IN THE

SUPREME COURT OF FLORIDA

CASE NO. 70,658

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

JOHN MICHAEL,

Appellee/Cross-Appellant.

ANSWER/INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

BILLY H. NOLAS
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR APPELLEE/CROSS-APPELLANT

PRELIMINARY STATEMENT

The instant appeal is predicated on a Circuit Court's actions and rulings during the litigation of a motion to vacate filed pursuant to Fla. R. Crim. P. 3.850. The Circuit Court vacated Mr. Michael's sentence of death and the State appealed. In this regard Mr. Michael, as appellee, will answer the State's contentions and defend the Circuit Court's judgment. The Circuit Court denied relief with respect to the capital conviction and certain other challenges to the death sentence at issue. In this regard Mr. Michael, as cross-appellant, will discuss why the Circuit Court's judgment should be reversed. See Fla. R. App. P. 9.110(g); 9.210(c). The Circuit Court also failed to rule on a number of issues. In this regard Mr. Michael will discuss why the case should be remanded for a complete and proper final order.

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

"R" -- Record on Direct Appeal to this Court;

"PC" -- Record on Appeal of Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will be otherwise explained.

TABLE OF CONTENTS

PRELIMINARY STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE AND PROCEDURAL HISTORY 1

SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. THE RULE 3.850 COURT'S RULING THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE AT THE SENTENCING PHASE OF MR. MICHAEL'S CAPITAL TRIAL AND ITS SPECIFIC FINDINGS IN SUPPORT OF THAT RULING WERE NOT ERRONEOUS AS A MATTER OF FACT OR LAW, WERE WELL SUPPORTED BY THE RECORD, AND ARE ENTITLED TO THIS COURT'S DEFERENCE 8

II. MR. MICHAEL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AMPLY AVAILABLE NONSTATUTORY MITIGATING EVIDENCE, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS 22

III. MR. MICHAEL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS 29

A. Counsel's Failure to Adequately Investigate His Client's Mental Health 31

B. Counsel's Failure to Challenge the Admission of Damaging, Although Clearly Inadmissible, Hearsay Evidence And To Protect Mr. Michael's Rights Under The Confrontation Clause 36

C. Counsel's Unreasonable Failure to Challenge The Unreliable Hypnotically Refreshed Testimony of a State's Key Witness 40

D. Counsel's Failure To Challenge The Admission Of Statements Elicited From Mr. Michael In Violation Of The Fifth, Sixth, And Fourteenth Amendments 41

E. Counsel's Failure To Challenge Or Correct Improper, Misleading, and Impermissible Argument By The State 43

F. Conclusion 44

IV. MR. MICHAEL WAS DEPRIVED OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE MENTAL HEALTH EXPERTS APPOINTED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT COMPETENT AND ROFESSIONALLY APPROPRIATE EVALUATIONS, BECAUSE HE WAS FORCED TO PROCEED TO TRIAL ALTHOUGH HE WAS NOT COMPETENT, BECAUSE HE WAS DENIED AN INDIVIDUALIZED, FAIR, AND RELIABLE SENTENCING DETERMINATION, AND BECAUSE THE TRIAL COURT REFUSED TO APPOINT MENTAL HEALTH EXPERTS TO CONDUCT THE NEEDED EVALUATION OF MENTAL HEALTH ISSUES RELEVANT TO SENTENCING 44

V. PERVASIVE AND SYSTEMATIC PROSECUTORIAL MISCONDUCT RENDERED JOHN MICHAEL'S CAPITAL CONVICTION AND SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND UNFAIR, AND JUDICIAL COMMENTS AND INSTRUCTIONS ENHANCED AND FURTHERED THE UNRELIABILITY AND UNFAIRNESS OF THESE PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS 53

A. The Unreliable Death Sentence 53

1. "Give The Judge The Opportunity." 54

2. "We Owe Fern Umble." 59

3. The Unreliability of This Death Sentence. 63

4. The Court Must Determine Mr. Michael's Claim On Its Merits. 65

5. The Interests Of Justice. 69

B. The Fundamentally Unfair Conviction 70

1. The Fundamental Unfairness. 70

2. The Court Must Determine Mr. Michael's Claim On Its Merits. 71

VI. THE PROCEEDINGS RESULTING IN JOHN MICHAEL'S CONVICTION AND SENTENCE OF DEATH VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE STATE INTRODUCED AND RELIED ON STATEMENTS EXTRACTED FROM THE ACCUSED WHICH WERE INVOLUNTARY, COERCED, NOT THE PRODUCT OF ANY VALID CONSTITUTIONAL WAIVER, AND TAKEN IN VIOLATION OF THE RIGHT OF COUNSEL 71

VII. MR. MICHAEL WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE SAME DEFENSE COUNSEL REPRESENTED HIM AND A KEY STATE WITNESS PRIOR TO TRIAL 75

VIII. JOHN MICHAEL WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HIS CAPITAL CONVICTION AND SENTENCE OF DEATH WERE BASED ON THE HYPNOTICALLY INDUCED TESTIMONY OF A KEY STATE WITNESS 77

IX. MR. MICHAEL WAS DENIED HIS RIGHT TO CONFRONT HIS ACCUSERS, AND HIS RESULTING CONVICTION AND DEATH SENTENCE WERE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS 78

CONCLUSION 79

CERTIFICATE OF SERVICE 80

TABLE OF AUTHORITIES

Adams v. Dugger
816 F.2d 1493 (11th Cir. 1987) 66, 67

Adams v. Wainwright
764 F.2d 1356 (11th Cir. 1985) 34, 56, 64, 65

Ake v. Oklahoma
105 S.Ct. 1087 (1985) 5, 33, 45, 48, 53

Aldrich v. Wainwright
777 F.2d 630 (11th Cir. 1985)
cert denied, 107 S.Ct. 324 (1986) 10, 14

Aldridge v. State
503 So.2d 1257 (Fla. 1987) 65, 66

Barber v. Page
390 U.S. 719 (1968) 40, 78

Beach v. Blackburn
631 F.2d 1168 (5th Cir. 1980) 30

Beavers v. Balkcom
636 F.2d 114 (5th Cir. 1981) 21, 29, 34

Bishop v. United States
350 U.S. 961 (1956) 51

Blackburn v. Alabama
361 U.S. 199 (1960) 73

Blake v. Kemp
758 F.2d 523 (11th Cir. 1985) 4, 13, 30, 33, 34, 45

Booth v. Maryland
107 S.Ct. 2529 (1987) 6, 54, 59, 62, 64, 65, 67, 68

Brown v. State
426 So.2d 76 (Fla. 1st DCA 1983) 40

Bundy v. State
471 So.2d 9 (Fla. 1985) 40, 77

Burnette v. State
157 So.2d 65 (Fla. 1963) 69

Caldwell v. Mississippi
105 S.Ct. 2633 (1985) 6, 54, 55, 56, 57, 58, 64, 65, 66, 68

Caraway v. Beto
421 F.2d 636 (5th Cir. 1970). 30

Castillo v. Estelle
504 F.2d 1243 (5th Cir. 1974) 76

Chambers v. Mississippi
410 U.S. 284 (1973) 78

Clark v. State
363 So.2d 331 (Fla. 1978) 71

Clark v. State
379 So.2d 372 (Fla. 1st DCA 1980) 40

Code v. Montgomery
799 F.2d 1481 (11th Cir. 1986) 10, 14

Cole v. State
181 So.2d 698 (Fla. 3d DCA 1966). 68

Connecticut v. Barrett
107 S.Ct. 828 (1987). 74

Copeland v. State
505 So.2d 425 (Fla. 1987) 65, 66

Cuyler v. Sullivan
446 U.S. 335 (1980) 68, 76

Donnelly v. DeChristoforo
416 U.S. 637 (1974) 70

Douglas v. Alabama
380 U.S. 415 (1965) 40, 78

Douglas v. Wainwright
714 F.2d 1532 (11th Cir. 1983)
vacated and remanded, 468 U.S. 1212 (1984)
adhered to on remand, 739 F.2d 1322 (1984)
cert. denied, 469 U.S. 1208 (1985). 13

Downs v. Dugger
12 F.L.W. 473 (Fla. 1987) 67

Drake v. Kemp
762 F.2d 1449 (11th Cir. 1985). 57, 58

Drope v. Missouri
420 U.S. 162 (1975) 35, 45, 51

Edwards v. Arizona
451 U.S. 477 (1987) 43, 74

Edwards v. State
393 So.2d 597 (Fla. 3d DCA 1981)
cert. denied, 402 So.2d 613 (Fla. 1981) 68

Elledge v. State
346 So.2d 998 (Fla. 1977) 69

Enmund v. Florida
458 U.S. 782 (1982) 68

Flowers v. State
351 So.2d 3878 (Fla. 1st DCA 1977). 68, 74

French v. State
166 So.2d 79 (Fla. 1st DCA 1964). 68

Gaines v. Hopper
575 F.2d 1147 (5th Cir. 1978) 10

Garcia v. State
492 So.2d 360 (Fla. 1986) 64

Gardner v. Florida
430 U.S. 349 (1977) 78, 79

Goodwin v. Balkcom
684 F.2d 794 (11th Cir. 1982) 12, 13, 29, 30

Gomez v. Beto
462 F.2d 596 (5th Cir. 1972). 10

Gregg v. Georgia
428 U.S. 153 (1976) 12, 14

Griffin v. California
380 U.S. 609 (1965) 70

Hall v. Wainwright
805 F.2d 945 (11th Cir. 1986) 9

Herring v. Estelle
491 F.2d 125 (5th Cir. 1974) 30

Hill v. State
473 So. 2d 1253 (Fla. 1985) 12, 35, 45, 51

Hitchcock v. Dugger
107 S.Ct. 1821 (1987) 67

Huckaby v. State
343 So.2d 29 (Fla. 1977). 20

Jones v. State
332 So.2d 615 (Fla. 1976) 20

Key v. State
430 So.2d 909 (Fla. 1st DCA 1983) 40, 77

Kimmelman v. Morrison
106 S.Ct. 2574 (1986) 10, 14, 30, 43, 74

King v. Strickland
748 F.2d 1462 (11th Cir. 1984)
cert denied, 471 U.S. 1016 (1985) 10, 13, 14, 29

Lambrix v. State
494 So. 2d 1143 (Fla. 1986) 9, 16, 17

LeDuc v. State
365 So.2d 149 (Fla. 1978) 64

Lemon v. State
498 So.2d 923 (Fla. 1986) 77

Lockett v. Ohio
438 U.S. 586 (1978) 15

Lovett v. Florida
627 F.2d 706 (5th Cir. 1980) 30

Mason v. State
489 So. 2d 734 (Fla. 1986). 27, 35, 36, 45, 49, 51

Mauldin v. Wainwright
723 F.2d 799 (11th Ciir. 1984). 17, 18, 21, 29, 30, 34

McCaskill v. State
344 So.2d 1276 (Fla. 1977). 65

McCorquodale v. Kemp
No. 87-8724 (11th Cir., Sept. 20, 1987) 67

Meeks v. State
418 So.2d 987 (Fla. 1982) 8, 77

Michael v. State
437 So.2d 138 (Fla. 1983) 2, 19

Michigan v. Jackson
106 S.Ct. 1404 (1986) 74

Miller v. Fenton
106 S.Ct 445 (1985) 73

Miranda v. Arizona
384 U.S. 436 (1966) 41, 42, 73, 74

Moore v. Kemp
809 F.2d 702 (11th Cir. 1987) 59

Morgan v. State
12 F.L.W. 433 (Fla. 1987) 65

Nealy v. Cabana
764 F.2d 1173 (5th Cir. 1985) 10, 14

Nelson v. Estelle
642 F.2d 903 (5th Cir. 1981). 30

Nero v. Blackburn
597 F.2d 991 (5th Cir. 1979). 12, 30, 74

Nova v. State
439 So.2d 255 (Fla. 1983) 68, 74

O'Callaghan v. State
461 So.2d 1354 (Fla. 1984). 10, 12, 13, 15, 21, 23, 29, 34, 76, 77

Olschefsky v. Fischer
123 So.2d 751 (Fla. 3d DCA 1960). 48

O'Neal v. State
308 So.2d 569 (Fla. 2d DCA 1975). 68, 74

Palmes v. Wainwright
460 So.2d 362 (Fla. 1984) 68, 74

Pate v. Robinson
383 U.S. 375 (1966) 34, 45, 51

Pinnell v. Cauthron
540 F.2d 938 (8th Cir. 1976). 30

Pointer v. Texas
380 U.S. 400 (1965) 40, 79

Porter v. Wainwright
805 F.2d 930 (11th Cir. 1986) 29

Reynolds v. State
429 So.2d 1331 (Fla. 1983). 68

Rodriguez v. State
327 So.2d 903 (Fla. 3d DCA 1976)
cert. denied, 336 So.2d 1184 (Fla. 1976). 40

Rummell v. Estelle
590 F.2d 103 (5th Cir. 1979). 30

Shockey v. State
338 So.2d 33 (Fla. 3d DCA 1976)
cert. denied 345 So.2d 427 (Fla. 1977). 40, 77

Smith v. Illinois
469 U.S. 91 (1984). 74

Smith v. Murray
106 S.Ct. 2661 (1986) 69, 71, 78, 79

Smith v. State
457 So.2d 1380 (Fla. 1984). 8

Spano v. New York
360 U.S. 315 (1959) 73

Speady v. Wyrick
702 F.2d 723 (8th Cir. 1983). 34

Squires v. State
12 F.L.W. 512 (Fla. 1987) 77

State ex rel. Russell v. Schaeffer
467 So. 2d 698 (Fla. 1985). 2

State v. Sireci
502 So.2d 1221 (Fla. 1987). 49

Strickland v. Washington
486 U.S. 688 (1984) 12, 21, 31, 44, 76

Tafero v. State
459 So.2d 1034 (Fla. 1984). 68

Tague v. Louisiana
444 U.S. 469 (1980) 73

Tedder v. State
322 So.2d 908 (Fla. 1975) 64, 65

Thomas v. Kemp
796 F.2d 1322 (11th Cir. 1986)
cert. denied, 107 S.Ct. 602 (1986) . . . 9, 10, 12, 13, 14, 15, 19, 21, 23, 29

Thompson v. Dugger
12 F.L.W. 469 (Fla. 1987) 67

Thompson v. Wainwright
787 F.2d 1447 (11th Cir. 1986). 12, 21, 34

Townsend v. Sain
372 U.S. 293 (1963) 73

Tyler v. Kemp
755 F.2d 741 (11th Cir. 1985) 9, 12, 13, 19, 21, 23, 29

United States v. Bosch
584 F.2d 1113 (1st Cir. 1978) 30

United States v. Edwards
488 F.2d 1154 (5th Cir. 1974) 34

United States v. Fessel
531 F.2d 1278 (5th Cir. 1979) 30, 34

United States v. Henry
447 U.S. 264 (1980) 76

United States v. McDonald
620 F.2d 559 (5th Cir. 1980). 70

Valle v. State
474 So. 2d 796 (Fla. 1985). 9, 16, 17

Vela v. Estelle
708 F.2d 954 (5th Cir. 1983). 30, 59

Washington v. Watkins
655 F.2d 1346 (5th Cir. 1981)
rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981)
cert. denied, 456 U.S. 949 (1982) 30

Wells v. State
98 So.2d 795 (Fla. 1957). 69

Wilson v. Kemp
777 F.2d 621 (11th Cir. 1985) 57, 58, 65

Wilson v. Wainwright
474 So.2d 1163 (Fla. 1985). 69

Witt v. State
387 So.2d 922 (Fla. 1980) 65, 66, 67

Woodson v. North Carolina
428 U.S. 280 (1976) 12, 54

Zant v. Stephens
462 U.S. 862 (1983) 59

STATEMENT OF THE CASE AND PROCEDURAL HISTORY 1/

The body of Fern Umble was discovered on July 3, 1980, in Pinellas County, Florida (R. 302). Mr. Michael reported her disappearance to the police on July 11, 1980 (R. 377). Five days later, law enforcement officers searched Mr. Michael's house and car (R. 397). On that same day he was questioned (R. 395-412) during a ten-hour interrogation session which began at his home and ended at the sheriff's office. Statements were elicited and later introduced at trial.

The police arrested Mr. Michael two months later (R. 5). A Pinellas County grand jury returned a first degree murder indictment (R. 23-24). Trial commenced on April 27, 1981, in the Circuit Court for the Sixth Judicial Circuit. Mr. Michael was convicted on the capital charges.

Fifteen minutes after the jury returned a verdict of guilty (R. 1259), the penalty phase commenced. There, defense counsel submitted a stipulated-to report from a psychiatrist who had earlier been appointed by the court to evaluate Mr. Michael's sanity and competency to stand trial. The only other evidence introduced by defense counsel involved the brief (eleven record page), perfunctory questioning of Mr. Michael's mother (R. 2089-2100). The State introduced crime-scene and autopsy photographs of the victim (R. 2088). After a brief (four record page) argument by defense counsel (R. 2111-14), the jury recommended death (R. 1260). On that same day, the trial court imposed that sentence (R. 1261). Written findings were entered on May 1, 1981 (R. 1262-64). Seven days later (May 8th), trial counsel filed a document captioned "Motion to Correct Sentence." By this pleading he asked that the court "acknowledge the existence" of certain [mental/emotional] mitigating circumstances, and that the court appoint experts to "examine the Defendant"

---

1. The facts relevant to the issues before the Court on this appeal are primarily detailed in the body of the brief.

regarding the existence of those mitigating circumstances (R. 1269-70). The motion was denied on May 11, 1980 (R. 1275).

On direct appeal, this Court affirmed the conviction and sentence. Michael v. State, 437 So. 2d 138 (Fla. 1983). Mr. Michael petitioned for executive clemency, which was denied by the signing of a death warrant on March 13, 1985. Execution was then scheduled for April 16, 1985. A volunteer attorney entered the case eleven days prior to the execution date (PC 3), and a memorandum in support of a stay application was filed in the Circuit Court (PC 1, 2-12). The State then filed in this Court for a Writ of Prohibition. This Court issued the Writ, precluding the Circuit Court from entering a stay on the basis of the memorandum which had been filed, but without prejudice to Mr. Michael's right to file a motion pursuant to Fla. R. Crim. P. 3.850. State ex rel. Russell v. Schaeffer, 467 So. 2d 698 (Fla. 1985). A Rule 3.850 motion to vacate was subsequently filed on April 11, 1980 (see PC 219), along with an application for a stay of execution (PC 353). The Circuit Court granted a stay (PC 401).

On July 3, 1985, the Circuit Court entered an order denying some of the claims raised in the Rule 3.850 motion and granting an evidentiary hearing on others (PC 437-40). An evidentiary hearing was held on March 11, 1986 (PC 553). The Rule 3.850 court then issued its Order (PC 649-57), which included specific findings of fact and conclusions of law. The Rule 3.850 court specifically found that trial counsel rendered ineffective assistance at the penalty phase of the proceedings. Among other things the court found, as a matter of fact, that counsel failed to investigate and prepare for the penalty phase, that counsel's failure was unreasonable, that substantial evidence which would have altered the outcome was available, that Mr. Michael was prejudiced, and that counsel's ineffective assistance undermined the constitutionally required confidence in the result of the sentencing proceedings (See PC 649-57 [Circuit Court Order, citing, inter alia, Strickland v. Washington]; see

also, PC 672-74 [Circuit Court Order denying State's motion for rehearing]). The Court vacated Mr. Michael's death sentence (PC 655, 657). The court, however, denied relief on the claims challenging Mr. Michael's conviction; it also specifically declined to rule on certain other claims (See PC 649-51, 657).

The State's motion for rehearing was denied on May 22, 1987 (PC 672-74), and Mr. Michael's motion for rehearing was denied on June 22, 1987 (PC 675). The State filed a notice of appeal and Mr. Michael filed a notice of cross-appeal. Both notices were timely filed (See PC 1139, 1145-56). The matter is now before this Court.

SUMMARY OF ARGUMENT 2/

I. After reviewing the entire record and the parties' pleadings, after hearing evidence and testimony presented at an evidentiary hearing, and after evaluating the facts and making the necessary credibility determinations, the Rule 3.850 court concluded that trial counsel was ineffective for failing to investigate, prepare, or even "think" about mitigating evidence. The court found, as a matter of fact, that the evidence relating to Mr. Michael's mental/emotional deficiencies, deficiencies which existed at the time of the offense, was readily available and that counsel's failure to develop and present it was unreasonable. The court specifically found, as a matter of fact, that because counsel conducted no investigation for the penalty phase, none of his subsequent actions regarding the presentation of evidence at sentencing could be attributed to reasonable "strategic" or "tactical" decisions. The court also found, again as a matter of fact, that counsel's unreasonable failures prejudiced Mr. Michael, and that but for the ineffective assistance counsel provided the result of the penalty phase would have been different. These factual findings were evaluated under the appropriate legal standards. The State, however, has

2. Mr. Michael will not outline procedural aspects of his claims in the summary of argument. These issues are discussed in the body of the brief.

apparently appealed simply because it disagrees with the trial court's findings of fact. But the State has presented nothing beyond its mere disagreement, and has cited no reason why the court's findings should be disturbed. This is not enough. The State's factual contentions have already been rejected below by a Circuit Court judge's rulings and factual determinations which are well supported by the record, by evidence and testimony taken at an evidentiary hearing, and by the applicable law. The court's factual findings are entitled to deference and should not be disturbed. This Court should affirm.

II. As the Rule 3.850 trial court specifically found, trial counsel conducted no investigation in preparation for the sentencing phase of Mr. Michael's capital trial. The jury and court were therefore precluded from considering compelling nonstatutory mitigating evidence regarding Mr. Michael's character and background. Substantial evidence which would have altered the result of the penalty phase was therefore lost. Counsel even failed to provide the evidence to the examining experts, rendering their evaluations inadequate, and resulting in the loss of substantial mental health mitigation. Mr. Michael was denied a reliable and individualized sentencing determination, and is therefore entitled to relief, on the basis of the issues discussed herein. Furthermore, these issues also demonstrate why the Rule 3.850 court's grant of relief was supported by the record. The court below specifically declined to render a ruling on these issues, determining that such a ruling was unnecessary because it was already granting relief. Should the lower court's determination on Claim I be reversed, this Court should remand the case for a proper initial ruling from the trial court. Blake v. Kemp, 758 F.2d 523, 525 (11th Cir. 1985).

III. Mr. Michael was also denied of the effective assistance of counsel at the guilt-innocence phase of his capital trial. Counsel's unreasonable errors and omissions at this phase included his failure to adequately investigate Mr. Michael's

mental health background and his resulting failure to obtain professionally adequate mental health evaluations. In this regard, counsel wholly failed in his duty to investigate and prepare. Moreover, counsel was ignorant of the law -- he did not recognize the difference between insanity and incompetency. As the unrebutted, unanimous testimony of the experts at the Rule 3.850 hearing established, John Michael was not legally competent to undergo a criminal prosecution. The experts' testimony was corroborated by a wealth of background information. Mr. Michael was therefore significantly prejudiced -- he was forced to stand trial although incompetent. The Rule 3.850 court failed to apply the proper constitutional standard to the prejudice prong of this claim, and analyzed the issue in terms of Mr. Michael's "incompetency <u>at the time of the offense</u>" while ignoring the overwhelming evidence concerning John Michael's incompetency at the time of trial. In this regard, the court erred.

Counsel's failings did not stop there. As a result of his ignorance of the law and failure to investigate and prepare, substantial defenses were lost. Moreover, counsel failed to challenge the admission of highly prejudicial, unconfrontable, and unrebuttable hearsay testimony; he failed to challenge the unreliable hypnotically-refreshed testimony of a State's key witness; he failed to challenge the admission of statements elicited from Mr. Michael in violation of the fifth, sixth, and fourteenth amendments; and he failed to challenge or correct the effect of pervasive and systematic prosecutorial misconduct. Trial counsel's ineffectiveness deprived Mr. Michael of his rights under the fifth, sixth, eighth, and fourteenth amendments. The trial court erred in denying relief.

IV. Mr. Michael was deprived of his due process and equal protection rights, as well as his rights under the fifth, sixth, eighth, and fourteenth amendments, and <u>Ake v. Oklahoma</u>, 105 S. Ct. 1087 (1985), when the mental health experts appointed to evaluate him prior to trial failed to conduct competent and appropriate evaluations.

As a result of the professionally inadequate performance of the court-appointed experts, Mr. Michael was denied his right to a competency hearing, and was forced to stand trial while incompetent. Moreover, he was denied an individualized, fair, and reliable sentencing determination by the inadequate performance of the appointed experts, and by the court's denial of his motion to appoint mental health experts for the purpose of evaluating him in regard to the existence of mitigating circumstances. Mr. Michael's conviction <u>and</u> sentence of death were thus obtained in violation of the fifth, sixth, eighth, and fourteenth amendments.

V. Mr. Michael's conviction and sentence of death were rendered fundamentally unreliable by pervasive and systematic prosecutorial misconduct. The prosecutors told the jurors that they should delegate their sentencing decision to the judge -- a more qualified authority who knew more about the defendant and who would learn about things that the State was not allowed to relate to the jury. The prosecutors implored the jurors to vote for death because a life recommendation would tie the judge's hands; returning a death verdict, however, would allow the judge to weigh all that he would learn and return a fair sentence. The prosecutors' arguments, reinforced and enhanced by the court's instructions, directly violated <u>Caldwell v. Mississippi</u>, 105 S. Ct. 2633 (1985). Mr. Michael was also denied a reliable and individualized sentencing determination because the prosecutors exhorted the jury to convict and sentence Mr. Michael to death because of the greater "worth" of the victim, contrary to <u>Booth v. Maryland</u>, 107 S. Ct. 2529 (1987). These and other improper arguments infected the guilt phase of trial as well, and rendered Mr. Michael's conviction fundamentally unfair.

VI. Statements were obtained from Mr. Michael during the course of a ten-hour interrogation session at which the interrogating officers employed almost every classically condemned coercive technique, and during which Mr. Michael's request for counsel was completely ignored. These statements were used against Mr. Michael at

his capital trial in violation of the fifth, sixth, eighth, and fourteenth amendments.

VII. The simultaneous representation of Mr. Michael and a crucial state witness by the Office of the Public Defender denied Mr. Michael his rights under the fifth, sixth, eighth and fourteenth amendments in that it irrevocably impaired his ability to prepare his defense, and to confront and challenge that witness's testimony. An evidentiary hearing was required for the proper resolution of this claim, and the court below erred in denying this claim without such a hearing.

VIII. The hypnotically-induced testimony of a key State witness was used to convict Mr. Michael and sentence him to death. Such evidence is inherently unreliable, and deprives the accused of the opportunity to confront and meaningfully cross-examine the testimony of the hypnotically refreshed witness. The use of this testimony violated the fifth, sixth, eighth, and fourteenth amendments, and the trial court erred in refusing to conduct an evidentiary hearing.

IX. The admission of testimony regarding the out-of-court statements of the victim and others deprived Mr. Michael of his right to confront and cross-examine the witnesses against him, and Mr. Michael's conviction and death sentence were rendered fundamentally unfair and violative of the sixth, eighth, and fourteenth amendments.

ARGUMENT

I

THE RULE 3.850 COURT'S RULING THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE AT THE SENTENCING PHASE OF MR. MICHAEL'S CAPITAL TRIAL AND ITS SPECIFIC FINDINGS IN SUPPORT OF THAT RULING WERE NOT ERRONEOUS AS A MATTER OF FACT OR LAW, WERE WELL SUPPORTED BY THE RECORD, AND ARE ENTITLED TO THIS COURT'S DEFERENCE

The Rule 3.850 court found, as a matter of fact, that trial counsel's failure to investigate and present important mitigating evidence through the appropriate use of mental health experts and supporting background information was unreasonable attorney conduct (PC 652-655), and that "but for counsel's unprofessional errors . . . the result of the sentencing proceeding would have been different" (PC 673). As the court explained, the findings were issued after a thorough review of the entire record and the parties' extensive pleadings. The court conducted an evidentiary hearing, heard the testimony, observed the witnesses' demeanor, and reviewed all of the evidence. The State was provided with every opportunity to prove its case below through evidence and argument. The lower court went so far as to prepare a specific, fact-oriented denial of the State's motion for rehearing -- a motion which presented no more than appellant's disagreement with the trial court's findings of fact and which had already been clearly refuted by the court's original order.

After carefully sifting through the evidence regarding counsel's ineffective assistance at the penalty phase, the trial court applied appropriate legal standards to the facts it had found (see PC 649, et seq. [Circuit Court's Order] [applying Strickland v. Washington]; PC 672 [Circuit Court's Order Denying State's Motion for Rehearing] [applying Strickland v. Washington]), and concluded that Mr. Michael was entitled to relief (PC 657).

This Court has traditionally deferred to the findings and rulings of Rule 3.850 trial courts in cases involving ineffective assistance of counsel claims, e.g., Meeks v. State, 418 So. 2d 987 (Fla. 1982); Smith v. State, 457 So. 2d 1380 (Fla. 1984),

and does not lightly disturb such rulings. The federal courts of appeal similarly defer to the factual findings of federal district courts, and refuse to disturb findings of fact unless the findings are "clearly erroneous." See, e.g., Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986), cert. denied, 107 S. Ct. 602; Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

The federal "clearly erroneous" standard is closely akin to the standard applied by this Court, and is therefore a wholly appropriate point of reference in the discussion of the instant claim. Under either standard, a reviewing court will not disturb a trial court's findings if those findings have support in the record. A trial judge, after all, is in a much better position to properly evaluate evidence: ". . . we pay great deference to the trial judge's findings because he was in a position to observe the [declarant's] demeanor and credibility, unlike we as a reviewing court," Valle v. State, 474 So. 2d 796, 804 (Fla. 1985); see also Lambrix v. State, 494 So. 2d 1143, 1146 (Fla. 1986) (same). Here, Judge Schaeffer's findings simply cannot be deemed "clearly erroneous," they are amply supported by the record, and they are entitled to this Court's deference.

The State's brief presents no more than the Attorney General's disagreement with the Rule 3.850 court's findings of fact. However, the State has provided no reason why the lower court's specific findings are incorrect -- the record supports the findings, and proper legal criteria were applied. Thus, for example, counsel's perfunctory submission of Dr. Mitchell's written report to the sentencing jury (a report which said nothing concerning mitigation and was prepared solely to address competency and sanity) was unreasonable attorney conduct, as the lower court found. The State's efforts to excuse this failure by titling it a "tactic" simply makes no sense: as the lower court found, the stipulated-to report which spoke to no mitigation was submitted because counsel had failed to investigate and prepare. No

"strategy" can be ascribed to attorney conduct resulting from counsel's failure to investigate and prepare. See, e.g., Kimmelman v. Morrison, 106 S. Ct. 2574, 2588-89 (1986) (failure to request discovery based on mistaken belief that state was obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir.) (little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) (failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate"); see also, O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984) (failure to investigate mental health mitigating evidence).

The result of counsel's failure was that in a case in which a wealth of substantial mitigating evidence was available, counsel merely submitted a stipulated-to report which said nothing about mitigating evidence. This was an example of unreasonable attorney conduct.

The starting point here is the Rule 3.850 trial court's specific [supported] finding of fact that trial counsel failed to investigate and adequately prepare for the penalty phase -- counsel's first breach was his unreasonable failure to "investigat[e] statutory mitigating factors." (PC 654 [Order granting Rule 3.850 relief]). That counsel failed in his duty to investigate, and that that omission was unreasonable, is therefore a given in this case. Those subsidiary factual issues

have been determined by the lower court, and the State has not shown that the lower court's findings have no record support.

Thus, the lower court's ruling was decidedly not based on a disagreement with "trial counsel's strategic and tactical decision about what evidence was to be presented in the penalty phase." (State's Brief, p. 8). Rather, the lower court's decision was based on the fact that trial counsel failed to investigate and prepare for the penalty phase at all. Because no investigation was conducted, no "strategic" choice could have been made:

> Here, neither a reasonable investigation into the doctor's opinions as to statutory mitigating circumstances was made, nor a strategic choice not to investigate or to limit the investigation. Counsel simply never thought about it!

(PC 653 [Trial Court's Order][emphasis in original). Even the State's statement of the issue -- "whether . . . counsel's decision to enter into a stipulation . . . was deficient" -- grossly oversimplifies and is plainly contrary to the facts. Had counsel conducted a reasonable investigation, or any investigation at all, into the existence of statutory mitigating circumstances, his decision regarding the stipulation might have been deemed "strategic", but that simply was not the case here:

> The omission of investigating statutory factors . . . shows how the decision to put in Dr. Mitchell's report rather than call him to testify was not action that could be considered sound trial strategy.

(PC 654 [Trial Court's Order]).

In sum, the "stipulation" is not all that this case is about. To the contrary, as the Rule 3.850 court found, this case is about counsel's failure to investigate and prepare. As a matter of fact, we now know that counsel "never thought" about mitigating evidence (PC 653 [Trial Court's Order]). His "decisions" were based on ignorance, and, as a matter of constitutional law, we know that no "strategy" can be ascribed to an attorney's actions based on ignorance -- such failures are

unreasonable. See, e.g., Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); cf. Hill v. State, 473 So. 2d 1253, 1259-60 (Fla. 1985); O'Callaghan v. State, supra.

The trial court found, and the State here apparently agrees, that trial counsel did not investigate the existence of the mental mitigating factors (PC 654; State's Brief, p. 2). Counsel's duty to investigate is paramount, particularly in capital cases, and particularly in capital sentencing proceedings. See, e.g., Strickland v. Washington, 486 U.S. 688, 695 (1984) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see also Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). The lower court's factual finding is entitled to this Court's deference. The lower court's application of proper legal standards are entitled to deference as well -- Mr. Michael's attorney's failures were unreasonable as a matter of fact and law. Relief was properly granted.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die . . ." Gregg v. Georgia, 428 U.S. 153, 190 (1976); see also, Woodson v. North Carolina, 428 U.S. 280 (1976). The essential component of a fundamentally fair capital sentencing proceeding is that such a proceeding provide the defendant with an individualized and hence reliable sentencing determination. Id. Attorney failures such as those found by the lower court in Mr. Michael's case abrogate that right. See Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986), citing Strickland v. Washington and Gregg v. Georgia.

This Court has therefore imposed strict standards of performance on attorneys

undertaking the penalty phase of a capital trial. For example, in O'Callaghan v. State, supra, 461 So. 2d at 1354-55, this Court examined allegations that trial counsel never had a mental status examination of his client performed, did not contact the defendant's family, did not discover physical and psychological problems of the defendant as a child, and failed to uncover "a family history of mental illness." 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing. In Mr. Michael's case, such facts have been proven, and specifically found by the Rule 3.850 trial court. They are the record before this Court. Relief was and is proper. O'Callaghan, supra.

The federal courts have also expressly and repeatedly held that trial counsel in a capital sentencing proceeding has a duty to investigate and prepare available mitigating evidence. Tyler v. Kemp, 755 F.2d at 745; Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1212 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1208 (1985); Goodwin v. Balkcom, supra, 684 F.2d 794; Thomas v. Kemp, supra, 796 F.2d 1322. We now know that Mr. Michael's counsel did not meet these rudimentary constitutional standards.

Despite the recognized importance of any type of mitigating evidence, the lower court found that counsel failed to investigate the presence of even statutory mitigating circumstances.3/ Substantial statutory mental mitigating factors were

---

3. Counsel's unreasonable failure to investigate, develop, and present amply available nonstatutory mitigating evidence, an issue not ruled on by the lower court, is discussed in detail in Claim II, infra.

available. The trial court had provided mental health experts. We now know that with even the most minimal investigation and preparation a wealth of such evidence -- evidence which would have made a difference -- would have been established. We know because those are the facts which the Rule 3.580 court found. However, this important evidence never got before the judge and jury because counsel unreasonably failed to investigate and then failed to inquire of the experts. (See PC 653 [Trial Court's Order]). Counsel did not "think" (PC 653) and flouted his duty. As a consequence Mr. Michael was deprived of an individualized and reliable sentencing determination -- the proceedings' results were not the product of a fair adversarial testing process. See, e.g., Kimmelman v. Morrison, supra, 106 S. Ct. at 2588-89 (1986); Code v. Montgomery, 799 F.2d at 1483; see also, Thomas v. Kemp, 796 F.2d at 1324; Aldrich v. Wainwright, 777 F.2d at 633 (failure to depose state's witnesses); cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d at 1464 (failure to present character witnesses). Here, counsel did not pursue any sound strategy -- he "simply failed to make the effort to investigate", Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985), and that is what Judge Schaeffer found.

Unhappy with her finding, the State asserts that counsel has no duty to investigate the mental status of his client:

> Appellee's trial counsel had no professional obligation to seek an opinion from the mental health experts appointed for the purpose of assessing appellee's competency to stand trial and whether an insanity defense was available in their initial communications.

(State's Brief, p. 8). The sixth and eighth amendments, and the decisions of this and the United States Supreme Court (discussed above), make plain that the State is wrong. Counsel does have the "professional obligation" to investigate statutory mitigating circumstances -- when no thought is given to such evidence, the defendant's sentence cannot be said to be individualized, and an individualized sentencing determination is what the eighth amendment is all about. Gregg;

O'Callaghan; Thomas v. Kemp, supra; cf. Lockett v. Ohio, 438 U.S. 586 (1978). In this case, the Rule 3.850 court also found, as a matter of fact, that counsel had that duty, and that he ignored it.

The State boldly asserts that there were "good reasons" for counsel's failure (see State's Brief, p. 11). It is impossible to discern from the State's brief what those reasons were. This is not surprising -- the flouting of an attorney's duty to investigate simply cannot be justified. However, according to the State, not only did counsel have no "professional obligation" in this regard, but any efforts he could have made would have been of "no benefit":

> Having sought an opinion on the mental mitigating factors in his first communication from the confidential mental health expert, Dr. Mitchell, would have been of no benefit to appellee and might have worked to his disadvantage. There would be plenty of time for the confidential exploration of the penalty phase issues after the competency and sanity evaluations were conducted.

(State's Brief, p. 8).

As Judge Schaeffer found, this version of the events makes no sense. The fact of the matter is that counsel never did seek the required opinion on mitigating factors. Moreover, as she also found, there clearly would have been a "benefit" to Mr. Michael from an opinion regarding the applicability of the statutory mental mitigating circumstances -- such an opinion would have resulted in a life sentence (See infra, discussing Judge Schaeffer's finding in this regard.4/ This is a case in which a defense attorney realized from the outset that his client was "disturbed".

---

4. If the State meant to say that seeking such an opinion would have been of no benefit at that time, because there was "plenty of time" to investigate and formulate such an opinion prior to the commencement of the penalty phase, it is conceding counsel's ineffectiveness -- irrespective of how much time there was within which to properly investigate and seek such an opinion, counsel did not do so. Those are the facts, as Judge Schaeffer has now found. Whether or not "there were good reasons for not doing so at the time of the request for the preparation of reports," (State's Brief, p. 11), there were good reasons to do so at some point prior to the penalty phase. But counsel did not "think", and did not ask.

Yet, he did nothing which would have shown that his client should not be sentenced to die.

The State's contentions are, at best, strange. They present contentions which find no support in the facts of this case or the applicable legal standards. Nevertheless, the State argues that the lower court's ruling was erroneous, as it "overlooked unimpeached and unrebutted evidence that trial counsel had prepared his expert for testimony in the penalty phase." (State's Brief, p. 11). The Rule 3.850 trial court did no such thing. It ignored nothing. To the contrary, it heard all of the evidence and testimony, and concluded that trial counsel conducted no investigation and no preparation regarding statutory mitigating circumstances (See PC 652-54). The simple truth of the matter is that Judge Schaeffer made a credibility determination and rejected the factual account which the State now asserts.5/ Her determination is entitled to deference, Valle, 474 So. 2d at 804; Lambrix, 494 So. 2d at 1146, and should not now be disturbed simply because the State disagrees. What Judge Schaeffer did find was that counsel did not discuss or investigate the existence of statutory mitigating circumstances with the doctor and thus had no basis from which to make a "strategic decision" not to have Doctor Mitchell or any other expert testify:

> Although he [trial counsel] talked to Mitchell about sentencing, he doesn't recall "exactly what we talked about" (E.H., p. 138). Even the State concedes that counsel never requested any opinions concerning the statutory mental

---

5. At the evidentiary hearing Dr. Mitchell testified as follows:

> Q: Were you ever called upon by the attorney to testify as you are now doing in court?
>
> A: No. The only participation I had was the examination of the Defendant, and I submitted a written report to the defense attorney. . . .

(PC 1227). (footnote continued on next page)

> mitigating factors by the court appointed psychiatrist and psychologists (see State's Response Memorandum at p. 22). The omission of investigating statutory mitigating factors is important because it then shows how the decision to put in Dr. Mitchell's report rather than call him to testify was not action that could be considered "sound trial strategy." Strickland, supra, at 695.

(PC 654 [Trial Court's Order]).

Judge Schaeffer found, as a matter of fact, that counsel did not investigate and discuss the existence of statutory mitigating circumstances with Dr. Mitchell. She heard the testimony of Dr. Mitchell and trial counsel before making this finding of fact; she observed their "demeanor and credibility." Her factual finding is entitled to "great deference." See Lambrix, supra; Valle, supra. The State has not shown why it should be disturbed.

In short, the State's bald assertion that "[t]he trial court's conclusions ever [sic] step along the way are nothing more than a second guessing of tactical choices well within trial counsel's discretion" (State's Brief, p. 15), is simply untenable -- as Judge Schaeffer found, because trial counsel did not investigate, he could make no "tactical" decision regarding what to present at sentencing. See, e.g., Mauldin

---

Trial counsel testified as follows:

> Q: Had you specifically talked with Doctor Mitchell about testifying in the penalty phase hearing?
>
> A: The only -- my only recollection with regard to that question is I do recall talking to Dr. Mitchell on the telephone. . . .
>
> And the only reason I would have used him would have been at the penalty phase, since we were not pursuing an insanity defense. So --

(PC 1276). Obviously, Judge Schaeffer credited the testimony of the former and rejected that of the latter. But even accepting the State's own construction, this is a far cry from the "unimpeached and unrebutted evidence" which the State asserts the record reflects. Here, there is no evidence, even from trial counsel, that he "prepared" the expert to testify at sentencing, but only the "recollection" that a telephone conversation took place. Dr. Mitchell's account (which Judge Schaeffer credited) was that he was not prepared.

v. Wainwright, 723 F.2d 799, 800 (11th Cir. 1984). Here, as in Mauldin, "the error in [the State's] argument is that [Mr. Michael's] attorney failed to conduct a legally sufficient investigation which would allow him to make such a strategy decision." Id. at 800. Here, as in Mauldin, the State has missed the point. Interestingly, the State's brief also ignores another record fact showing why Judge Schaeffer's findings were eminently reasonable: trial counsel admitted his lack of preparation for the penalty phase. It was only after the judge imposed a sentence of death that counsel moved, for the first time, to have the court appoint an expert to evaluate potential mental health mitigating evidence (R. 1269-70). At the hearing on that motion counsel admitted: "I will be very candid with the Court, and perhaps this was an oversight on my part or what, but from the outset I did not perceive this to be a death penalty case" (R. 2129)(emphasis supplied). Counsel's honest disclosure is commendable. His "oversight" is not -- it denied Mr. Michael his eighth amendment right to a reliable and individualized sentencing determination, as Judge Schaeffer found.

Judge Schaeffer's factual finding that counsel's failures were unreasonable are amply supported by the record. Her factual findings as to prejudice similarly find ample support. Dr. Mitchell testified at the Rule 3.850 hearing that statutory mental health mitigation existed in Mr. Michael's case, and that he would have so reported and testified at the time of trial had counsel asked him to (PC 1236). Dr. Sidney Merin, M.D., testified that all of the mental mitigating circumstances existed (PC 1178). Dr. Harry Krop testified that at least two of the mental health statutory factors existed (PC 1222-23). This mitigating evidence would have made a difference, as shown by Judge Schaeffer's factual findings, and by the record itself.

Mr. Michael was sentenced to death on the basis of an Order which found no mental mitigating circumstances (see R 2121-22, 1262-64), because no evidence of their existence had been presented. This Court emphasized this lack of proof on

direct appeal:

> Michael contends that the trial court failed to consider his mental and emotional disturbances in mitigation. In support of this contention, Michael introduced the report of one psychiatrist which expressed the possibility that he might not have been competent to stand trial. Evidence of incompetency to stand trial is not evidence of a defective mental condition at the time of commission of the offense. The psychiatrist who questioned his competency to stand trial could not form an opinion as to his competency at the time of the murder, nor did he express an opinion on any statutory mental mitigating circumstance.

Michael v. State, 437 So.2d 138, 141 (Fla. 1983)(emphasis added). Of course, Judge Schaeffer's findings of fact now tell us why no such opinion was expressed -- counsel unreasonably failed to investigate, develop, or even ask for it.

Mr. Michael was prejudiced -- his death sentence was unreliable:

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

Tyler v. Kemp, 755 F.2d at 743(citations omitted)(emphasis supplied). His death sentence was not individualized:

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

Thomas v. Kemp, 796 F.2d at 1325(emphasis supplied). Mr. Michael's jury and sentencing judge were precluded from considering the evidence in mitigation because of counsel's ineffectiveness.

The sentencing judge found three aggravating circumstances and one statutory mitigating factor. On direct appeal this Court struck a similar balance. Had the available mental health mitigation been presented, specific statutory factors would have been proven[6] and a plethora of nonstatutory factors would have been established. Such evidence would have also undermined the "heinous, atrocious, cruel" and "cold, calculated" aggravating factors. See generally, Huckaby v. State, 343 So. 2d 29 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). As Judge Schaeffer found, a different balance -- one for life -- would have been struck. In short, confidence in the reliability of this death sentence is undermined.

The State, however, now argues that it was "reasonable" for trial counsel to present Dr. Mitchell's insanity/competency report in the hopes that the jury would extrapolate from that report the existence of statutory mitigating factors:

> Trial counsel was in the best position to know whether the jurors and particularly the most likely opinion leaders among them were literal minded rule oriented people or more flexible types likely to look at the values and concepts embodied in specific formulations and apply those. There is simply no reason to believe that counsel was not counting on the jurors in this case to be of the more flexible type and pour the raw material developed during trial and the penalty phase into the open shell of the mental mitigating factors on which they had been instructed.

(State's Brief, pp. 13-14). Of course, Judge Schaeffer specifically found such a "reason" -- counsel's failure to investigate. But even if trial counsel had investigated the existence of statutory mitigating circumstances, the decision to

---

6. The State presented absolutely nothing to rebut the findings of the three mental health experts who testified at the Rule 3.850 evidentiary hearing. Similarly, nothing could have been presented to rebut this evidence at the time of trial -- the two other experts who evaluated Mr. Michael's competency at the time of trial were not asked to, and did not, render an opinion on mitigating factors. Dr. Mitchell, the third expert, testified at the Rule 3.850 hearing that he would have testified that statutory mental mitigating evidence existed had he only been asked to do so at trial. Simply put, the State did not have anything to rebut the experts' opinions at the time of trial or at the Rule 3.850 evidentiary hearing because no such evidence exists.

present no proof in the hopes that the jury would find the existence of statutory mitigating circumstances on their own was not a reasonable one. This is precisely the factual finding that the Rule 3.850 court made.

Trial counsel's argument at the sentencing phase of Mr. Michael's trial is reported in less than four transcript pages. Even if counsel's argument had, as the State asserts, gone "to the heart of the concept at the core of the mental mitigating circumstances" (State's Brief, p. 5), argument does not take the place of proof. A wealth of proof was available, but counsel did not "think" (as Judge Schaeffer found) (PC 653). Without the proof, the argument was a farce. Presenting argument, while ignoring available evidence which would have supported the argument, is no decision at all. What Judge Schaeffer found is again worth repeating: since counsel made no investigation into the existence of mitigating circumstances, his failure to present the available evidence can neither be deemed "tactical" nor "strategic". See, e.g., Mauldin v. Wainwright, supra, 723 F.2d at 800; Thomas v. Kemp, supra, 796 F.2d at 1324-25; Tyler v. Kemp, supra, 755 F.2d at 741; Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981); cf. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); O'Callaghan v. State, supra.

The Rule 3.850 trial court clearly found, as a matter of fact, that trial counsel failed "to properly investigate the existence of statutory mental mitigating factors," and "to present proof of the existence of at least one of them at the sentencing phase," and that this failure "was not reasonable under prevailing professional norms." (PC 655). The court also found, as a matter of fact,

> that there is a reasonable probability that but for counsel's unprofessional errors, (the ones discussed in the original order even without discussion of the other alleged errors) the result of the sentencing proceeding would have been different -- that is, Michael would have received a life sentence and not a sentence of death.

(PC 672)(Order denying State's motion for rehearing). The Court applied the correct constitutional standard -- under Strickland v. Washington the results of this

proceeding cannot be deemed reliable. Mr. Michael was and is entitled to relief.7/

II

MR. MICHAEL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AMPLY AVAILABLE NONSTATUTORY MITIGATING EVIDENCE, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The lower court granted relief with regard to Mr. Michael's claim that he was denied effective assistance of counsel at the penalty phase of his capital trial (PC 655; Claim I, supra). The court therefore found it unnecessary to address the instant claim, and specifically refused to rule on the issues discussed below:

> It should be noted that the Court has not addressed all the alleged acts or omissions of counsel in the penalty phase raised by Defendant in his pleadings since a new sentencing hearing is being ordered based on the two matters raised and discussed in this Order.

(PC 657). As will be discussed, trial counsel's failure to investigate and present available, significant nonstatutory mitigating evidence establishes an independent basis for relief. Moreover, the issues discussed below are compelling support for the trial court's grant of relief and should be considered in conjunction with the issues discussed in Claim I.8/

Counsel's highest duty is the duty to investigate and prepare. The applicable constitutional standards in this regard have already been discussed (see Claim I,

---

7. In the interests of brevity, we have not detailed all of the compelling available mental health mitigating evidence which was presented to the Rule 3.850 trial court -- but never presented to the sentencing judge or jury because counsel failed to look. That evidence is discussed in Claim II, infra.

8. We believe that the Court will not disturb Judge Schaeffer's reasoned grant of relief (discussed in Claim I, supra). However, should her Order be reversed, this case must be remanded for a proper initial ruling on these issues by the Circuit Court -- a ruling which the Circuit Court has not yet provided. See, e.g., Blake v. Kemp, 758 F.2d 523, 525 (11th Cir. 1985); see also id. at 539 (Tjoflat, J., dissenting).

supra). Here, counsel utterly failed in this duty, and his client was sentenced to death by a jury and judge which heard virtually nothing in mitigation, nothing which "humanized" the accused, O'Callaghan, 461 So.2d at 1354-55, and nothing which would have allowed for an individualized sentencing determination. See Thomas v. Kemp, supra; Tyler v. Kemp, supra.

Ample mitigating evidence concerning Mr. Michael's background and character existed, but was not discovered by trial counsel. Judge Schaeffer found that counsel did no investigation. As a result, the sentencing judge and jury never learned of Mr. Michael's traumatic childhood, and its effect on his emotional and psychological development:

> One reason John and I were so close as we grew up was that we had special feelings of protection for one another. We were both sexually abused by our grandmother's second husband, often punished severely, and abused by other members of the family. Our brother Tom and sister Marian were never treated as badly as we were, so John and I developed a strong bond and understanding.
>
> One of the common punishments John and I received from my mother was being put in a closet. The closet was small, like a coat closet, and dark, and for some reason wasn't ever used. We'd get put in there when Mom thought we'd done something wrong. The longest I ever stayed in there was for a whole day. Sometimes I'd stay in there a couple of hours or part of a day. The length of time just depended on how bad my mother thought we were. Sometimes I was in the closet alone and sometimes John and I were in there together. I remember wishing that my father would come home because things were nicer when he was there. We still got put in the closet, but not as much or for as long.
>
> It was real hard to tell what I might be punished for. Our family was not very affectionate. We were taught that hugging and kissing were bad. Once I was sitting on my father's lap, and my mom got real upset. She started yelling at my father and made me go spend the day in my room. I just never could figure out what was good and what was bad. John and I used to talk about this because when we'd go over to a friend's house, the friend's family would greet each other with a hug or a kiss. But when John and I went home after school, all my mom said was, "Put your books away and do what you're supposed to." John would tell me that when we got older, we'd be able to have a real family, and things would be different.

. . . .

> John and I were forced to spend a lot of time on the farm where my grandmother and her husband lived. We had to go there every weekend. We didn't want to go, but we were made to. We didn't like it there because my step-grandfather sexually used both John and me. One time, John had to be taken to the hospital because he was bleeding from his rectum because of this abuse. My step-grandfather told John not to tell the people at the hospital how he had been hurt, but to tell them some boys had hurt him with a stick. We were afraid to tell mother about it because we thought she would punish us by making us stay in the closet for a long time. I also remember that my grandfather used to take John into the chicken coop and John would be crying when he came out. John didn't want me to go in the chicken coop. My grandfather tried to get me to go in there by offering me a dollar, but John wouldn't let me go.
>
> Once, my mother found Tom fooling with John sexually, but John was the one who was punished. My mother put him in the dark cellar, and made him hold his hands in ice water.

(PC 289-95 [affidavit account of Yvonne Nirosky, Mr. Michael's sister][emphasis supplied]). Ms. Nirosky's testimony reveals in even more shocking detail the horror to which Mr. Michael was subjected as a child:

> A. As I said, the first time I became aware of it, we lived in the country, and one day I just walked in the house and it was very, very quiet. I thought maybe nobody was home. The school bus had just let me out. I was in kindergarten, and I came in and I remember opening my grandfather's door and he had John in there and neither of them had any clothes on, and I turned around and left the room right away.
>
> Q. How old was John at that time, do you recall offhand?
>
> A. He was about eight.
>
> Q. About eight.
>
> A. But then I found out later that that was not the first time that my grandfather had done anything to him, as we talked.
>
> . . . .
>
> [S]hortly thereafter that, it started where he would bring us both in the room at the same time. So I not only knew, I had to watch and he would try to make us do things together or us do things to him.

Q. When you say he, ma'am --

A. My grandfather.

Q. Okay. I'm sorry. Go ahead.

A. And --

Q. Who was present?

A. At that time just my grandfather, myself, and my brother John. But then one night I came in and my other brother was also in the room and I thought at first that, you know, he was doing the same thing, but it didn't turn out to be that way. He --

Q. When you say he, are you speaking of your brother?

A. My other brother, Thomas.

Q. Okay.

A. Tom, he then started asking either myself or John to do things sexually with him and threatening, you know, if we said anything or told anything.

. . . .

My brother would walk into my bedroom and force me to do things, and I would see him force my brother to do things.

. . . .

My brother Tom took John back there and he said since John was such a sissy and wanted to be and act like a girl, you know, that he would help him out, he would get money from the migrant workers to have sex with John.

. . . .

My brother Tom one time when he worked at the greenhouse, he set up a tent and at the time I didn't know what the terms meant, but -- and it's hard for me even to use the terms; he would collect money from other boys for John to have oral sex with them, and that not only started there, but when we went back like to visit my grandfather on the weekends, it would just be a continuance of that with my grandfather and my brother Tom.

. . . .

Q. Can you tell us whether or not John was ever disciplined as a child, to your knowledge?

A. Yes.

Q. What did that involve?

A. Besides being put in a closet, he would be taken downtown, they called it a cellar when we lived in the country. <u>It was just a dirt floor and that, and he would be put down there and she would tie his hands around the railing so he wouldn't move, and she would leave him down there long enough to know that he had to like use the bathroom and that and then she would again punish him because</u> -- she was the one that made him -- you know, <u>when you are a child, you can only wait so long. She was the one to tie him and make him wait, but then she would again punish him because he couldn't wait</u>.

. . . .

At times <u>she would take ice water and pour it over his body and hold his hands in ice water as a punishment for going to the bathroom like that when she had him tied up</u>.

. . . .

Q. Can you tell us, were you yourself disciplined in similar ways as a young girl as well?

A. By my mother, yes. She -- I got the feeling that it was shameful to be a girl. When I started growing up, she would wrap me in elastic and bind my breasts and she would tell me men only want one thing and she showed me what that one thing was.

Q. What do you mean she showed you what that one thing was?

A. She would take things and put them up in my body or if not that, she would take her hand and hurt me.

(PC 472-80 [Deposition testimony of Yvonne Nirosky][emphasis supplied]). The sentencing jury and court heard none of this tragically compelling mitigating evidence.

Nor were Mr. Michael's sentencing jury and court apprised of his past-diagnosed psychological disturbances or those of his immediate family, and neither did counsel provide any of this to the appointed mental health experts. Mr. Michael had been <u>committed</u> to a mental health facility where he had been diagnosed as <u>schizophrenic</u> (<u>see</u> PC 515-17). Moreover, Mr. Michael's father spent most of his own early childhood and adolescence in mental institutions (<u>see</u> PC 524-28). It is noteworthy that "genetic factors have been proven to be involved in the development of

[schizophrenia]." See, DSM III-R, p. 192. Again, counsel failed to look -- none of this critical background information was provided to the examining experts, the court, or the jury -- counsel did not investigate.

As discussed in Claims III and IV, infra, none of the mental health experts appointed pretrial learned of such evidence. As also discussed in those claims, the validity of conclusions and findings made without such background information is questionable at best. See, e.g., Mason v. State, 489 So.2d 734, 737 (Fla. 1986). The trial prosecutor recognized these deficiencies in the expert evaluation -- a deficiency directly caused by counsel's ineffectiveness -- and capitalized on it in attacking the report introduced by defense counsel:

> The doctor's report, I feel compelled to point out, reveals several things to you, reveals that this Defendant has spoken of being taken into a spaceship, having met creatures from other worlds as part of his divine relationship with God. Look at it closely. It is also interesting to note that this psychiatrist was able to reach all those conclusions as a result of a single interview in the Pinellas County jail, a single interview. That's what you are reading about, a couple of hours with a psychiatrist at which the only thing the psychiatrist knows is what the Defendant told him and what the Defendant's attorney told him.

(R. 2106-07)(emphasis added).

When, post-conviction, mental health experts were provided with this important critical background evidence the conclusions they reached were markedly different than the barren record that counsel's ineffectiveness permitted at trial. The evidence would have been compelling:

> A review of past reports and records suggests that Mr. Michael is an emotionally impoverished individual who has never developed the maturity necessary to relate as an adult.
>
> . . . .
>
> Based on the current evaluation, Mr. Michael appears to meet the diagnostic criteria for Schizotypal Personality Disorder (DSM III 301.22). The essential features of such a personality disorder are various oddities of thought, speech, perception and behavior throughout a person's

> lifetime. Because of peculiarities in thinking, individuals with Schizotypal Personality Disorder are prone to eccentric convictions, such as bigotry and fringe religious beliefs. Under stress these individuals often exhibit psychotic symptoms as suggested by Mr. Michael's hospitalization in 1966 and reports of bizarre incidents such as being transported in a spaceship. There is also evidence to indicate that such a disorder is more common among families whose members also suffer with psychiatric disorders.

(PC 287-88 [Report of Dr. Harry Krop])(emphasis added).

Dr. Sidney Merin testified at the evidentiary hearing regarding the psychological effects of Mr. Michael's traumatic childhood:

> This man has experienced some very horrendous type of phenomena as a small child -- as a dependent, small child. Such horrendous behavior as severe sexual abuse, physical abuse, being violated, being put into a cellar, being put into a closet. . . . These things represent an enormously destructive phenomena, an on-going phenomena in a child's life.

(PC 1175)(emphasis supplied). Similarly, Dr. Joseph Mitchell (who had seen Mr. Michael at the time of trial) testified regarding this compelling information -- information counsel had failed to provide when Dr. Mitchell evaluated Mr. Michael prior to trial:

> [i]t [childhood sexual and physical abuse] is one of the worse things that can happen to a person. They don't develop an adequate psychological structure. They don't really know who they are or what they are. There is in their mind a doubt. They live in fundamental doubt, and in a fundamental confusion. . . . And if they get into a situation where doubt and confusion begin to become significant, they lose grasp of reality. They lose it.

(PC 1231)(emphasis supplied).

None of this substantial nonstatutory mitigating evidence was presented to judge or jury -- counsel failed to investigate, and failed his client. At the Rule 3.850 hearing, trial counsel testified that he did talk to Mr. Michael's mother and "to other individuals" whose identity he did not know (PC 1271). Any contention that this discussion may have constituted adequate preparation for sentencing is belied by counsel's own subsequent testimony that he did not broach the subject of penalty

phase testimony with Mr. Michael's mother, or anyone else, until after the conclusion of the guilt phase of trial, less than fifteen minutes before the commencement of sentencing (PC 1273). Counsel simply did not prepare, a fact which Judge Schaeffer has now found.

Counsel rendered ineffective assistance, as Judge Schaeffer, and numerous courts reviewing similar circumstances, have concluded. See e.g., Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); see also, Tyler v. Kemp, supra; King v. Strickland, supra; Thomas v. Kemp, supra; O'Callaghan v. State, supra. The mental health evidence discussed in this brief leaves little doubt that Mr. Michael's rights under the sixth, eighth, and fourteenth amendments have been violated. The magnitude of the constitutional violations which have occurred here demand that his sentence be vacated. These facts also support Judge Schaeffer's conclusions, and her grant of relief.9/

III

MR. MICHAEL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Courts have repeatedly pronounced that an attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense. See Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Likewise, courts have recognized that in

---

9. As discussed previously, the Rule 3.850 court did not believe that it was necessary to rule on this claim. Should this Court decide to reverse the ruling of the lower court discussed in Claim I, supra, remand to the lower court is appropriate for a proper initial ruling on all the claims which Mr. Michael has presented prior to this Court's review. See Blake v. Kemp, supra, 758 F.2d at 525.

order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 497 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Attorneys have been found ineffective for failing to impeach key state witnesses; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible or prejudicial evidence, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent the introduction of such evidence, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, an attorney has a duty to ensure that his or her client receives professionally adequate expert mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when the client's mental health is or should be at issue. Mauldin, supra; see also, United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

Even if counsel provides effective assistance at trial in some areas, counsel may still be ineffective in his or her performance in other portions of the trial. Washington v Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Nero v. Blackburn, 597 F.2d at 994; Kimmelman v. Morrison, supra.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washington requires a petitioner to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Michael pled and demonstrated in the lower court numerous and substantial errors and omissions on the part of trial counsel, and the significant prejudice resulting from those errors. Each of the instances of unreasonable attorney conduct discussed below were sufficient to warrant relief. Each undermines confidence in the fundamental fairness of the guilt/innocence determination. The combined effect of those errors and omissions and the consequent prejudice demanded Rule 3.850 relief, and the lower court's denial of relief was therefore contrary to law and fact, and was fundamentally erroneous.

A. Counsel's Failure to Adequately Investigate His Client's Mental Health

John Michael has never been well. He suffers and has suffered from deep-rooted and long-standing psychological disorders, stemming in large part from a traumatic childhood history of systematic and severe sexual, physical, and psychological abuse. (See, e.g., PC 1175, 1181, 1195 [testimony of Dr. Sidney Merin]; PC 1231 [testimony of Dr. Joseph Mitchell]; see also Claims II and IV). From an early age he was sodomized by his grandfather, and on at least one occasion was hospitalized as a result (See PC 259-95). Mr. Michael's brother often participated in this systematic sexual abuse (Id). His parents often punished Mr. Michael by torturing him (Id.). Evidence concerning the depraved brutality to which Mr. Michael was subjected during his early youth was presented to the court below, and is discussed in Claims II and IV.

Mr. Michael was committed to a mental facility in 1966, where he was diagnosed as schizophrenic (see PC 515-17). He was psychotic at the time of the offense at

issue, and at trial. His schizophrenia rendered him insane and incompetent (e.g., PC 446-47). He was at all relevant times severely delusional, dysfunctional, and "unable to hold on to reality"' (See PC 1224-38 [Testimony of Dr. Joseph Mitchell]). In short, Mr. Michael "never had a normal day in his life" (PC 1235).

His immediate family has a significant history of severe mental disorder. His father spent much of his early life in various mental health facilities (See PC 524-28). His sister has been diagnosed as suffering from Multiple Personality Disorder, a schizophrenic-type condition characterized by frequent periods of amnesia, great variations in behavior and mood, auditory hallucinations, and severely disassociative behavior (See PC 150-59; PC 164-65). Multiple Personality Disorder often has its roots in early childhood experiences of physical, sexual, and/or emotional abuse. Experts agree that Multiple Personality Disorder is probable in all siblings when one sibling suffers from it. All qualified experts would agree that a family history of schizophrenia is significant evidence that Mr. Michael also is plagued by that disorder. See e.g., DSM-IIIR, p. 192. Mr. Michael has, in fact, always exhibited all the characteristics of Multiple Personality Disorder (See PC 155, 1181-82, 1190).

Trial counsel recognized that Mr. Michael was "disturbed" (see PC 1247), and moved pre-trial for the appointment of experts to evaluate for competency and sanity. Two of the appointed experts did not find that Mr. Michael was insane or incompetent (see PC 326-329 [Report of Dr. Harold Smith], PC 330-32 [Report of Dr. William Chambers]), although both recognized that something was fundamentally amiss (See PC 329 ["disturbances in thinking"], PC 331 ["He manifests very little understanding of himself or other persons"]). A third expert, Dr. Mitchell, found "serious doubts regarding the mental, psychological, and emotional state of the defendant" (See PC 324). After receiving these reports, counsel decided not to pursue a defense of insanity. He never argued that his client was incompetent to stand trial, and did not request a hearing on the issue.

The reports of the three court-appointed experts were based solely on interviews of Mr. Michael. No collateral data was provided to the experts -- the experts knew nothing about the crucial background information detailed above (and in Claims II and IV). They knew only what Mr. Michael told them, and Mr. Michael's continuing mental disorder impaired his ability to provide relevant information (See, e.g., 1184-85, 1205-06, 1215). See also, Mason v. State, 489 So.2d at 737 (recognizing inadequacies of expert evaluations based solely on interview).

The experts never received critically necessary information because counsel completely failed to conduct an adequate investigation into his client's mental status. Counsel admittedly recognized that something was fundamentally wrong with his client (see PC 1247), but made no efforts to investigate, discover, and present to the experts the wealth of available information concerning his client's "disturbance". Because he failed to investigate, he did not know that his client had been previously committed to a hospital for psychiatric treatment; he did not know that mental health experts in the past had found that his client was schizophrenic; he did not know of his client's disabling childhood; he did not know of his client's family's history of mental disorder. The experts learned none of this because counsel did no investigation. Counsel's [non]effort rendered their opinions and conclusions invalid and inadequate (See, e.g., PC 305 [Affidavit of Dr. Curtis Barret], PC 446 [Affidavit of Dr. Sidney Merin]).

There exists a critical interdependency between the right to effective assistance of counsel and the right to mental health assistance. Mental health experts are essential for the preparation of a defense whenever the State makes mental health relevant to a matter at issue. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). Counsel owes his client a duty to obtain professionally adequate mental health assistance -- especially in cases where the client is not well and cannot fend for himself. See, e.g., Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985); see also

United States v. Fessell, supra, 531 F.2d at 1279. Adequate preparation, investigation, and assessment of mental health issues is necessary before any strategy decision can be properly made. See, e.g., Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).

Thus, when, as here, counsel unreasonably fails to properly investigate incompetency, Speady v. Wyrick, 702 F.2d 723 (8th Cir. 1983); Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985); United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974), insanity and diminished capacity, Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981); Mauldin v. Wainwright, supra, or mental circumstances relevant to sentencing, Blake v. Kemp, supra; O'Callaghan v. State, supra, ineffective assistance is demonstrated. It has been demonstrated here.

Prejudice

The court below denied relief on this claim because

> [t]he defendant insisted at the time of his trial, and still insists today, that he is innocent of this crime. (E.H. pgs. 56, 62, 63, 90, 134). The Defendant insisted his counsel not present an insanity defense. (E.H. pgs. 89 and 122). See Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983), which discusses an attorney's ethical obligation to comply with his client's wishes against presenting an insanity defense. Dr. Mitchell concluded, in his confidential report, that he could not render an opinion on the Defendant's sanity at the time of the offense because the Defendant said he did not commit the offense. Neither of the other two doctors appointed opine anything in their reports to suggest the Defendant was insane.

(PC 650). However, the court failed to consider the many reasons demonstrating that the experts' opinions were fundamentally unreliable: the experts did not have any of the needed background information. In fact, the lower court specifically declined to rule on many of these issues (see Claim II, supra), and completely failed to consider the unrebutted, unanimous evidence adduced at the Rule 3.850 hearing that Mr. Michael was not legally competent to stand trial.

Mr. Michael was indeed incompetent to stand trial. The lower court's holding

that "none of the three doctors who testified at the [Rule 3.850] evidentiary hearing -- even with all the 'new-found' evidence of family background abuse, prior hospitalizations, etc. -- were asked, nor volunteered that the Defendant was incompetent at the _time of the offense_" (PC 650-51) (emphasis added), completely missed the point: competency has nothing to do with the defendant's mental state at the time of the offense -- the due process competency inquiry relates to the defendant's mental/emotional state _at the time of trial_. _See_ _Pate v. Robinson_, 383 U.S. 375 (1966); _Drope v. Missouri_, 420 U.S. 162 (1975); _Hill v. State_, 473 So. 2d 1253 (Fla. 1985); _Mason v. State_, _supra_.

All of the experts who testified at the Rule 3.850 hearing agreed that Mr. Michael was incapable of assisting his counsel in preparing his defense, the _sine qua non_ of the competency determination. Dr. Sidney Merin reviewed the extensive background material which counsel had failed to look for and provide to the trial experts, _cf_. _Mason_, _supra_, or the court. He testified that because of Mr. Michael's severe mental disorders there was "_no way_ he could have" effectively assisted his counsel or aided in his defense (PC 1185)(emphasis added). Dr. Harry Krop, after conducting a similarly complete evaluation, agreed (PC 1215). Dr. Joseph Mitchell had prior to trial found a "very strong doubt" (PC 1228) as to Mr. Michael's competency. He was provided post-conviction with the materials counsel never sought at the time of trial, and he testified at the hearing, after reviewing those materials, that his conclusion as to lack of competency would have been even stronger (PC 1229). All of this evidence was consistent -- the expert opinions were unanimous. The conclusions were supported by a wealth of information presented to the Rule 3.850 trial court. But the court below applied the wrong legal standard.

Because she applied an erroneous legal standard, Judge Schaeffer failed to see that the substantial prejudice resulting from counsel's unreasonable failure to adequately investigate: John Michael was forced to stand trial while incompetent.

The conclusions of the trial experts were and are invalid: they were made without the benefit of extensive and critically important background material (e.g., PC 305, 446). See Mason v. State, supra; Bonnie and Slobogin, supra. Mr. Michael proved below what this Court considered sufficient to require a hearing in Mason, and relief in Hill. The evidence existed at the time of trial, but counsel simply failed to develop and present it. Here, counsel's failings resulted in a capital trial that should never have taken place. Counsel's failure therefore resulted in a patent violation of his capital client's sixth, eighth, and fourteenth amendment rights. The prejudice cannot be plainer.

B. Counsel's Failure to Challenge the Admission of Damaging, Although Clearly Inadmissible, Hearsay Evidence And To Protect Mr. Michael's Rights Under The Confrontation Clause

Four witnesses from Ohio testified against Mr. Michael regarding out-of-court statements purportedly made by the victim and others. Through this testimony the State attempted to show, inter alia, that the victim was dominated by Mr. Michael, and that she had changed her will to make Mr. Michael the sole beneficiary. This testimony was clearly inadmissible hearsay. Trial counsel, however, failed to adequately litigate the hearsay and Confrontation Clause issues attendant to this evidence.

Randall Clifford testified about the relationship between Mr. Michael and the victim in Ohio. He testified that the victim considered herself the caretaker of the "Upper Room," a chapel she had built in her home (R. 1531), that she had told him about her relationship with Mr. Michael (id.), and that the victim "felt very highly of John" (R. 1535).

Robert Nye, an Ohio real estate broker, testified regarding the victim's business practices (R. 1539), her wealth (as she represented it to him) (id.), and her real estate transactions (R. 1542-54). He related that she told him she had to leave Ohio to "get away from the people with whom she had been associating," and that

that decision had been prompted by instructions which Mr. Michael received from God (R. 1543-44). Nye also testified about a trip which his wife, the victim, and Mr. Michael (but not the witness himself) had made in an effort to locate and purchase a house. He related the details of a discussion which purportedly occurred between the three after they returned from the trip (R. 1545-47). Here also Nye testified that the victim told him that the decision was based on instructions Mr. Michael had received from God (R. 1546). Less than one month after a house was purchased according to Nye, the victim called him and said "Bob, I need your help right away" (R. 1548), after which he assisted her in selling the house, at a loss (R. 1540). Nye testified in great detail to conversations he had with the victim in regard to this transaction. The State further elicited from Nye testimony regarding a sale of property by the victim where he was "_told_ where this money [the proceeds of the sale] was to go, to the Defendant's parents for them to purchase a mobile home" (R. 1550) (emphasis added). Although Nye had not yet met Mr. Michael, he knew that Mr. Michael was involved in this transaction from what the victim had told him (_Id_.).

Wilson Leece, an Ohio lawyer, testified regarding the contents of a will which the victim had allegedly changed to accommodate Mr. Michael. This will had been drafted by the witness's father in the 30's, before the witness was born, and his firm had never retained a copy of it (R. 1563-65). Leece had never seen the will -- any knowledge of its contents could only have been obtained through hearsay. Leece also testified to conversations between himself, his father, the victim, and a "young man" who had accompanied the victim regarding the drafting of a new will.

All of this testimony was rank hearsay. It was unconfrontable and unrebuttable. However, trial counsel misunderstood the rules of evidence, the law, and constitutional provisions regarding hearsay evidence and its Confrontation Clause implications. Trial counsel did object to the testimony prior to its admission, but his objection was on general relevancy grounds (R. 1503). The trial court, however,

did recognize the hearsay problem, and sua sponte warned the State: "[y]ou aren't going to be able to get into what the deceased told somebody else" (R. 1504). This correct statement of the law was shortly thereafter modified by the court to allow testimony regarding statements the victim made "in the Defendant's presence" (R. 1507). Because counsel did not understand the law, he did not object to this blatantly erroneous interpretation of the hearsay rule. In any event, the trial court ultimately ignored even this limitation, and allowed all of the testimony regarding statements made by the victim, and others, irrespective of Mr. Michael's presence.

Counsel was not "tipped off" by the trial court's sua sponte hearsay rulings. Even after the court made its rulings, counsel for the most part either sat silent or made inappropriate objections to the testimony (See, e.g., R. 1520, 1522, 1523, 1533, 1534, 1535, 1539). Counsel's occasional appropriate objections (see R. 1534, 1539) were far outnumbered and more than vitiated by his wholly inappropriate objections or total failure to object to the vast majority of the testimony. For example, the most damaging and outrageous evidence -- Leece's hearsay within hearsay testimony regarding the contents of a will which was drafted before his birth and which he had never seen -- was objected to on "best evidence" grounds (R. 1564). When this objection was understandably overruled, counsel simply sat silent while his client's Confrontation Clause rights were violated.

Counsel's ignorance of the law directly resulted in the admission of the damaging hearsay testimony which should never have been introduced. Reasonably effective counsel would have obtained a court ruling severely limiting the testimony of the Ohio witnesses, and precluding altogether the testimony regarding the out-of-court statements. Effective counsel would have enforced such a limiting order through appropriate objection and argument. Here, trial counsel failed.

Prejudice

The State relied heavily on the hearsay evidence in its pleas for a capital conviction and death sentence. The State strenuously argued that the testimony of Wilson Leece regarding the victim's prior and subsequent wills established the motive for the crime, i.e., Mr. Michael's inheritance under the subsequent will (See, e.g., R. 1905, 1913). The court found this evidence sufficiently compelling to support a statutory aggravating circumstance -- pecuniary gain (R. 1262). The admission of this evidence was prejudicial.

The testimony of the other Ohio witnesses was similarly relied on by the State. The testimony of Nye and Clifford established, according to the State, that the victim was totally dependent on Mr. Michael and his God-given advice, that Mr. Michael took advantage of the victim's dependency, as well as her age, and ultimately, that his domination of her led to her death (See, e.g., R. 1510-12; R. 1903-06). The domination theory (e.g., R. 1512) was also based on patent hearsay.

Moreover, the hearsay evidence was used to paint the inflammatory portrait of the victim as "an intelligent, articulate, successful businesswoman" (R. 1903) who was the "caretaker" of a chapel which she built at her own expense so that elderly people could have a place to gather (R. 1510-11, 1903). These wholly improper arguments (see Claim V, infra) were also based on the hearsay testimony of Clifford and Nye. Again, there can be no doubt as to prejudice: the trial prosecutors' use of this evidence directly resulted in John Michael's capital conviction and sentence of death.

All of the evidence was completely unconfrontable and unrebuttable. In fact, irrespective of the hearsay issue, the evidence was constitutionally inadmissible under the Confrontation Clause: Mr. Michael obviously could not confront, and counsel could not cross-examine the declarants. Counsel's failure to preclude this testimony deprived Mr. Michael of his right to confront the witnesses against him,

and thus to a fundamentally fair trial. See Pointer v. Texas, 380 U.S. 400 (1965); Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965).

C. Counsel's Unreasonable Failure To Challenge The Unreliable Hypnotically Refreshed Testimony of a State's Key Witness

Mike Morin was a crucial State witness. His testimony was used to contradict Mr. Michael's exculpatory statements, and to corroborate the testimony of the State's jailhouse informants. Moreover, the State repeatedly relied on his testimony to remind the jury of Mr. Michael's homosexuality (see Claim V, infra).

Neither the jury nor the court ever learned that Morin had been hypnotized by police investigators. Counsel knew of the hypnosis, yet did nothing to challenge the admissibility of the testimony pretrial or to impeach the witness' credibility with this fact at trial. At the Rule 3.850 hearing, counsel stated that he did not object to Morin's testimony because the witness' pre- and post-hypnotic statements were the same (P.C. 1264).

The simple truth of the matter, however, is that the statements were very different, and different in a way which would have had a significant impact on the credibility of Morin's testimony. Courts have always viewed hypnotically refreshed testimony with skepticism. Suggestibility, confabulation, and the possibility of outright prevarication render such testimony so unreliable that some courts have "adopted a blanket rule against the admission of testimony that has been refreshed by hypnosis." Key v. State, 430 So.2d 909, 910 (Fla. 1st DCA 1983). At the time of trial, Florida courts treated such testimony with extreme caution, and excluded statements made while the witness was actually under hypnosis. See Shockey v. State, 338 So.2d 33 (Fla. 3d DCA 1976), cert. denied, 345 So.2d 427 (Fla. 1977); Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA 1976), cert. denied, 336 So.2d 1184 (Fla. 1976); cf. Key, supra; Clark v. State, 379 So.2d 372 (Fla. 1st DCA 1980); Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983). Under the current law, such evidence is deemed inherently unreliable and is therefore per se inadmissible. See Bundy v. State, 471

So.2d 9, 18 (Fla. 1985). Moreover, since the accused cannot effectively confront and cross-examine the pre-hypnotic memory of a hypnotically-refreshed witness, admission of such testimony violates the Confrontation Clause.

Despite the recognized unreliability of hypnotically- refreshed testimony, trial counsel made no effort to bring the fact of hypnosis to the court's attention or seek to have Morin's testimony excluded. Counsel did not even bring it to the jury's attention. His failure to do so was unreasonable attorney conduct. Counsel's testimony at the hearing on Mr. Michael's Rule 3.850 motion demonstrates that he did not bother to familiarize himself with the content of Morin's post-hypnotic statement. Neither court nor jury were apprised of the circumstances underlying the testimony, circumstances which demonstrated its unreliability. Mr. Michael's rights under the sixth, eighth, and fourteenth amendments were violated because of counsel's ineffectiveness.

D. Counsel's Failure To Challenge The Admission Of Statements Elicited From Mr. Michael In Violation Of The Fifth, Sixth, And Fourteenth Amendments.

On July 16, 1980, Mr. Michael was questioned by the police during a ten-hour interrogation session which commenced at his home and ended at the sheriff's office. The statements elicited during the course of that interrogation were introduced at trial.

The ten-hour interrogation session was replete with the type of State coercion which has been repeatedly condemned. See generally, Miranda v. Arizona, 384 U.S. 436 (1966); see also Claim VI, infra. Two detectives took the lead during the interrogation. One systematically badgered, becoming violently angry, screaming, yelling, and threatening when he did not get the answers he desired. As the interrogation became increasingly heated, Mr. Michael's answers became more bizarre and conflicting.

The interrogation techniques had a discernable and traditionally condemned

pattern. One detective [Herbein] would work himself into a frenzy, and would threaten, scream at, and curse the accused. At that point the other detective [Motts] would intercede in the role of the "good detective," reassuring Mr. Michael in a gentle, ingratiating manner while all the while subtly continuing and controlling the interrogation. These interrogators used the very techniques condemned over twenty years ago by the landmark Miranda v. Arizona opinion. The officers were, of course, "alone with the person under interrogation," he having been skillfully removed from "his own home [where] he may be confident. . ." Miranda at 449. They "display[ed] an air of confidence in the suspect's guilt and . . . maintain[ed] only an interest in confirming certain details." Id. They directed "comments toward the reasons the subject committed the act rather than court failure by asking the subject whether he did it." Id. They "minimiz[ed] the moral seriousness of the offense," assumed guilt, and "[e]xplanations to the contrary [were] dismissed and discouraged." Id. These techniques were "alternated with a show of some hostility . . . or the 'Mutt and Jeff' act." Id. at 452.

Mr. Michael's severe mental disturbances left him particularly susceptible to the type of psychological coercion employed here by the police. The interrogators recognized Mr. Michael's distinct mental disabilities.10/ They capitalized on his susceptibility to psychological coercion, and used his mental/emotional difficulties against him. Mr. Michael's statements were simply involuntary.

Not only were the statements involuntary, they were also obtained in violation of the fifth and sixth amendments. Mr. Michael requested an attorney early on during the course of the interrogation. His request, however, was simply ignored by the

---

10. Detective Motts believed that the suspect was suffering from "delusions of grandeur" at the time of the interrogation (PC 787 [Deposition of Bruce Motts]). During the interrogation, this same detective told Mr. Michael that he knew that Mr. Michael was suffering from emotional problems.

detectives who continued the interrogation without skipping a beat. Because the interrogation did not cease when he made the request, the statements were obtained in stark violation of Mr. Michael's fifth and sixth amendment rights. See Edwards v. Arizona, 451 U.S. 477 (1987).

Trial counsel made no attempt to challenge the admission of Mr. Michael's statements pre-trial. Counsel was aware of his client's psychological disturbances and was aware of the circumstances underlying the interrogation, as he had listened to the tapes, but inexplicably made no effort to have the statements suppressed. His failure to do so was stark ineffective assistance. Kimmelman v. Morrison, 106 S.Ct. 2574 (1986).

Trial counsel testified at the Rule 3.850 hearing that he did not challenge the statements because he saw no reason to, nor any "lawful basis" for such a challenge (PC 1265, 1288). As discussed above, and as discussed more thoroughly in Claim VI, infra, there clearly were substantial constitutional bases for challenging the statements. The justifications offered by counsel for not doing so "betray a startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation," Kimmelman, 106 S.Ct. at 2589, and simply cannot support a finding of a reasoned strategic or tactical decision. The statements were admitted because of counsel's failures. The fifth, sixth, and fourteenth amendments were violated. Since the statements were used to sentence Mr. Michael to death, the eighth amendment was violated as well.

E. Counsel's Failure To Challenge Or Correct Improper, Misleading, and Impermissible Argument By The State

A systematic and pervasive pattern of prosecutorial misconduct rendered the proceedings resulting in Mr. Michael's capital conviction and sentence of death fundamentally unfair and unreliable, and violated the fifth, sixth, eighth, and fourteenth amendments. The prosecutors' grossly unconstitutional comments, and the effect of those comments on the fairness and reliability of Mr. Michael's conviction

and sentence, are discussed thoroughly in Claim V, infra. Trial counsel made no effort to properly object to the improper comments and argument, or to correct their substantial prejudicial impact. This too was gross ineffective assistance of counsel.

F. Conclusion

The record before this Court establishes that Mr. Michael can meet, and has met, the deficiency and prejudice prongs of Strickland v. Washington. Taken individually and collectively, the deficiencies in counsel's performance demonstrate that Mr. Michael is entitled to the relief he seeks, and that the lower court erred. This Court should now correct that error.

IV

MR. MICHAEL WAS DEPRIVED OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE MENTAL HEALTH EXPERTS APPOINTED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT COMPETENT AND PROFESSIONALLY APPROPRIATE EVALUATIONS, BECAUSE HE WAS FORCED TO PROCEED TO TRIAL ALTHOUGH HE WAS NOT COMPETENT, BECAUSE HE WAS DENIED AN INDIVIDUALIZED, FAIR, AND RELIABLE SENTENCING DETERMINATION, AND BECAUSE THE TRIAL COURT REFUSED TO APPOINT MENTAL HEALTH EXPERTS TO CONDUCT THE NEEDED EVALUATION OF MENTAL HEALTH ISSUES RELEVANT TO SENTENCING

The instant Claim, like Claim II, supra, was not ruled on by the Rule 3.850 court. That court found it "[un]necessary to address the issue of inadequate assistance of psychiatric experts since that issue is moot in light of the Court's Order" granting the motion to vacate sentence (PC 657). The court, however, also failed to address these issues as they related to Mr. Michael's conviction. The court did render a general ruling on the competency issue when discussing the prejudice prong of Mr. Michael's ineffective assistance of counsel claim, but the lower court's ruling in this regard was based on a wholly improper legal standard. Although the overwhelming, unrebutted evidence presented at the Rule 3.850 hearing showed that Mr. Michael was not competent to stand trial, and although the experts

who testified at the hearing unanimously concluded that Mr. Michael's specific psychological, mental, and emotional deficiencies precluded him from assisting counsel or aiding in his defense at the time of his trial -- i.e., that Mr. Michael was not competent -- the lower court found that Mr. Michael had failed to establish prejudice because the experts' testimony failed to establish that he was incompetent "at the time of the offense." This, of course, is the wrong legal standard, see Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So.2d 1253 (Fla. 1985), for the constitutionally proper evaluation requires the determination of competency at the time of trial. Drope; Pate; Hill. Based on the unrebutted evidence adduced below, the Court should grant relief, see Hill, supra; see also, Mason v. State, 489 So.2d 734 (Fla. 1986), or, alternatively, remand the case for a proper initial ruling from the Circuit Court. See Blake v. Kemp, supra, 758 F.2d at 525. Moreover, with regard to the penalty phase aspects of Mr. Michael's claim, this Court should remand the case for such an initial ruling from the trial court should it reverse that court's grant of relief on the issues presented in Claim I, supra. Blake v. Kemp.

Mr. Michael has established a compelling claim. A defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d at 529. As an indigent whose mental capacity is at issue at all stages of a capital proceedings, Mr. Michael was entitled to competent psychiatric and/or psychological assistance. As will be discussed below, Mr. Michael did not receive such assistance, and as a result was forced to stand trial while incompetent and was deprived of a fair and reliable sentencing determination.

John Michael has never been well. The deep-rooted and long-standing psychological disorders from which he suffers stemmed in large part from a traumatic

childhood history of systematic and severe sexual, physical, and psychological abuse. (See, e.g., PC 1175, 1181, 1195 [testimony of Dr. Sidney Merin]; PC 1231 [testimony of Dr. Joseph Mitchell]).

Mr. Michael's history reveals a childhood marked by sexual abuse, brutality, torture, and neglect. From an early age he was sodomized by his grandfather, and on at least one occasion was hospitalized as a result (See, e.g., PC 259-95). His own brother often participated in the systematic sexual abuse. His parents often punished Mr. Michael by locking him in closets for periods of up to a day. The depraved brutality to which Mr. Michael was subjected during his early youth is detailed in Claims II and III, supra.

Mr. Michael has a history of institutionalization. He was committed to a psychiatric institution in 1966; there, he was diagnosed as schizophrenic (See, e.g., PC 515-17). He suffered from his long-term psychosis and schizophrenia at the time of the offense and at trial (See, e.g., PC 446-47). He is and was at all relevant times severely delusional, dysfunctional, and "unable to hold on to reality"' (See PC 1224-38). In short, Mr. Michael "never had a normal day in his life" (PC 1235).

The record developed below clearly shows all this. The unanimous, unrebutted testimony of all the experts who testified at the Rule 3.850 hearing was that Mr. Michael was not competent at the time of trial. The experts' testimony was supported by a wealth of significant background information which was inexcusably ignored and never assessed at the time of trial.

Moreover, Mr. Michael's immediate family has a significant history of severe mental disorder. His father spent much of his early life in various mental health facilities, essentially growing up in institutions (See PC 524-28). His sister has been diagnosed as suffering from Multiple Personality Disorder, a schizophrenic-type condition characterized by frequent periods of amnesia, great variations in behavior and mood, auditory hallucinations, and severely disassociative behavior (See PC 150-

59; PC 164-65). Multiple Personality Disorder often has its roots in early childhood experiences of physical, sexual, and/or emotional abuse. Experts agree that Multiple Personality Disorder is probable in all siblings when one sibling suffers from it. Mr. Michael exhibits all the characteristics of Multiple Personality Disorder (See PC 155, 1181-82, 1190). Mr. Michael suffers from long-term schizophrenia. His family's similar psychological ailments further corroborate this fact. See DSM-IIIR, p. 192. But his schizophrenia (and the impact of his debilitating difficulties on competency and mitigating circumstances) was never properly considered and evaluated at the time of Mr. Michael's trial. Counsel and the experts failed their client.

Trial counsel recognized that Mr. Michael was "disturbed" (see PC 1247), and moved pre-trial for the appointment of experts to evaluate for competency and sanity. Two of the appointed experts found that he was sane and competent (see PC 326-329 [Report of Dr. Harold Smith], PC 330-32 [Report of Dr. William Chambers]), although both recognized that something was fundamentally wrong with John Michael (See PC 329 ["disturbances in thinking"], PC 331 ["He manifests very little understanding of himself or other persons"]). Neither the experts nor counsel sought out, considered, or properly accounted for the wealth of available background information concerning Mr. Michael's mental illness.

Dr. Mitchell (the third expert who saw Mr. Michael at the time of trial) in fact had doubts as to Mr. Michael's competency. However, he had no background information. He received the information and evaluated it during the course of the post-conviction proceedings. His testimony at the Rule 3.850 hearing shows the significant change in his opinions resulting from consideration of the background information which had been made available -- John Michael was not competent, and a wealth of mental health mitigation existed.

The available evidence was never considered by the experts. No competency hearing was requested. None was held. The three court-appointed experts relied

solely on their self-report examinations of Mr. Michael. None of the necessary and critical background information adduced below and discussed in this brief was provided to or considered by the court-appointed experts. They were not aware of Mr. Michael's extensive childhood history of sexual, physical, and emotional abuse. They were not aware of Mr. Michael's previous psychiatric history, of his hospitalization, or of his prior diagnoses of schizophrenia. They did not know of his family's history of mental illness. They knew nothing but what Mr. Michael told them, and Mr. Michael's continuing mental disorder impaired his ability to provide relevant information (See, e.g., 1184-85, 1205-06, 1215).

The Due Process Clause protects indigent defendants against professionally inadequate evaluations by psychiatrists or psychologists. The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and who undertakes that task in a professional manner. Cf. Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087 (1985). Accordingly, an appointed psychologist must render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). The expert is required to adhere to procedures that experts in the field deem necessary to render an accurate diagnosis. Olschefsky v. Fischer, 123 So.2d 751 (Fla. 3d DCA 1960). The experts appointed here did not.

All of the experts who evaluated Mr. Michael pretrial based their reports exclusively on self-reporting. None of the experts were provided or sought collateral data -- information without which no expert could perform a professionally competent evaluation. The experts failed to even ask for such information, much less independently seek it out. Because they based their evaluations entirely on self-reporting, they knew nothing about Mr. Michael. The evaluations were professionally inadequate:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. . .
>
> In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va.L. Rev. 427, 508-10 (1980).

Mason v. State, 489 So.2d 734, 737 (Fla. 1986) (emphasis added). The problem with this method of evaluation is obvious: the very problem which the mental health expert seeks to uncover prevents the subject from accurately relating critical information. This is exactly what occurred here -- Mr. Michael's severe mental disorders rendered him incapable of providing accurate and relevant background information (see PC 1184-85, 1205-06, 1215). The evaluations which occurred here were not in any sense "complemented by a review of independent data."

In Mason, supra, this Court remanded for an evidentiary hearing at which it could be determined whether different (more favorable) mental health competency evaluations would have been available had the experts at trial been provided with background evidence regarding the defendant's mental illness. See also State v. Sireci, 502 So. 2d 1221 (Fla. 1987). In this case, Mr. Michael has proven the issue on which Mason directed that an evidentiary hearing be held -- the information would have made a difference, as the unanimous expert opinions regarding Mr. Michael's lack of competency and the testimony concerning substantial mental health mitigating evidence presented at the Rule 3.850 hearing makes plain.

Experts who properly considered the requisite background information, and who reviewed the evaluations of the previously appointed experts, all agreed that the pretrial evaluations were professionally inadequate:

> [i]t is my professional opinion that the psychiatric and psychological opinions expressed are not adequate in that

> the doctors did not have available to them the requisite background information ordinarily used in rendering forensic opinions of this sort. In particular, they did not have available the information contained in the records from Ohio indicating that Mr. Michael (Cherruy) was diagnosed in January 1966 as suffering from a Schizophrenic Reaction, Chronic Undifferentiated Type. In my professional experience this information would have had a substantial probability of altering the opinion that the doctors expressed and/or would have caused them to conduct much more extensive psychiatric and psychological evaluations.

(PC 305 [Affidavit of Curtis Barrett]).

> [i]t is my professional opinion that the opinions expressed by Drs. Chambers, Mitchell, and Smith are not adequate, as the doctors were not provided with the requisite background information generally used in rendering opinions of this nature. In particular, the doctors were not aware of and did not have the documents from the Ohio Department of Mental Health indicating that John Michael (Cherruy) had been diagnosed as suffering from a Schizophrenic Reaction, Chronic Undifferentiated Type, in January 1966. It is my opinion that this information would have had a substantial probability of altering the opinions expressed by Drs. Chambers, Mitchell and Smith.

(PC 419-20 [Affidavit of Dr. Sidney Merin]). Dr. Merin went on to conclude that Mr. Michael was at all relevant times suffering from a schizophrenic disorder (Id.) Dr. Mitchell recognized the deficiencies of his own previous evaluation -- as his testimony at the Rule 3.850 hearing demonstrates (See, e.g., PC 1229).

Adequate professional evaluations, conducted with the benefit of the necessary background data, reveal what the inadequate and invalid pretrial evaluations did not -- i.e., that Mr. Michael was incompetent to stand trial, and that a plethora of substantial mental health mitigating evidence was available. Dr. Merin testified that because of Mr. Michael's severe mental disorders there was "no way he could have" effectively assisted his counsel (PC 1185). Dr. Krop, after conducting a similarly complete evaluation, agreed (PC 1215). Dr. Mitchell, who prior to trial had a "very strong doubt" (PC 1228), as to Mr. Michael's competency, testified that after reviewing the background information made available to him post-conviction, his conclusion as to lack of competency would have been even stronger (PC 1229). Mr.

Michael was denied the right to be tried only while competent because of the appointed experts' inadequacies.

A criminal defendant simply cannot be tried while incompetent. See, e.g., Hill v. State, supra, 473 So. 2d 1253; Mason v. State, supra; Bishop v. United States, 350 U.S. 961 (1956); Pate v. Robinson, supra; Drope v. Missouri, supra. Thus, a criminal defendant has the constitutional right to a competency hearing in the trial court during the initial trial level proceedings: "The significance of the Robinson decision is that it places the burden on the trial court, on its own motion, to make an inquiry into and hold a hearing on the competency of the defendant when there is evidence that raises questions as to that competence." Hill, 473 So. 2d at 1257. Such evidence existed in this case, but because of the professionally inadequate performance of the trial experts, and counsel, it was never properly brought to light. Now, Mr. Michael has proven his lack of competency as well as the professional inadequacies of the evaluations conducted at the time of his trial. His capital conviction and sentence violate the fifth, sixth, eighth, and fourteenth amendments. He is entitled to post-conviction relief. See Mason v. State, supra; Hill v. State, supra.

The professionally inadequate performance of the court-appointed experts also rendered Mr. Michael's sentence of death fundamentally unreliable. The mitigating impact of professionally adequate evaluations performed with the benefit of independent background data in Mr. Michael's case is discussed in Claim II, supra, and those facts will not be repeated here. Suffice it to say that Mr. Michael's sentencing judge and jury were deprived of a plethora of significant mitigating evidence because of the court-appointed experts' inadequacies.

However, an even more substantial violation of Mr. Michael's due process, equal protection, and eighth amendment rights occurred in connection with the sentence of death at issue in this case. On May 8, 1981, trial counsel filed a "Motion to

Correct Sentence" which stated, _inter alia_,

> c. That the Court failed to accord proper weight to the following mitigating circumstances:
>
> 1. That the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
> 2. That the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
> 3. That the mitigating circumstances referred to above were unrebutted by the State.
> 4. That the evidence elicited during the course of the trial coupled with Dr. Joseph B. Mitchell's report and the testimony of the Defendant's mother would support the existence of such mitigating circumstances.
> 5. _That should the Court fail to acknowledge the existence of the aforesaid mitigating circumstances, the Defendant would hereby request that the Court appoint two experts to examine the Defendant and report back to the Court the results of their examination as it pertains to the existence of the aforesaid mitigating circumstances._

(R. 1269-70)(emphasis supplied).

On May 11, 1981, the court conducted a hearing on the motion. At that hearing, trial counsel stated: "I will be very candid with the Court, and perhaps this was an oversight on my part or what, but from the outset I did not perceive this to be a death penalty case" (R. 2129). Counsel said that upon entering the sentencing phase under these conditions, he, "in an effort to proceed at that time," stipulated that Dr. Mitchell's report could be introduced into evidence (R. 2129). In an effort to correct his errors at the sentencing phase (_see_ Claim I, _supra_), counsel implored the court:

> [W]e are dealing with a man's life. I request that in order to clarify any potential question that we have someone appointed, an expert appointed to conduct further investigation because I think I'm not grasping for straws. There is something here. And that would be the basis, Your Honor, for the Motion to Correct Sentence.

(R. 2130). The trial court denied counsel's request (R. 2131).

Obviously, in a capital proceeding, the defendant's mental condition is made relevant to the punishment he receives. Having made mental condition relevant, the

state cannot consistent with due process, equal protection, and the eighth amendment deny an indigent capital defendant the assistance of a mental health expert on those issues. See Ake v. Oklahoma, supra. There was no psychiatric examination of Mr. Michael regarding mitigating circumstances in this case. Counsel made the request while the trial court still had the ability to entertain a request for such an examination, and to consider any evidence such an examination would have produced. The request, however, was denied. The court's actions thus denied Mr. Michael's fourteenth amendment rights, Ake v. Oklahoma, as well as his right to reliable and individualized sentencing determination. The substantial prejudice which Mr. Michael suffered as a result of this error -- i.e., the loss of significant mental health mitigating evidence -- was shown at the Rule 3.850 hearing and is discussed in Claims I, II, and III, supra.

For each of the reasons discussed herein, Mr. Michael is entitled to the relief he seeks. His capital conviction should be vacated, and his unconstitutional death sentence should not be allowed to stand.

V

PERVASIVE AND SYSTEMATIC PROSECUTORIAL MISCONDUCT RENDERED JOHN MICHAEL'S CAPITAL CONVICTION AND SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND UNFAIR, AND JUDICIAL COMMENTS AND INSTRUCTIONS ENHANCED AND FURTHERED THE UNRELIABILITY AND UNFAIRNESS OF THESE PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

During the proceedings resulting in John Michael's capital conviction and death sentence the State violated the most essential constitutional imperatives governing the government's conduct in adversarial judicial proceedings. Mr. Michael's resulting death sentence was unreliable. His capital conviction remains fundamentally unfair.

A. The Unreliable Death Sentence

The eighth amendment imposes one rudimentary prerequisite to the validity of any

death sentence: the reliability of such a sentence cannot be open to question. As a consequence, a capital sentence "does not meet the standard of reliability that the Eighth Amendment requires" when "the State [seeks] to minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2646 (1985). Similarly, a death sentence cannot stand when the proceedings "create the risk" that the sentencer's verdict may be based on considerations or information which are "irrelevant to a capital sentencing decision." Booth v. Maryland, 107 S.Ct. 2529, 2535 (1983). Here, the State flouted each of these bedrock Eighth Amendment principles.

1. "Give The Judge The Opportunity."

The Caldwell prosecutor told the sentencing jury, "[T]he decision you render is automatically reviewable by the [Mississippi] Supreme Court." 105 S.Ct. at 2638. Because such comments tended to diminish the jury's sense of responsibility by imparting a "view of its role in the capital sentencing procedure" which is "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" Caldwell, 105 S.Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976), the Court vacated Caldwell's death sentence. Such comments rendered the sentence unreliable because they tended to bias the jury in favor of death:

> The chance that [the jury's sense of responsibility will be diminished] is increased by the fact that, in an argument like the one in this case, appellate review is only raised as an issue with respect to the reviewability of a death sentence. If the jury understands that only a death sentence will be reviewed, it will also understand that any decision to "delegate" responsibility for sentencing can only be effectuated by returning that sentence [of death].

Caldwell, 105 S.Ct. at 2641 (emphasis supplied).

Here, the prosecutors' arguments not only created a chance that the jury would "delegate" its sentencing responsibility by voting for death -- the prosecutors

implored the jurors to do just that. They told the jurors that a life recommendation would tie the judge's hands, while misinforming them that only by recommending death would they allow the "opportunity" for an appropriate sentence to be "decided" -- by a judge who would hear additional evidence about the defendant which the State had not been allowed to "relate" to the jury. What the Caldwell prosecutor only hinted, these prosecutors expressly urged:

> If you recommend a life sentence you put great weight on the Judge to give the life sentence, but the Judge can consider things other than the aggravated (sic) circumstances that we are allowed to present to you right now. Once again, the State is limited to those specific categories of aggravating circumstances. The State is asking you to do, what we are asking you to do as representatives of the people, is to recommend the death penalty. You know th recommendation is not binding on the Judge, but it gives the Judge the opportunity, it gives him the opportunity at least to consider it in light of all the other things that he will know that we cannot even relate to you at this point about this man. But if you recommend life, that puts great weight on him not to give the death penalty in spite of that which he may know and will know that you don't know about it. You have heard, based upon my questions, indictions of satanic cults, preoccupation with it. Those questions were asked by myself based on information known to me and to Mr. Hewetson based on good faith. This is an individual who we are asking that you tell the Court that, Judge, this is a man that should be subjected to the possibility of the death penalty . . . All we are asking is that you give the Judge the opportunity to consider this man for the death penalty and that is the right of the Judge to impose it. That's all we are asking you to do . . . . We are asking you to give the Judge the opportunity to give this man and to to do to this man what he had no compunctions about doing to this lady and that's why we are asking you to recommend the death penalty. Thank you.

(R. 2112-14)(emphasis supplied). That was the last thing the prosecutors told the jury at sentencing. As in Caldwell, the remarks here "were quite focused, unambiguous, and strong." 105 S.Ct. at 2645. Beyond Caldwell, the jurors in Mr. Michael's case were not only "led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," 105 S.Ct. at 2639

(emphasis supplied), they were specifically told that a much more qualified authority -- the judge -- would learn things about the defendant that they were not allowed to learn, but that that authority could only determine an appropriate sentence if they recommended death. A life recommendation, on the other hand, would forever take the decision away from that authority. The jurors were lied to. The comments were more than misleading -- they imparted a view of the jury's and judge's roles that is simply untrue. Cf. Caldwell, 105 S.Ct. at 2646-47 (O'Conner, J., concurring).

The trial court here not only failed to correct the misinformation, it substantially enhanced the risk that the jurors would accept the unconstitutionally minimized role that the prosecutors urged -- that they would relinquish responsibility to the judge by voting for death. See, e.g., Caldwell, 105 S.Ct. at 2641-42 ("[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role."); see also, Adams v. Wainwright, 804 F.2d 1526, 1531 (11th Cir. 1986)(jury minimizing comments provided by court create greater unreliability than that condemned by Caldwell). Throughout the proceedings the trial court informed the jury that the sentencing decision was not on their "shoulders", that it rested [and should rest] solely with the judge, that it was not for them but was [and should be] the judge's. The theme was persistent:

> [The jury] does not sentence . . . It does not impose any punishment. The law puts upon my shoulders the duty to impose sentence, whatever it may be. However, under our procedures when the jury has returned a verdict . . . the jury will then render a separate advisory opinion . . . on what punishment should be . . . That is just that, an advisory opinion.

(R. 1414)(Preliminary instructions)(emphasis supplied).

> As I said, the ultimate responsibility is mine. The jury doesn't sentence anybody, I do, and the jury's recommendation is not binding.

(R. 1464)(Instructions at voir dire). After similar final instructions at guilt-

innocence, the theme continued into the penalty phase:

> [T]he final decision as to what punishment should be imposed rests solely upon my shoulders as Judge of this Court. However, the law requires [that the jury provide a recommendation].

(R. 2087-88)(Penalty phase instructions)(emphasis supplied).

> As I have already mentioned, the final decision as to what punishment should be imposed is the responsibility of the Judge of this Court, myself.

(R. 2100)(Penalty phase instructions)(emphasis supplied).

The prosecutor and trial court could not have made the message clearer. But that message is precisely what Caldwell forbids. The eighth amendment simply does not countenance a sentence of death obtained from a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc). The prosecutors told [misinformed] this jury that a recommendation of death was the prerequisite to a full and proper sentencing determination -- it was what would allow the judge to properly make the decision that the law placed solely on his "shoulders". Caldwell, on the other hand, teaches that imparting such a view to a capital sentencing jury is impermissible. 105 S.Ct. at 2642. Thus, because jurors will be tempted to view respected legal authorities as having more of a "right" to make "such an important decision . . .," leading the jurors to believe that "review" will only be available if they return a death sentence makes any resulting sentence unreliable: "the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great [to tolerate]." Caldwell, 105 S.Ct. at 2642.

The Eighth Amendment was abrogated because Mr. Michael's jury was misled into abandoning its sense of responsibility, see Caldwell, 105 S.Ct. at 2645; see also, Wilson v. Kemp, 777 F.2d 621, 626-27 (11th Cir. 1985)(Eight Amendment violated when prosecutorial comments may mislead jury into believing that it must sentence defendant to death), and into "deferring to [the] expert legal judgment [of the

judge] in their choice of penalty." Drake, 762 F.2d at 1460. The judge, after all, had special knowledge -- he knew things, according to the prosecutors, which they could not tell the jury (R. 2006), and he would learn more about the defendant which the law did not allow the jury to know (R. 2112-14). Other authorities would then provide their own review:

> [W]e have been kind of walking on egg shells, Mr. Hart and I, we have had to be careful about how we phrase questions and witnesses, have been admonished as to what answers may be given, and the Judge has, as you know already ruled what evidence you, as the jury may hear, that is the legal and proper evidence. That's correct, because if this jury returns to this courtroom with a conviction, this court reporter's role all during this trial is going to be important because for sometime hence under the laws of this State, other judges are going to be sitting down and reviewing everything that has been said to be sure of one thing and one thing only, that this society of which we are all a part did everything that it could to give this man his day in court and to give him a fair trial. I submit to you that's what we have done.

(R. 2006)(emphasis supplied). Cf. Caldwell, 105 S.Ct. at 2641 (prosecutorial references to appellate review create bias toward jury verdict of death because jury more likely to "send a message" of disapproval for defendant's acts on basis of assurance that any error may be corrected on appeal). All this review, of course, would be provided even though the defendant's proper sentence had already been decided: "The people of this State have decided that the death penalty is an appropriate sentence for this type of offense" (R. 2112). Cf. Wilson, supra, 777 F.2d at 625-28 (eighth amendment violated by comments which lead jury to believe that death penalty must be imposed or that it has already been deemed proper, as it is by type of comments condemned in Caldwell v. Mississippi).

But this was not all. The comments were part of an overall effort to exhort a jury whose sense of responsibility had been systematically diminished into expressing "outrage" by convicting and imposing death on the basis of wholly improper considerations. The comments therefore cannot be read in isolation -- the

prosecutors said a great deal more:

2. "We Owe Fern Umble."

The presentation of evidence or argument concerning "the personal characteristics of the victim" before a capital sentencing jury violates the eighth amendment because such factors "create[] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth v. Maryland, 107 S.Ct. 2529, 2533 (1987). Similarly, it is constitutionally impermissible to rest a sentence of death on evidence or argument whose purpose is to compare the "worth" of the defendant to that of the victim. Cf. Booth, supra; Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); see also, Moore v. Kemp, 809 F.2d 702, 747-50 (11th Cir. 1987) (en banc) (Johnson, J., concurring in part and dissenting in part). "Worth of victim" and "comparable worth" evidence and arguments have nothing to do with 1) the character of the offender, and/or 2) the circumstances of the offense. See Zant v. Stephens, 462 U.S. 862, 879 (1983). They deny the defendant an individualized sentencing determination, and render any resulting sentence arbitrary, capricious, and unreliable. See generally, Booth, supra, 107 S.Ct. at 2532-35. In short, the eighth amendment forbids the State from asking a jury to return a sentence of death because of who the victim was.

Here, the prosecutors urged the jury to do just that. They asked the jury to convict, and to sentence Mr. Michael to death, because:

> We know that from 1974 to 1980 a relationship of some kind existed between this Defendant and that impersonal being we have called throughout this trial Fern Umble, the victim, the deceased, this non-entity who is not here with us today. I think that this jury can conclude from the evidence that it's heard that that relationship was not a sexual relationship. It was not a love affair type of relationship, but what do we know about it? We know that Fern Umble at the time that they met was in her 70s because we know that when she was murdered she was 83, an elderly woman, if you will, living alone, if you will, without children, no indication of relatives near. We know that she on her own funded and built what became known as the Upper

> Room. I think Mr. Nye the real estate salesman described it to you as a chapel attached to her house. Fern Umble, an intelligent, articulate, successful businesswoman used her money to build that chapel for profit? I submit not, but I submit rather to provide a gathering place for the elderly people in the neighborhood and some of the young people and at least initially a place where she could be with others for companionship, for friendship, the need that we all have to be close to other people, to love and to be loved.

(R. 2007) (emphasis supplied). They went on:

> [T]his woman, who in her later years had constructed a will that would leave a continuing legacy on either, after she was done funding a chair at Oral Roberts University, leaving money to various recognized evangelical organizations. She suddenly has a change of heart and what does she do? Of her own free will or of her choice after consulting the Defendant she said to her lawyer, I don't care what I have done before, I want everything now to go to John Michael . . . It's after all, her money and her property and she's a woman, in February of 1980, of considerable wealth and substance. He draws the will that she requests. Everything is then left to the Defendant.

(R. 2008-09) (emphasis supplied). Mrs. Umble, the victim, was a "friendly" person (R. 2010). She was special, the prosecutors explained, and the jury owed her a conviction and sentence. Of course, the prosecutors had shown the jury who this woman was -- they had given the jurors her safety "box":

> In the box basically are documents or at least the documents that the Court has ruled are relevant to this case. There is something a little funny about this box. I don't know, I think everyone here is of the age that you people have had an experience where a close relative, spouse, parent, possibly child dies and after the funeral is over and after everything has settled down, you have to, somebody has to go into something that was uniquely personal to that individual. Well, this box was uniquely personal to Fern Umble. There is nobody in this courtroom who was closer to her or loved her other than the Defendant who knew her during her lifetime. This box contains her legacy, a copy of the birth certificate, Campaign County, 1898 -- pardon me, 1897, April 14th, Campaign County, Ohio. It contained a social security card obtained in 1944, a certificate of vaccination that has the date of 1899 and looks like it's marked over to 1917 here, a student at the University of Chicago and this card validated by the cashier is June 18, 1923. It contains two letters. You will have the opportunity, I'm not going to read them to you, you will have an opportunity when you go back in the jury room to

> look at those letters, read them. You may find them enlightening. Contracts for trailer, for the Shearers, which Fern Umble paid $35,774. Was she a good woman? Was she willing to help others? Was she trusting? Perhaps overly so. You know about her only real estate transactions and you know from Detective Herbein that her assets with the exception of the trailer, the car and the thousand dollars have not been allocated to this time. There is here, pursuant to a letter dated in January, 1980, a schedule of assets from an estate of Eva Umble, obviously a relative of the deceased, of which she was obviously a beneficiary in excess of $400,000, not to mention her own.

(R. 2022-23)(emphasis supplied). She was kind -- she bought Mr. Michael's parents a $35,774 trailer -- and she was good. She used her wealth to help others. Was she also a "[s]harp lady? You bet" (R. 2025). She was a very intelligent woman (R. 2030). She was a special lady.

Because of Fern Umble's qualities, because of who she was, the jury owed her a conviction:

> Fern Umble isn't here and I'm tired of people saying that the victim is the State and the victim is society. That's true, as a lawyer I believe that, but I also believe that this 83 year old woman was a victim and she isn't here, but everything that she left on this earth is here in this box, and it's going to be back there in the jury room with you and I'm going to ask you to bring back a verdict, you know, who do we owe, who do we owe? Who do we owe as the criminal justice system when you deliberate that case? You owe him his fair trial just as we did. That's true. But you owe society to do your job and we owe Fern Umble. We owe her. I ask you to bring back a verdict that says to society and more particularly this Defendant, you did it, you killed her, murder in the first degree, guilty. That's the only way that this Defendant can get from that chair to right up here before this Judge so that he can deal with him. Thank you.

(R. 2046-47)(emphasis supplied). The jury owed her a death sentence as well:

> This is an individual who we are asking that you tell the Court that, Judge, this is a man that should be subjected to the possibility of the death penalty. This is a man who has, in a cold and calculated manner, and really atrocious manner, has struck out at a helpless, virtually mentally and physically helpless individual. There is not much difference except for the age of killing this woman or killing a small child. Both of them are equally helpless in today's society. Both of them qualify as susceptible to

> undue influences and the dangers that can be perpetrated on them by the men of capabilities, the beliefs and character of the man that you are dealing with here today. All we are asking is that you give the Judge the opportunity to consider this man for the death penalty and that is the right of the Judge to impose it. That's all we are asking you to do. We are asking you to recommend that this man be put to death for that which he did to Miss Umble. We are asking you after all the procedural safeguards that this man has had to remember Fern Umble had none, no one tried Fern Umble, no jury sat there and decided whether Fern Umble was going to die. Nobody looked at her past and said, Fern, you have been a bad woman and now you must die. We are asking you to give the Judge the opportunity to give this man and to do to this man what he had no compunctions about doing to this lady and that's why we are asking you to recommend the death penalty. Thank you.

(R. 2113-14)(emphasis supplied). The last thing the prosecutors said at guilt-innocence and sentencing made what they were asking the jury to do abundantly clear. They were asking for what Booth forbids.

Urging the jury to convict and sentence the accused to death because of the nature and value of the victim was bad enough, Booth v. Maryland, supra, but these prosecutors did not stop at that alone. They asked the jury to compare this very special victim -- Fern Umble -- to the "abnormal", "con man", "homosexual", "satanic" defendant. John Michael, according to the State, took advantage of young boys. Mrs. Umble, the kind victim, objected. But the "con man" (R. 2030) -- John Michael -- "wanted her money and he wanted his boys" (R. 2018).

Thus, according to the prosecutors, Mr. Michael took advantage of Michael Morin. Morin "was not one of the boys" (R. 2011) and was sent "by his brother who was a pastor . . . and who was known to Fern Umble . . . to stay with the Defendant while the brother was gone to Maine" (R. 2011-12). But Mr. Michael had sex with Morin, as he did "with many others" (R. 2021). Mr. Michael and Fern Umble argued about Morin:

> She didn't like [Morin's] presence. Now, he would never admit to the homosexual relationship that existed with Morin and with many others . . .

(R. 2021). Morin, of course, was not the only one: "he wanted to have his boys too"

(R. 2017); "he wanted her money and he wanted his boys" (R. 2018); he had a "predilection towards boys" (R. 2066); his "concern for younger boys" overtook his judgment (R. 2030); he killed the kind and trusting Mrs. Umble so he could "indulge in his own perverted sexuality" (R. 2110); he "kill[ed] this woman [because] she had disapproved of him being in the house with young, various young men . . ." (R. 1362). The argument was "supported" by graphic and blatantly impermissible "evidence" about homosexual sex (see, e.g., R. 1583, 1676, 1808, 1813). The State even introduced "love letters" from Mr. Michael to a cellmate -- letters written while Mr. Michael was incarcerated on these charges (e.g., R. 2026 ["Now, I'm not going to read this love letter from the Defendant to Jeff Allen. You can take it back in the jury room and you can read it, but it's totally compatible with what we knew about the Defendant and his predilection towards boys . . ."]).

Seeking a capital conviction and death sentence on the basis of a criminal defendant's sexual preference obviously violates due process, equal protection, and the eighth amendment (see Section V [B], infra, and cases cited therein). But the prosecutor's "comparable worth" arguments did not stop there. Mr. Michael, according to the prosecutors, was a liar (e.g., R. 2018; 2019; 2027; 2028; 2035; 2037), a "con man" (e.g., R. 2010; 2018; 2030), and was involved in satanic cults (e.g., R. 2113). The prosecutors knew what kind of man this was, but they had not been allowed to present the jury with all they had -- they were "walking on egg shells" (see, e.g., R. 2005-06; 2045). The police initially had to sit and watch this man walk out the door -- the jury should not do the same (see, e.g., R. 2029; 2045-47). Rather, according to the prosecutors, the jury owed Fern Umble a conviction and death sentence because of who she was and because of her worth as compared to that of vilified John Michael.

3. The Unreliability of This Death Sentence.

It is hard to imagine a more blatant violation of Caldwell, Booth, and the

Eighth Amendment than this case. The egregious misconduct discussed above (sections A[1] and [2]) and below (section B) did not involve isolated comments; to the contrary, the misconduct was so extensive that it dwarfed what little proper argument was made. In this case, a defendant was sentenced to death by a jury whose sense of responsibility for the awesome task of deciding whether a man should live or die was completely undermined, and by a jury that was misinformed and misled. It was asked to vote for death because only such a vote would allow a proper sentence to be determined -- by a judge who knew more and would learn more, and who was a more qualified authority. It was asked to vote for death because of who the victim was, and because of the victim's "worth". It was asked to compare the worth of the victim to the [non]worth of the vilified, homosexual defendant. It was told that it owed the victim a conviction and death sentence. John Michael's sentence of death was not the product of an individualized determination based on proper, reliable sentencing considerations. Booth v. Maryland. Under no view could this death sentence be considered constitutionally reliable. Caldwell v. Mississippi. If the prosecutor's efforts in this case did not render Mr. Michael's death sentence fundamentally unreliable and unfair, then no argument, however egregious, does or can.

Under Caldwell and Booth, the eighth amendment places on the State the burden of establishing that the argument in question had no effect on the jury's verdict of death. In this case, that burden cannot be met, for under no construction can these arguments be said to have not affected the jury, and the jury's decision does affect the judge. Mr. Michael was therefore denied the protections afforded under the Tedder v. State, 322 So. 2d 908 (Fla. 1975) standard. See Garcia v State, 492 So. 2d 360 (Fla. 1986)(noting critical nature of jury's role under Tedder v. State); see also, Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985)(same). Cf. LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978)(jury recommendation of death entitled to deference).

"Here . . . the prosecutor's remarks were quite focused, unambiguous, and strong." Caldwell v. Mississippi, 105 S.Ct. at 2633. They were woven throughout the State's arguments. They were at the heart of those arguments. Moreover, the trial judge not only failed to cure the misinformation -- his instructions endorsed the comments, effectively indicating "to the jury that the remarks were proper." Caldwell, 105 S.Ct. at 2645. The prosecutors' comments, left uncorrected, undeniably affected the sentencing proceeding. Caldwell, 105 S.Ct. at 2645; Wilson, 777 F.2d at 627; Booth, 107 S.Ct. at 2536. Mr. Michael's death sentence was obtained in stark violation of the eighth amendment.

4. The Court Must Determine Mr. Michael's Claim On Its Merits.

Neither Caldwell v. Mississippi nor Booth v. Maryland existed at the time of John Michael's trial, sentencing, and direct appeal. We discuss immediately below why each of these precedents requires that Mr. Michael's claim be determined on the merits pursuant to Rule 3.850. See generally, Witt v. State, 387 So. 2d 922 (Fla. 1980); cf. Morgan v. State, 12 F.L.W. 433 (Fla. 1987).

At the outset, however, we recognize that this Court has declined to reach the merits of jury instruction-based Caldwell issues (such as the one addressed in Adams v. Wainwright, 804 F.2d 1526 [11th Cir. 1986]) on collateral review. In such cases, this Court has held that those jury instruction issues could have been presented on direct appeal on the basis of the Court's opinions in Tedder v. State, 322 So. 2d 908 (Fla. 1975) and its progeny. See, e.g., Copeland v. State, 505 So. 2d 425, 427 (Fla. 1987), citing, Tedder v. State and McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); see also, Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987). Such Caldwell challenges to standard jury instructions have been rejected because the instructions were deemed "a correct statement of Florida law . . ." Aldridge, 503 So. 2d at 1259, and because Tedder would have allowed the defendant to raise such a challenge before Caldwell. See Copeland; Aldridge. In this regard Mr. Michael respectfully disagrees

with the Court's previous analysis and urges the Court to reconsider. See Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987)(on rehearing)("[t]he mere fact a practice may be condemned as a matter of state law, . . . does not indicate that the same practice constitutes an Eighth Amendment violation.").

But much more importantly, we note at the outset that Mr. Michael's is not a boilerplate Adams/Tedder claim. Rather, Mr. Michael has presented a classic Caldwell v. Mississippi claim -- one which has never before been addressed in Florida as a matter of eighth amendment law, and one which was never recognized by the United States Supreme Court until Caldwell.

Here, the prosecutors told the jurors that they should shift their sentencing responsibility to the judge, and allow the judge -- a more qualified authority who knew more and would learn more about the defendant -- to decide the defendant's proper sentence. A proper sentence, the jurors were consistently told, could only be decided if they voted for death. If they voted for life, the judge's hands would forever be tied; if they voted for death, the judge would weigh everything (including things the jurors were not allowed to learn) and decide what the proper sentence should be. This is precisely what Caldwell condemned. 105 S.Ct. at 2641-42. This misleading of the jurors is precisely what renders the resulting death sentence unreliable. This is precisely the type of Caldwell claim which falls within Witt v. State: it involves the fundamental change in eighth amendment jurisprudence which Caldwell announced.

The claim simply could not have been raised prior to Caldwell -- i.e., at the time of Mr. Michael's trial and direct appeal. Since it is not based solely on the judge's instructions, it could not have been brought on the state-law basis of Tedder. Cf. Copeland; Aldridge. Since no federal constitutional precedent existed prior to Caldwell, it could not have been brought on the basis of the eighth amendment. Caldwell, after all, was the first opinion which provided the "tools"

upon which a defendant such as Mr. Michael could base an eighth amendment challenge to "State-induced suggestions" that the jury shift its sense of responsibility to the judge by voting for death. See, e.g., Adams v. Dugger, supra, 816 F.2d at 1499; McCorquodale v. Kemp, No. 87-8724 (11th Cir., Sept. 20, 1987). Mr. Michael's eighth amendment claim could not have been raised before Caldwell recognized it -- for the first time.

With regard to Mr. Michael's claim, therefore, Caldwell does represent a "substantial change" in eighth amendment law. See Witt v. State, supra. Mr. Michael's is precisely the type of new eighth amendment claim which Caldwell recognized. Similarly, no eighth amendment basis existed at the time of trial and direct appeal on which Mr. Michael could have challenged the prosecutors' efforts to obtain a death sentence because of the victim's value and worth. Booth v. Maryland involved the first eighth amendment condemnation of such sentencing proceedings.

Mr. Michael's Caldwell and Booth claims therefore clearly fall within the rubric of the Witt v. State analysis. Caldwell and Booth involve the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. The opinions "emanate[d] from . . . the United States Supreme Court;" they are fundamental, constitutional, and retroactive precedents; and, they changed the relevant eighth amendment analysis. See Witt v. State, 387 So. 2d at 922. Thus, just as Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), fell within Witt's analysis because it altered the standard of review which this Court had previously applied to a class of constitutional claims, see Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987); Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987), Caldwell and Booth also altered the standard of review -- they require the State to show that the constitutional errors had no effect on the jury's verdict, a standard of review which had never before been

announced.

More importantly, Caldwell and Booth involve a more significant change in eighth amendment jurisprudence than Hitchcock. Where Hitchcock only changed the standard of review previously applied to a class of constitutional claims, these opinions went further: they established a new class of constitutional issues. Mr. Michael's eighth amendment challenges are properly before the Court. Witt v. State; see also, Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984)(finding Enmund v. Florida, 458 U.S. 782 [1982], a change in law cognizable in post-conviction proceedings); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. App.), petition denied, 402 So. 2d 613 (Fla. 1981)(finding Cuyler v. Sullivan, 446 U.S. 335 [1980], a change in law cognizable in post-conviction proceedings).

Moreover, these new precedents involve the most fundamental of constitutional errors -- proceedings which violate the standards discussed above render any ensuing sentence arbitrary, capricious, and unreliable. See, Caldwell, 105 S.Ct. at 2645 (misleading comments concerning jury's role offend "the principal concern of [the Supreme Court's] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." [citation omitted] [emphasis supplied].) See also, Booth v. Maryland, 107 S.Ct. at 2532-35. For this reason also Mr. Michael's eighth amendment claim is properly before the Court. What Mr. Michael has presented involves errors of fundamental magnitude no less than those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964) (denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966)(right to

presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957) (overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963) (error found fundamental "in view of the imposition of the supreme penalty").

This Court, after all, exercises a very special scope of review in capital cases and carefully scrutinizes the proceedings resulting in such a sentence of death to ensure reliability and to assure itself that those proceedings are free of error. See, e.g., Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985). This Court so reviewed the proceedings during Mr. Michael's direct appeal and did not recognize the fundamental unreliability of this death sentence -- the Court did not then have the benefit of Caldwell or Booth. Now, those opinions establish that Mr. Michael's death sentence was unreliable. Relief is now undeniably warranted.

5. The Interests Of Justice.

Mr. Michael was denied the most essential eighth amendment requirement -- his death sentence was constitutionally unreliable. Here, the eighth amendment violations directly resulted in a capital proceeding at which the sentencer's weighing process was "perverted", i.e., the error directly affected the sentencer's consideration "concerning the ultimate question whether in fact [John Michael should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). Given such circumstances, the Supreme Court has explained that no procedural bar can be properly applied. Id. Beyond all else that Mr. Michael has discussed above, the ends of justice require that the merits of the claim now be heard, and that relief be granted.

B. The Fundamentally Unfair Conviction

The constitutional improprieties discussed above rendered Mr. Michael's capital conviction as unconstitutional as his death sentence. The conviction remains unreliable, and fundamentally unfair.

1. The Fundamental Unfairness.

As discussed, the prosecutors called on the jury to convict as well as to return a vote for death on the basis of the most impermissible of factors. Character assassination, impermissible propensity evidence, and comparable worth arguments were the cornerstone of their presentation. Their arguments were textbook examples of what the Constitution forbids. They attacked defense counsel (See, e.g., R. 2028, 2031-34, 2038-39). Such comments "strike at the jugular" of the defense, United States v. McDonald, 620 F.2d 559, 563 (5th Cir. 1980), by suggesting that the accused's own lawyer does not believe in his client's case. They time and time again used the constitutional protections afforded the accused to request that the jury return a conviction and death sentence (see, e.g., R. 2044-45; 2005-06). The indictment was used as affirmative evidence (e.g., R. 2026). As if Griffin v. California, 380 U.S. 609 (1965), had never been decided, the prosecutors argued that the accused had failed to come forward with information which he had, but the State did not (e.g., R. 2038-39).

At the center of the improprieties was comparable worth -- the jury owed Fern Umble a conviction. The defendant, after all, deserved no better -- the jury was constantly reminded that all he wanted was "his boys."

These arguments did not involve isolated, ambiguous comments. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974). Rather, they violated specific constitutional rights, see, e.g., Caldwell, 105 S.Ct. at 2645, citing Donnelly and Griffin v. California, afforded even to a misdemeanant. The Constitution forbids a conviction urged on the basis of a defendant's sexual preference, or the exercise of

the right to trial by jury, or the inability to come forward with evidence, or because the defendant has constitutional rights, or because of who the victim was. But that is precisely what the prosecutors here urged. Mr. Michael's capital conviction remains fundamentally unfair.

2. The Court Must Determine Mr. Michael's Claim On Its Merits.

Much of the analysis discussed in section V(B)(4) applies here as well. Almost a decade ago, this Court determined that prosecutorial misconduct of this type is fundamental error. See Clark v. State, 363 So. 2d 331, 333 (Fla. 1978). This type of misconduct denied Mr. Michael the most basic constitutional right afforded to any criminal defendant -- the right to a fundamentally fair trial. In short, the prosecutors "precluded the development of true facts," and "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [John Michael was guilty of murder]." Smith v. Murray, supra, 106 S.Ct. at 2668(emphasis in original). Mr. Michael's claim should now be heard, and this fundamentally unfair capital conviction should now be vacated.

VI

THE PROCEEDINGS RESULTING IN JOHN MICHAEL'S CONVICTION AND SENTENCE OF DEATH VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE STATE INTRODUCED AND RELIED ON STATEMENTS EXTRACTED FROM THE ACCUSED WHICH WERE INVOLUNTARY, COERCED, NOT THE PRODUCT OF ANY VALID CONSTITUTIONAL WAIVER, AND TAKEN IN VIOLATION OF THE RIGHT OF COUNSEL.

On July 16, 1980, John Michael was forced to undergo a ten-hour interrogation session which began at his home and ended in the early morning hours at the sheriff's office. Much of the interrogation was recorded. The court below declined to hear the tape -- it summarily denied relief. Mr. Michael urges that this Court listen to it before ruling -- what it discloses is frightening.

The tape discloses that the interrogating officers knew exactly what they wanted -- a confession. They had their facts, and they knew what they wanted John Michael

to say. They pushed him in the direction that they wanted, and they obtained admissions.

Mr. Michael was under their control and in their custody. Early on in the interrogation, while at the sheriff's office and after Miranda rights were provided, he demanded a lawyer. The request was blatantly ignored. The interrogation continued.

Mr. Michael was confronted with "evidence" and with law enforcement's version of the events. His homosexuality was used against him. Law enforcement told him that he was a liar. They elicited contradictions and then used those contradictions against him. They controlled the tape recording device, turning it on and off as they saw fit.

They threatened; they screamed; they shouted; they coerced. Mr. Michael cried, and more admissions were made. They played a continuous good cop/bad cop "Mutt and Jeff" routine. They told him they could get others to say that he "did it." They confronted him with fictional evidence of guilt. Mr. Michael was "shaken", "upset", frightened. They pressed on -- yelling and threatening. Finally, with the exclamation "you're full of . . . ," they turned the tape off.

Minutes later the tape is turned on. Mr. Michael and the "good cop" are in conversation. Mr. Michael asks if he can go home. As with an earlier request that he be allowed to call his mother, this request too is ignored. The interrogation continued.

As discussed herein and in Claim III, supra, the detectives throughout screamed, yelled, cursed, coerced. They employed precisely those techniques which have long been condemned. They simply swept the fifth and sixth amendments away.

The extremely coercive context of the questioning must be examined in the context of Mr. Michael's personal characteristics -- John Michael is not well, his

mental and emotional deficiencies are apparent (see also Claim IV, supra) and were apparent to the interrogating officers. In fact, they admitted as much: Detective Motts believed that Mr. Michael was suffering from "delusions of grandeur" at the time of the interrogation (PC 787); during the interrogation, the same detective told Mr. Michael that he knew Mr. Michael was suffering from emotional problems. But law enforcement took advantage of his mental/emotional disabilities to extract statements. The tape itself reveals that Mr. Michael was overwrought; he had lost what little control of himself he may have had. It was an obviously emotionally disturbed man that was pushed into providing statements -- the statements were the product of subtle and overt State overreaching. See generally, Blackburn v. Alabama, 361 U.S. 199 (1960); Townsend v. Sain, 372 U.S. 293 (1963); Spano v. New York, 360 U.S. 315 (1959). After all,

> certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.

Miller v. Fenton, 106 S.Ct. 445, 449 (1985). Mr. Michael's statements were the product of such techniques.

Mr. Michael's disturbances, and law enforcement's techniques, also rendered any purported waiver of Miranda v. Arizona, 384 U.S. 436 (1966), rights constitutionally invalid. Obviously, Mr. Michael could not be said to have knowingly, intelligently, and voluntarily waived his rights. The State bears a very "heavy" burden in proving waiver. Tague v. Louisiana, 444 U.S. 469 (1980). The State cannot carry that burden here.

But law enforcement's misconduct did not stop there -- the officers blantantly violated Mr. Michael's right to counsel. They read Mr. Michael his Miranda rights. Then, early in the interrogation, he requested counsel. The request, however, was completely ignored -- they continued their interrogation as if it had never been made. Such overreaching is what the fifth and sixth amendments forbid: once the

accused "states that he wants an attorney, the interrogation must cease until an attorney is present." Edwards v. Arizona, 451 U.S. 477, 484 (1981); Miranda, supra, 384 U.S. at 474. In this regard a broad interpretation and effect must be given to a suspect's request for counsel. Edwards, supra, 451 U.S. at 479; Michigan v. Jackson, 106 S.Ct. 1404 (1986). Thus,

> any plain reference, however glancing, to a need or a desire for representation must result in the cessation of questioning.

Connecticut v. Barrett, 107 S.Ct. 828, 835 (1987)(Brennan, J., concurring), citing, Miranda v. Arizona, 384 U.S. at 444-45, and Smith v. Illinois, 469 U.S. 91 (1984).

Here, Mr. Michael requested counsel. Law enforcement ignored the request and continued questioning. The resulting statements were illegally obtained.

The statements should never have been introduced. A number of reasons demonstrate that the statements were unconstitutionally obtained. Counsel's failure to challenge the statements was stark ineffective assistance. Cf. Kimmelman v. Morrison, 106 S.Ct. 2574 (1986); see also, Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979).

Mr. Michael's claim should now be determined because the admission of a coerced and involuntary confession, and law enforcement's violation of the right to counsel, are issues involving the most fundamental of errors. See, e.g., Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984); cf. O'Neal v. State, 308 So. 2d 569 (Fla. App. 1975); Nova v. State, 439 So. 2d 255 (Fla. App. 1983); Flowers v. State, 351 So. 2d 387 (Fla. App. 1977). Moreover, the eighth amendment's mandate of heightened reliability in capital proceedings requires that the Court correct law enforcement's unconstitutional conduct in obtaining the statements at issue. Such egregious misconduct simply should not be left undisturbed. The Court should vacate this unlawful conviction and death sentence.

VII

MR. MICHAEL WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE SAME DEFENSE COUNSEL REPRESENTED HIM AND A KEY STATE WITNESS PRIOR TO TRIAL

Jeffrey Allen, a jailhouse informant, testified against Mr. Michael at trial, and revealed a number of highly damaging inculpatory statements which Mr. Michael had purportedly made while the two were incarcerated together, pretrial, in the Pinellas County Jail. At the time, both Mr. Michael and informant Allen were represented by the public defender's office (See R. 8, 72, 108, 110). Allen knew that it would be to his benefit to aid the State (R. 307, 1363, 1370). He obtained statements and evidence and relayed them to law enforcement (R. 1364).

On September 19, 1980, a preliminary hearing was held in Mr. Michael's case. Allen appeared as a State's witness at that hearing. Allen and Mr. Michael were both still represented by the public defender.

After Allen testified for a few minutes, Mr. Michael's assistant public defender, Mr. Clapp, asked him who his attorney was. Allen said that it was Mr. Edie, also an assistant public defender. Mr. Clapp then stated on the record that Mr. Edie was "in our division" (R. 67). He moved to withdraw. The court initially refused. The State then moved for the public defender to be removed from the witness' case, a request the court granted (R. 70-71).

After a recess, Mr. Clapp again moved to withdraw. He explained that two other assistant public defenders had had contact with State witness Allen (R. 72). He informed the court that during the recess he had talked to Mr. Edie about "the confidential relationship that existed between Mr. Edie and [Allen]" (R. 73), and that based on the conversation with Allen's counsel the public defender's office had to withdraw from Mr. Michael's case. The public defender was allowed to withdraw, and another attorney was subsequently appointed.

The proceedings summarized above were the starting point for the conflict of

interest claim on which Mr. Michael requested an evidentiary hearing before the Court below. We know that this type of

> . . . situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of [defendant's] rights whether or not it in fact influences the attorney or the outcome of the case.

Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). We also know that the sixth amendment is specifically violated when "conflicting interests" are represented by the same defense counsel. See Cuyler v. Sullivan, 445 U.S. 335, 350 (1980); see also Strickland v. Washington, 486 U.S. 688 (1984). Finally, we know that the eighth amendment's requirement of heightened reliability in capital proceedings does not countenance such practices.

What the record does not show in this case -- because no evidentiary hearing was ever held -- is the grave harm that Mr. Michael suffered as a result of the conflict. Mr. Michael alleged before the court below that the conflict precluded the proper pretrial presentation of his United States v. Henry, 447 U.S. 264 (1980) claim. He alleged, inter alia, that because of pretrial counsel's divided loyalties substantial evidence was lost -- Allen, for example, had worked for the State as an informant in the past, but the public defender's loyalty to Allen precluded the proper development and use of this evidence in Mr. Michael's case; moreover, important evidence which would have undermined Allen's credibility went undeveloped because of the conflict.

Mr. Michael requested an evidentiary hearing. The Rule 3.850 court, however, summarily rejected the claim, ruling that it should have been presented on direct appeal. In this regard, the court below erred -- this type of non-record evidentiary claim has traditionally been deemed cognizable in Florida post-conviction proceedings because, by its very nature, it involves the allegation that the defendant has been denied the effective assistance of counsel, and an ineffective assistance of counsel claim can only be properly addressed under Rule 3.850. See, e.g., O'Callaghan v.

State, 461 So. 2d 1354 (Fla. 1984); Squires v. State, 12 F.L.W. 512 (Fla. 1987); Meeks v. State, 418 So. 2d 987 (Fla. 1982).

The files and records here did not "conclusively show that [Mr. Michael] [was] entitled to no relief" on his claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986) (emphasis supplied); see also O'Callaghan v. State, 461 So. 2d at 1355. Mr. Michael was entitled to an evidentiary hearing. One should now be ordered so as to allow Mr. Michael the opportunity to present the non-record facts establishing that he is entitled to the relief he seeks.

VIII

JOHN MICHAEL WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HIS CAPITAL CONVICTION AND SENTENCE OF DEATH WERE BASED ON THE HYPNOTICALLY INDUCED TESTIMONY OF A KEY STATE WITNESS

Hypnotically induced testimony has always been viewed with suspicion, see, e.g., Key v. State, 430 So. 2d 909, 910 (Fla. 1st DCA 1983); Shockey v. State, 338 So. 2d 33 (Fla. 3d DCA 1976), cert. denied, 345 So. 2d 427 (Fla. 1977), and this Court ruled -- after Mr. Michael's trial -- that because hypnotically refreshed testimony is inherently unreliable, it is per se inadmissible. Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985). The accused simply cannot properly confront or cross-examine such testimony, defense counsel has no effective way to deal with it, and the fact-finder has no way of determining its veracity, credibility, and/or value (this is especially true in a case such as this where no one informs the court or jurors that the testimony at issue was hypnotically induced).

Michael Morin was a key State witness. His testimony was critical (See Claim III, supra). The State, in fact, so informed the jury. But that critical testimony was per se unreliable, Bundy, supra -- it was hypnotically induced.

Before the Rule 3.850 court, Mr. Michael requested a hearing on this claim at which he could establish the unreliability of Morin's trial testimony, the

contradictions between his pre- and post-hypnosis version of the events, and the resulting fundamental unfairness of this capital conviction and death sentence. The court below refused to allow the necessary evidentiary development and summarily denied relief. The court erred -- the fundamental unreliability of such testimony requires that the claim be properly addressed under Rule 3.850. A fortiori, the admission of such evidence, "preclude[s] the development of true facts" and "perverts" the jury's [and court's] proper determination of material issues. Cf. Smith v. Murray, 106 S. Ct. at 2668. This is especially true when, as here, neither judge nor jury is allowed to know that the testimony they are hearing has been hypnotically induced.

This is therefore precisely the type of non-record evidentiary claim which should be determined under Rule 3.850. The files and records in this case do not conclusively demonstrate that Mr. Michael is entitled to no relief. The Court should remand the case for a full and fair evidentiary hearing, and thereafter grant Mr. Michael the relief he seeks. The eighth amendment's mandate of heightened reliability in the proceedings resulting in a capital conviction and death sentence, see, e.g., Gardner v. Florida, 430 U.S. 349 (1977), calls for no less.

IX

MR. MICHAEL WAS DENIED HIS RIGHT TO CONFRONT HIS ACCUSERS, AND HIS RESULTING CONVICTION AND DEATH SENTENCE WERE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The factual predicate for this claim was previously discussed in the context of Mr. Michael's ineffective assistance of counsel claim (See Claim III, supra). That factual predicate demonstrates that Mr. Michael's capital conviction and death sentence were obtained in stark violation of his right to confront the witnesses against him. As such, Mr. Michael was denied one of the essential prerequisites to a fundamentally fair trial [and sentencing determination]. See Chambers v. Mississippi, 410 U.S. 284 (1973); Douglas v. Alabama, 380 U.S. 415 (1965); Barber v.

Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965). This fundamental constitutional error a fortiori "precluded the development of true facts" and "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [John Michael was guilty of capital murder and should be sentenced to die]." Smith v. Murray, supra, 106 S. Ct. at 2668. The Confrontation Clause violation presented in this brief is simply incompatible with the eighth amendment's heightened reliability mandate. See Gardner v. Florida, supra, 430 U.S. 349. Accordingly, the claim should now be heard, and relief should now be granted.

CONCLUSION

Because the Circuit Court's grant of relief (Claim I) is supported by the record and based on proper legal standards, that ruling should not be disturbed. Because the Circuit Court erred in its disposition of other issues, those aspects of its Order should be reversed. Because certain issues were never fully and fairly resolved, and others expressly but erroneously not ruled on, the case should be remanded. Because Mr. Michael has shown that his state and federal constitutional rights have been violated, a new trial should be ordered.

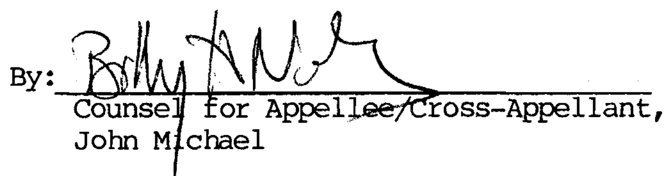
Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

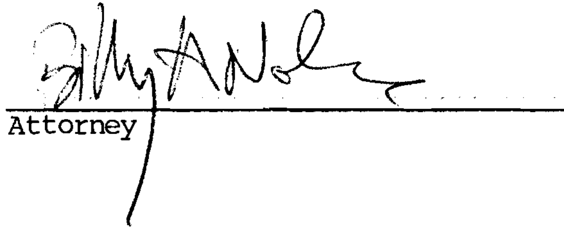
BILLY H. NOLAS
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: 
Counsel for Appellee/Cross-Appellant,
John Michael

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Davis G. Anderson, Jr., Assistant Attorney General, Office of the Attorney General, 1313 N. Tampa Street, Suite 804, Tampa, Florida 33602, this 2nd day of December, 1987.



Attorney