (1986), says.

In any event, the claim is cognizable, is not defaulted, and warrants relief. Adams.

IV.

CLAIMS UPON WHICH EVIDENCE WAS ALLOWED

Hiding evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory information violates the sixth amendment right to effective

assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). The unreliability of fact determination (rendered upon less than full cross-examination of critical witnesses violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margins of error).

All these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in this case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). "Of course, the right to cross-examine includes the opportunity to show that a witness is biased, without the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, No. 85-1347, slip op. at 10 (U.S. S. Ct. February 24, 1987).

As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and when that star happens to be a co-defendant, it is especially troubling.

> Thus, "[o]ver the years . . . the Court has spoken with one voice declaring presumptively unreliable accomplice's confessions that incriminate defendants.

Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986). Thus, it is with a very careful eye that the State's handling of star-witness co-

defendant's statements should be scrutinized.

We start with the proposition that the State has a duty other than to convict at any cost.

> By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). See Brady v. Maryland, 373 U.S., at 87-88.

United States v. Bagley, 105 S. Ct. 3375, 3380 n.6.

Counsel for Mr. Mills made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence of a favorable character for the defense which creates any reasonable likelihood that the the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence is one in the same.

The method of assessing materiality is well-established. Analysis begins with the Supreme Court's reminder in Agurs that

the failure of the prosecution to provide the defense with specifically requested evidence "is seldom if ever excusable." United States v. Agurs, 427 U.S. at 106. Any doubts on the materiality issue accordingly must be resolved "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980); accord United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Anderson v. South Carolina, 542 F. Supp. 725, 732 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983); United States v. Feeney, 501 F. Supp. 1324, 1334 (D. Colo. 1980); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977). "[T]his rule is especially appropriate in a death penalty case." Chaney v. Brown, supra, 730 F.2d at 1344.

Second, materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980);

Anderson v. South Carolina, 542 F. Supp. 725, 734-35, 736, 737 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

Third, materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant. Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981). For, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's

innocence or a reasonable doubt as to his guilt, or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is for a jury, and not th[e] Court to determine guilt or innocence," Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981), materiality is established and reversal required once the reviewing court concludes that the suppressed evidence "might" or "could" have affected the outcome on the issue of guilt . . . [or] punishment," United States v. Agurs, supra, 427 U.S. at 105, 106, and that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." Bagley, supra, 105 S. Ct. at 3383.

Promises and threats to witnesses are classically exculpatory. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Changes in witnesses' stories as prosecution progresses must be revealed. Any motivation for testifying and all the terms of pretrial agreements with witnesses must also. Giglio. Impeachment of prosecution witnesses is often, and especially in this case, critical to the defense case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a prosecutor, co-defendant, dealing witness:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. 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 defendant's life or liberty may depend").

And so it is here: whatever Fredrick and Galimore were promised, whenever they deviated from their initial story, whatever they might have felt they would achieve from testifying, and how their mental condition changed throughout the proceedings, defense counsel should have known.

A case quite similar to Mr. Mills' case is Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). In Smith, the State's star witness was a co-defendant: "a plea bargain had been struck with him under the terms of which he would escape the death penalty . . . if he testified for the State in the case against Smith." At the time of the Smith trial, Johnson was awaiting sentencing. Id., p. 1443. The State failed to reveal statements made pretrial by the co-defendant which were different

than his bargained-for trial testimony. The Smith court held:

> We need not tarry long in determining whether or not the failure of counsel to have impeached Johnson or his wife with their prior statements was prejudicial to Smith's defense. The jury was permitted to believe that Johnson's testimony against Smith was consistent with what he had told the police from the outset and subject to belief for that reason, in spite of his character defects, when the undisclosed truth was that his testimony at trial conflicted remarkably with his first detailed statement both in its content and in what was omitted. Mrs. Johnson's testimony was similarly unimpeached despite the availability of an inconsistent statement.
>
> As noted on the earlier appeal, issues arose as to whether Smith's attorney had possession of the prior statement of Smith and, by failing to use it for impeachment, rendered ineffective assistance to his client or whether the State had failed to disclose the statement in spite of the mandate of Brady v. Maryland, 373 U.S. 83 (1963). The district court found, after hearing, that there had not been a Brady violation but that counsel's representation had been inadequate. This finding is supported by the evidence.
>
> The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different. Strickland v. Washington, 466 U.S. 668 (1984). See United States v. Bagley, 641 F.2d 1235 (9th Cir. 1981), cert. denied, 454 U.S. 942.

Id, p. 1444.

A. THE STATE FAILED TO REVEAL EXCULPATORY EVIDENCE.

1. The Script.

Both Fredrick and Galimore were provided outlines of their testimony, with many answers. In post-conviction, Mr. Kirwin admitted going over the questions and answers with Fredrick, and sending Fredrick away with the script. Mr. Fredrick admitted studying the script, and that he was supposed to give the answers that were on the script.

Defense counsel testified that this would have been an excellent tool for impeachment. All agree that the scripts were not provided to defense counsel, even though a request for exculpatory information was made.

This Court is well aware of the reason that exculpatory evidence be revealed and why: "Society wins not only when the guilty are convicted but when criminal trials are fair." Arango v. State, 467 So. 2d 692 (Fla. 1985). Impeaching information, created by the State, should be provided defense counsel.

It can hardly be doubted what effect the script could have had on the jury, when used properly to impeach. Mr. Fredrick's (and the prosecutor's) credibility would have been entirely gutted. Some of the questions and answers are included at the beginning of this brief. Without question this was exculpatory evidence. The only question is "prejudice."

The trial court's order regarding the questions and answers provided Mr. Fredrick states:

"Coaching" Witnesses

> Counsel for both the State and the defense, like any competent lawyers, prepared their witnesses by going over questions they expected to cover at trial. Neither party disclosed this activity to the other.
>
> The State provided written copies of its questions to its witnesses. The questions reviewed by this Court are largely just questions without answers, though a few answers appear as to some of the questions. These questions do not constitute a "script".
>
> The record at trial shows that the so-called "scripts" were not followed. Mr. Kirwin asked approximately 150 questions of Mr. Frederick that do not appear on the list. This is hardly in keeping with the concept of a "script". Miss Galimore was asked 60 questions not appearing on her list. Some questions on each list were not even asked.
>
> Mr. Randolph argued at trial that Mr. Frederick was "coached" so the jury considered this factor in any event. The Court also observed Mr. Frederick at trial and notes that he withstood rigorous cross examination. This, too, does not comport with the concept of a "coached" witness.

The record does not support these findings. First, as quoted at the beginning of this brief, many, not "a few" answers, are on the written copies. Of particular moment is the fact that the answers on the written pages were used throughout closing argument. The prosecutor had certain things he wished to say to the jury in closing, and these things were studied by Fredrick.

With regard to questions being asked that were not on the scripts, a cursory examination of the direct examinations of these witnesses by the State will reveal how closely the written questions are followed. This Court can conduct its own independent review of that comparison.

Finally, it is difficult to imagine how withstanding rigorous cross-examination "does not comport with the concept of a 'coached' witness." That is, of course, part of the reason for coaching -- so that someone <u>can</u> withstand cross-examination.

2. <u>The Shirt</u>.

The State argued at trial that

> You heard Deputy Whittaker testify. If Michael Frederick hadn't pointed out where that shirt was when he and Mr. Harley and myself and Mr. Whittaker were driving around . . . we never would have had that shirt for you here today. We'll get to that shirt in a little while. But I think that is another indication of his truthfulness.

(R 1859).

. . . .

> Michael Frederick, on the same day that he testified he pointed out where that shirt was, pointed out that house.

(R 1515).

> Is that corroborated? Yeah. Jim Whittaker. Jim Whittaker said as you were going into Lake Ellen area, that shirt was found on the right side of the road and it was only three or four feet off the road in the thick under brush <u>and Michael Frederick led him to it</u>.

(R 1872-73).

Mr. Mills' allegation in the Rule 3.850 motion was that Mr. Fredrick did not lead anybody to any shirt, did not point it out, that the State brought a shirt to him, and he lied about it being Mr. Mills'. This is purely exculpatory. Mr. Fredrick testified consistently with this in the post-conviction proceedings. Harley, a state attorney witness, who interrogated Fredrick before he testified in post-conviction, verifies that Fredrick told him he took no one to a shirt, he lied about the shirt being Mr. Mills', and that he was promised things to do so.

This claim was denied:

> Mr. Mills first claim under this heading is a charge that the State failed to disclose that Mr. Frederick "did not lead them to the shirt". The allegation rests largely upon semantics and is unproven. Mr. Frederick directed agents of the State to the scene of the murder. Upon arrival, one of the State's agents found the shirt. Whether this constitutes leading the police to the shirt is semantic gamesmanship and does not support the claim of a Brady violation. This finding is consistent with Frederick's trial testimony (R 1253) that he took the police to the scene, not the shirt. Mills was available for deposition to both sides, as was the investigator who actually located the shirt.

This finding is not supported by the record. It bears no discernable relationship to what the known facts are. The State has never argued that the shirt was found at the scene of the murder. Their position is that Mr. Mills took them to the murder

scene in May, to the shirt in October, and the shirt was not at the murder scene. This is the testimony at page 1252:

> Q (By Mr. Kirwin) After your arrest in May for this crime, did you take law enforcement officers anywhere?
>
> A I didn't understand.
>
> Q After you were arrested for this crime in May, did you agree to take law enforcement officers anywhere?
>
> A Yes, sir, I did.
>
> Q Okay. Where did you take them?
>
> A I took them back to the actual day to what happened.
>
> Q All right. Did you lead them to anyplace in particular?
>
> A Yes, I did.
>
> Q Where was that?
>
> A To the area where Mr. Lawhon was killed.
>
> Q Do you know if they found the remains of a human being in the area where you took them?
>
> A Yes, sir.
>
> Q Now, <u>after that time</u>, at my request, did you drive with myself, with Mr. Tim Harley, and Deputy Jim Whittaker in a patrol car?
>
> A Yes, sir.
>
> Q And where did we go?
>
> A I directed y'all back through the

area.

Q Did you show us the house in front of which you had turned around before you got to the Lawhon residence?

A Yes, sir, I did.

Q Did you show us the area where Boone Mills got out of the truck and got rid of the shirt he had worn that day?

A Yes, sir.

(R 1252-53). The judge's finding is simply wrong. The State argued that Mr. Fredrick led them to the shirt, which is not even true from the testimony presented. The claim is that Mr. Fredrick did not take them to a shirt, and that he lied about it being Mr. Mills'. No findings were made on this claim. Relief is warranted.

3. Psychiatric Treatment.

The record reveals that the star witness, Mr. Fredrick, was provided psychiatric treatment by the sheriff's department before trial. On the day of his trial testimony, in fact, Mr. Fredrick received medical treatment for his condition. He was so upset the day he testified that Mr. Fredrick had to see a doctor. This man who the State lauded as unshakeable, as a calm, cool and collected witness:

> [v]omited stomach contents (x3) at 1:30 p.m. Felt sick all day. No v/n at this time. HEDA. Medical history: many c/o nervousness and trouble sleeping. Saw Dr. Hausfield -- got prescription of adapin 50 mg. Has been out since Oct. C/o nervousness past 2 ks.

State went to trial yesterday.

Ex. 28. No one from the State rushed to tell Mr. Randolph that this cool and collected truth-teller was so nervous he could not keep food down.

Also not disclosed was the following: Upon attempting suicide in jail while awaiting trial, Mr. Fredrick was treated at a mental health center. According to the intake forms, Mr. Fredrick was "incorrigible/anti-social," he was "scared," he was having "flashbacks," and "needed drugs to help me sleep and settle my nerves." He told the staff he was innocent and that "before they put me in the electric chair, I will do it myself." App. N. This statement is inconsistent with his May 8 statement. He was returned to jail and was medicated regularly in the jail with sinequan and adapin. This information was not revealed to counsel for Mr. Mills. Mr. Fredrick denied any psychiatric treatment when he testified, and the State knew of its existence.

Perhaps the number one manifestation of an anti-social personality disorder is "disregard for the truth as indicated by repeated lying" or "'conning' others for personal profit." Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association (3d ed.), p. 321. It is per se exculpatory when the State's chief witness has a mental disorder, the chief manifestation of which is that he lies all the time.

Yet this was not revealed. Also not revealed was that during Mr. Fredrick's plea of guilty he was taking State-prescribed sinequan, which is prescribed for the treatment of

1. Psychoneurotic patients with depression and/or anxiety.

2. Depression and/or anxiety associated with alcoholism (not to be taken concomitantly with alcohol).

3. Depression and/or anxiety associated with organic disease (the possibility of drug interaction should be considered if the patient is receiving other drugs concomitantly).

4. Psychotic depressive disorders with associated anxiety including involutional depression and manic-depressive disorders.

Physicians Desk Reference, p. 1740. During his October 12, 1982, deposition, Mr. Fredrick was taking State-prescribed adapin, which is prescribed for the treatment of:

1. Psychoneurotic anxiety and/or depressive reactions.

2. Mixed symptoms of anxiety and depression.

3. Anxiety and/or depression associated with alcoholism.

4. Anxiety associated with organic disease.

5. Psychotic depressive disorders including involutional depression and manic-depressive reactions.

Id., p. 1581. No one told defense counsel. The claim was denied on the following basis:

> The Court finds no evidence to support any claim of impropriety by the State. Mr. Roosevelt Randolph testified that, as former counsel for the mental health care facility that saw Frederick, the treatment records from that facility would be confidential and unavailable to State or defense counsel. Hospital exhibits provided by CCR are indeed stamped "confidential".
>
> Mr. Randolph testified that he knew that Fredrick saw a psychiatrist prior to trial. Randolph did not know about the medication but testified that his trial strategy was not based upon psychiatric impeachment of Mr. Frederick in any event. The Court agrees that any usefulness attaching to this information is conjectural and relevant only to a possible alternate strategy.
>
> The Court also agrees with the testimony that old jail records regarding Mr. Frederick were available on demand by either counsel. Frederick was also deposed twice by Mr. Randolph. Thus, this information regarding medication was not in the exclusive possession and control of the State.
>
> Finally, Mr. Frederick's psychiatric treatment consisted of four visits, usually by a social worker or nurse. The last visit took place six months prior to trial. Mr. Frederick took medication, but said medication ceased at least six weeks prior to trial. The Court does not find this information to be so damaging to Frederick's credibility that its "non-disclosure" in any way affected the outcome of this trial.

The record does not support this. First, Mr. Randolph specifically asked Mr. Fredrick at trial if he had seen a psychiatrist, and Mr. Fredrick lied and said no. If it was not part of strategy, to discern psychiatric treatment, it is

difficult to imagine why the question was asked.

Secondly, the Court says that the "psychiatric" records were unavailable to counsel because they were confidential, and then says that the jail records "were available upon demand by either counsel." The jail records reveal medication with anti-psychotic drugs. The mental health facility records reveal the reason. No testimony was allowed upon whether the failure to obtain the medical records was an unreasonable omission by counsel.

If the records were not available, and they are exculpatory, the unavailability is a due process violation. Whether their absence was prejudicial, is a matter of case law. If per se exculpatory information is not available as a matter of law, due process is violated. When the star witness is the one to be impeached, it is prejudicial.

Evidence of mental instability and drug taking by the State's chief witness must be revealed to defense counsel:

> The first federal decision in this field [impeachment for psychiatrical reasons] seems to have occurred in the noted case of United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950). There, as here, the defendant sought to introduce psychiatric testimony to discredit the government's key witness, Whittaker Chambers. Holding evidence of insanity or mental derangement to be admissible for credibility purposes, the Court stated that such evidence not only went to the preliminary question of competency but also the jury question of credibility.
>
> . . . .

> The readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness' credibility to aid in their determination of the truth. Walley v. State, supra. It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know and correctly state the truth.

United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974).

Running out of medication six weeks before testifying does not mean the evidence of having been prescribed medication is not exculpatory. The reason Mr. Fredrick was sick the day of testimony, and incredibly nervous off the stand, is because he was out of medication.

4. Threats and Promises.

As testified to by prosecutor Harley last Saturday, Mr. Mills said to him last Thursday that he lied about the shirt because he had been promised things by the State. That is what Fredrick's affidavit states: "they made me testify about leading them to the shirt which I knew and they knew wasn't true." App. F. The evidence supports a finding of threats and promises. Mr. Fredrick's cellmate at the jail during this period verifies Mr. Fredrick's affidavit:

> 1. My name is Jessie Sampson. I live in Tallahassee, Florida.
>
> 2. From March, 1982 thru 1982, I was incarcerated at the Wakulla County Jail.

> While I was there, I shared a cell with Michael Fredrick for a while.
>
> 3. The police would take Mike out of his cell late at night when they thought everybody was asleep. Mike would be sleeping and they would wake him up to talk to him and question him.
>
> 4. When we were in the same cell together, he told me the state attorney, the prosecutor told him, Mike, they would go easy on him if he would testify about Boone. (John Mills). Mike said they wanted Boone, they would let Mike go. He kept saying they just want me to tell on Boone.
>
> 5. Mike Fredrick told me the police and prosecutor threatened him that if he didn't say where he had got some ring from, they would put him in the electric chair. I told him you can't go to the electric chair for no ring. They also said if Mike would tell them about the ring, he would get off easy.
>
> 6. I know the police and them scared Mike Fredrick into talking. I remember one night he was sitting on his bed crying. He said Jesse, I don't know what to do. Another night he came in all muddy like he had been through a hog pen or something.
>
> 7. I knew the police weren't happy with his story because they kept on pulling him out to question him more and would not let up until he said what they wanted him to say.

App. M. This was admitted into evidence below. These events, or Mr. Fredrick's description of them, are completely exculpatory.

Ms. Galimore's "promise" is equally disturbing. Kirwin testified that he told Galimore's lawyer that the case would probably be dismissed if she testified. This was not revealed.

5. Inconsistent Statements By Fredrick After May 8, 1982.

The order which was prepared by the State and which the Court signed recites that the Court is "disturbed" by this claim. Specifically, the order says:

> The Court finds that Mr. Fredrick did not give any inconsistent statement regarding this crime after May 8, 1982.
>
> The Court is disturbed by the following quotation from page 31 of the 3.850 petition:
>
> > " . . he deviated from the information given to Mr. Frederick and Mr. Gandy on the night he was supposedly giving a statement".
>
> That quotation from the deposition of Mr. Landrum, inserted in the petition by CCR to induce court action, is a misrepresentation of the actual quotation, which reads:
>
> > "I don't think, of my personal knowledge, he deviated from the information given to Mr. Frederick and Mr. Gandy on the night he was supposedly giving a statement".

Landrum deposition, p. 36.

In fact, the Order deletes the part of the sentence immediately preceding the "I don't think" quote. The deposition actually says:

> He's tried on several occasions, I think, with knowledge of these -- I don't think of my personal knowledge, he deviated from the information that was given to Mr. Fredricks and Mr. Gandy on the night that he was supposedly giving a statement.

Of course, this can mean many things, one of which is that, although Mr. Landrum did not personally know what was said to Gandy, he believed that what Fredrick told him deviated from what he told Gandy.

Regardless, the Rule 3.850 motion actually said the following:

> In a deposition of Officer Charles Landrum taken August 31, 1982, Landrum is questioned by counsel for Mr. Fredrick. Landrum says that he "took no statements" from Mr. Fredrick, but that Mr. Fredrick did make statements to him. These statements came after the Mills' implication, while Fredrick was awaiting trial. Specifically, "he deviated from the information that was given to Mr. Frederick and Mr. Gandy on the night that he was supposedly giving a statement."

No citation to the deposition is given. It is Mr. Mills' position that Fredrick <u>did</u> deviate, and that's what the motion says. Contrary to the State's eclipsed quotation of the deposition, and the Court's signed State's order, Mr. Mills did not "insert[] [a quote] in the petition by CCR to induce Court action," and did not misrepresent the actual quote.

What Landrum said was that he was counseling Mr. Fredrick in jail when Mr. Fredrick would get in a "certain state of mind" and would want "to go back into the situation that he didn't do this and he didn't do that and somebody did this and somebody did that." Landrum deposition, August 31, 1982, p. 36. Counsel for Mr. Mills was present at this deposition, but unreasonably did

not pursue the changed "statements" issue, and did not reveal Mr. Fredrick's post-May vacillating. No hearing was allowed on this. Further, Mr. Fredrick was telling mental health personnel, post-May 8, 1982, that he was innocent, certainly a matter inconsistent with his May 8 statement, and trial testimony.

5. Testimony Must Be Consistent with May 8 Statement.

Mr. Fredrick pled, and during that plea the State said his second-degree plea was conditional on Mr. Fredrick's testimony being consistent with the May 8, 1982, statement. Counsel for Mr. Mills was not present, and did not hear that plea, or its predicate. Neither the jury nor defense counsel was told that Mr. Fredrick had to mimic the May 8 statement in order to avoid the death penalty.

The order says that since the deal was stated in open court, then it is not "Brady." The motion and evidence reveal that Mills' lawyer was absent. It is irrelevant who was told the contents of a deal, if defense counsel was not.

6. Other Material not Revealed.

The Court says that statements by witnesses, if included in "summaries of what witnesses said to counsel or their agents prior to trial were not statements," and so defense counsel is not entitled to them. The "statements" revealed that witness Turner said completely different information pretrial than trial. Ms. Turner reported on March 12, 1982, to FDLE and Wakulla

County Sheriff Department that a pick-up truck had turned around in her yard, 2.6 miles from the Lawhon residence, before the fire. The truck was rust colored, had a camper the same color, and there were two or three people in it. She could not tell whether they were males or females. At trial she said the truck was pumpkin-like, with a white top, two people were in it and she lived one half mile from the Lawhons. The State knew this was not consistent with her earlier statement, but did not reveal it.

V.

PRESENTATION OF FALSE TESTIMONY

The State may not lie; it may not even come close to lying. It's worse than hiding information. 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 (1957). 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, for example, "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 defendant's life or liberty may depend"). Evidence of a reward would substantially undermine credibility:

> [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, 22-23 (1967). The State must correct false testimony. 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). We have demonstrated that witnesses were operating on "understandings" which they denied. See Moore v. Kemp, 809 F.2d at 730 ("Finally, the question still remains whether Pasby testified under a formal or informal grant of immunity and if so, the extent of that immunity, or whether absent such a grant, Pasby thought he had immunity. Pasby freely admitted engaging in conduct which, at the very least, warranted

the revocation of his probation; yet, the conduct went unpunished"). The State admitted with regard to Galimore that they were offering what they believed were lies. This is all too much. When a prosecutor did "not believe [a witness's] testimony but called him anyway, then that would be constitutional error." Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985)(Clark, J., concurring). The prosecutor's duty is quite broad:

> In Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935) and Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) the Supreme Court made clear that a conviction obtained through the use the prosecution of false evidence, known to be such by the state, renders the conviction void under the Fourteenth Amendment. The prosecutor has a duty not only to refrain from soliciting false evidence but also a constitutional duty to correct false evidence that he does not intentionally elicit. Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L.Ed.2d 737 (1967). Furthermore, courts have not adopted a technical conception of "false" evidence or testimony. Blankenship v. Estelle, 545 F.2d 510, 513-14 (5th Cir. 1977) (testimony does not have to technically be perjurious to fall within the ambit of knowing use of false testimony).

Id. "It is a constitution we deal with, not semantics. 'The thrust of Giglio and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . .'" Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, 464 U.S. 1003 (1983), . .." Brown, 785 F.2d at 1457. In determining materiality, "the disclosure is even more important

when the witness provides the key testimony against the accused. See Giglio, 405 U.S. at 154-55." that, 756 F.2d at 1523. 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). In Lockhart v. McCree, 106 S. Ct. 1758 (1986), the Court wrote:

> [J]urors 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.

The order simply states that there was no evidence of false testimony having been placed before the jury. The record does not support this. The following examples are clearly supported by the record.

A. COACHING AND A SCRIPT.

Lies by omission are nevertheless lies. Mr. Fredrick was provided questions and answers. The jury was not told this

truth. He was rehearsed. The jury was not told this truth. Defense counsel argued that Mr. Fredrick appeared coached, and the State said that it was not coaching that made Mr. Fredrick look good -- it was the "ring of truth."

B. FREDRICK SAID HE GOT THE GUN, AND DRUG THE BODY INTO THE BUSHES.

On May 8, 1982, the day the State said Mr. Fredrick decided to tell the truth, he said <u>he</u> stole Mr. Lawhon's gun, and he helped drag the body into the bushes. Ex. 13, 14, 7, 18. This was omitted from the May 8th taped statement, was omitted in the script, and was never revealed to the jury. He also told Gary Lassiter that he helped drag the victim into the bushes. Ex. 18, p. 28.

Since these questions and answers were not in the script, they did not come out. The State argued the opposite of what was said by Fredrick:

> Fredrick goes out there, just as involved as Boone Mills. He was ready to hit that house. He was ready to burglarize it. And out the door comes Les Lawhon, behind him Boone MIls, and <u>Boone has got a .12-gauge</u>, double-barrell shotgun. This .12-gauge, double-barrel shotgun, I suggest to you ladies and gentlemen, Les Lawhon's own weapon, was the weapon held to his head. And he throws Fredrick the keys and he says, "Get in and drive."
>
> And he gets Lawhon in and then he climbs over the seat, still holding onto the shotgun, sits right behind Michael Fredrick, points the shotgun at Les Lawhon's head, and

tells Fredrick how to drive.

(R 1865-66). Mr. Fredrick had said he stole that gun, gave it to Mr. Mills, and then Mr. Mills walked out with it. Mr. Fredrick had told the State attorneys that the gun he stole was Les Lawhon's, and he got it from a room in the trailer.

The State misquotes the record by saying defense counsel actually argued that Mr. Fredrick got Mr. Lawhon's gun, the murder gun: "The allegation that the State coached Fredrick to omit the fact that he had stated that he had found the shotgun was brought out by trial counsel (Tr. 1937)." Memorandum of Law in Support of Motion to Dismiss, p. 12. There were, however, two different shotguns. One was in the pick-up truck, according to Mr. Fredrick, and it was placed there when Mr. Mills left his house, before going to the Lawhon's:

[Defense Closing]

> They go to the house. Fredrick says, again, that he [Mills] went inside the house and got a shotgun and he came back out, "A shotgun that I [Fredrick] have given him."

(R 1937-38). This was at Mr. Mills' house, not the trailer. This was a shotgun Mr. Fredrick had given Mr. Mills to repay a debt. At the trailer, Mr. Lawhon's gun was taken by Fredrick, and used as the murder weapon, according to what he told the State. The jury did not hear it -- it was not in the script.

C. PSYCHIATRIC TREATMENT.

The State allowed Fredrick to testify as follows:

> MR. RANDOLPH:
>
> Q: Mr. Fredrick, have you had any psychiatric treatment since January 1982?
>
> A: No, sir, I haven't.
>
> Q: You have had no psychiatric treatment?
>
> A: No, sir, I haven't.

(R 1265). This was a bald-faced lie, the State knew it, the State did not correct it. Ex. 19.

D. GALIMORE IS A LIAR.

The State did not like the inconsistency between Fredrick's and Galimore's statement about what happened on March 5, 1982. In fact, the State told the judge that the State belived Galimore was telling a lie

> (Thereupon, a brief recess was taken and the following proceedings were held in Chambers:)
>
> MR. KIRWIN: Judge, about two or three witnesses down the road is Ms. Fawndretta Galimore, who was the Defendant girlfriend at the time all this occurred. She is -- at that time was his girlfriend. She was living with him down at his mama's house.
>
> We want to -- I want to examine her about two things. I want to ask her about did she know John Mills; how did she know him; how long had she known him; where was she living. And then I want to ask her about the day in March when John Mills, Jr. was arrested and told her to destroy the

> property. I specifically do not want to go into March 5th, the day Les Lawhon was killed.
>
> I have several reasons for that, why I don't want to do it. First of all, I don't feel that she is telling the truth about March 5, and I hate to call her and in some way vouch for her. Now if I can impeach her, then I wouldn't mind it all that much. Call her as Court's witness or something. But I just don't feel like she is telling the truth about what happened on that day. I think she is telling part of the truth and part that ain't the truth.

(R 1178). She did testify to the "lies," and then the prosecutor turned around in closing argument and said that she was not lying:

> Fawndretta Galimore is not lying, did not lie under oath. She is mistaken about the day.
>
> . . . .
>
> I don't think she is lying. I think she is telling it as best as she can remember.

(R 1884). This is improper.

E. THE RUST, OR PUMPKIN, TRUCK.

The state allowed testimony and presented arguments about the truck that was false and misleading. Ms. Turner said she lived 2.6 miles from the scene. She told police that a rust-colored pick-up truck with a rust-colored camper and 2-3 black people in it turned around in her driveway before the Lawhon fire. Ex. 4. At trial, she testified that there were two

people, the pick-up was pumpkin-colored, the camper shell was white, there were two black males in the truck, and she lived one-half mile from the Lawhon's. That is different, but the state did nothing. The State argued strongly that this witness corroborated Fredrick.

## CONCLUSION

For the reasons stated above and in the 3.850 motion and memorandum of law in support of motion for stay of execution filed below, John Mills, Jr., requests a stay of execution and vacation of his judgments and sentences. This request is made on the basis of all matters raised below. This brief does not address all matters simply because of time constraints.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

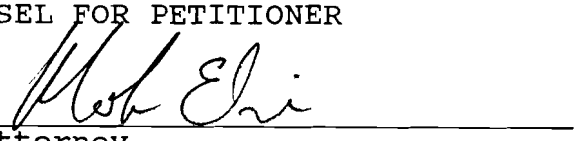
MARK EVAN OLIVE
Litigation Director

JAMES C. LOHMAN
Staff Attorney

David Milford
Staff Attorney

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

COUNSEL FOR PETITIONER

BY: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Elliott Building, 401 South Monroe Street, Tallahassee, Florida 32301, this 4th day of May, 1987.

Attorney