IN THE SUPREME COURT OF FLORIDA

WILLIAM LEE THOMPSON,

Appellant,

vs. CASE NO. _____

STATE OF FLORIDA,

Appellee.

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APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF FOR APPELLANT, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

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ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

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## I. INTRODUCTION

The jurors who served on Mr. Thompson's capital "sentencing" jury were required to agree to violate Mr. Thompson's eighth amendment rights as a precondition to jury service. As the judge and prosecutor repeatedly told the jury in 1978, matters of mitigation which were not contained in Florida's statutory list -- for example, the fact that Mr. Thompson admitted guilt and pled guilty (R. 104), his degree of drug and alcohol ingestion (R. 446, 447), Mr. Thompson's mental illness (R. 118, 119), mercy, sympathy, or compassion (R. 122) -- could not be considered. As the following exchange illustrates, an ab initio limitation on the consideration of mitigating circumstances was part of the jury selection process:

> MR. McHALE: . . .Would you try to satisfy yourself in this case whether there might have been any type of mental illness on the part of the defendant?
>
> MS. BYRNE: No, not if they already pled guilty.
>
> MR. McHALE: If His Honor's instructions of law did not include that for your consideration in any way, would you try to consider it? Would you go outside of his instructions?
>
> MS. BYRNE: No.
>
> MR. McHALE: To bring something else into the case?

MS. BYRNE: No.

(R. 118, 119). Of course, a sentencer's consideration of mitigating circumstances may not be limited, and a juror or judge must not be restricted if he or she believes that factors to be considered "should be otherwise [than the statutory list] in determining[,] or as a determinant of what sentence should be imposed." (R. 182-83)("Q. Could you still follow those instructions of law even though you may not personally agree with them, or think they should be otherwise in determining or as a determinant of what sentence should be imposed?" Id.)

This record contains one of the most evident Lockett violations imagineable. It is not necessary for this Court to decide under the threat of Mr. Thompson's execution precisely how the unanimous United States Supreme Court decision in Hitchcock v. Dugger, 107 S. Ct. 1826 (1987), affects the outcome here: whatever the ultimate merits resolution of this issue in this case may be, the pleadings and record more than meet the standards for issuance of a stay, so that the matter can be decided upon full briefing and normal judicious review. If resolution of this case "under warrant" is for some reason a legitimate concern, then immediate vacation of the sentence per Hitchcock is proper.

The Hitchcock/Lockett issue, while compelling, is not the only compelling basis for relief. Among other things, Mr.

Thompson's Rule 3.850 motion presented his well-documented claim under Mason v. State, 489 So. 2d 734 (Fla. 980), that his competence to be tried in 1978 was unconstitutionally addressed, in that 1978 competency was assumed based exclusively upon reports of examiners from 1976, examiners who had not been presented with a significant history indicative of Mr. Thompson's disabling brain damage. An examination in 1984, and two examinations last month, revealed that a mental health examination of Mr. Thompson conducted in a competent manner must result in a finding that he suffers from organic brain damage, which, in combination with other factors, rendered him incompetent, insane, and easily and readily dominable by others (including co-defendant Rocco Surace). The proof of domination is evident -- Mr. Surace is in a minimum security facility, the State's chief witness, who easily could have been convicted of first-degree murder, is free, but brain-damaged and mentally retarded Bill Thompson is awaiting execution, because he had no rational understanding of the proceedings against him, and could not meaningfully assist counsel in the conduct of the defense.

This case is in a somewhat unusual procedural posture -- the federal courts have addressed parts of some of the claims first -- but that posture does not affect whether the merits of the claims should be addressed. The lower court ruled upon all the claims on the merits, despite a potpourri of procedural bars

argued by the State. "Merits" rulings are proper, as will be presented in the body of the arguments presented infra.

Mr. Thompson's sentencing proceeding was permeated by fundamental eighth amendment error. It has already been determined that his attorney was ineffective. Thompson v. Wainwright, 787 F.2d 1447, 1451-55 (11th Cir. 1986). Now we know that he was and is brain damaged, was forced into taking the blame and was incompetent and insane. It would seem that there is sufficient fact and law presented to demonstrate that there is an intolerable risk that the sentencing proceedings presented an unreliable result.

## II. PROCEDURAL POSTURE/STATEMENT OF FACTS

This case was first before this Court in Thompson v. State, 351 So. 2d 701 (Fla. 1977), when the 1976 conviction and death sentence was reversed because the guilty plea had been induced by information which proved to be inaccurate. The proceedings that occurred after that reversal are pertinent to this appeal.

Trial counsel in 1978 (now Judge Solomon) requested psychiatric and psychological evaluations of Mr. Thompson, but the request was summarily denied because examinations had occurred in 1976. A guilty plea was entered September 18, 1978. An advisory jury recommended death and the trial judge immediately imposed death, September 20, 1978. This Court's

denial of rehearing in Songer v. Florida, 365 So. 2d 696, 700 (Fla. 1978), in which this Court first addressed the affect of Lockett on the Florida death penalty statute, occurred December 21, 1978, three months after Mr. Thompson's sentencing. This Court affirmed the 1978 conviction and sentence in Thompson v. State, 389 So. 2d 197 (Fla. 1980), with now Chief Justice McDonald dissenting.

Trial counsel filed a Rule 3.850 motion July 21, 1981, raising a single issue -- that Mr. Thompson testified at his co-defendant's trial and took total responsibility for the offense because of Surace's domination. This Court concluded that "[a]ppellant offers no evidence, other than his present statement, to establish that his testimony at Surace's trial was the product of coercion," Thompson v. State, 410 So. 2d 500 (Fla. 1982), and, consequently, that no evidentiary hearing was necessary.

Subsequently, new volunteer counsel, Mr. Michael Von Zamft, filed a petition for writ of habeas corpus in federal district court in Miami. Those proceedings were stayed so as to allow exhaustion of state remedies on various claims, and a Rule 3.850 motion was filed February 22, 1982, for the purpose of exhausting those claims. That motion was dismissed without prejudice May 14, 1984, because the State decided to waive exhaustion in the federal district court forum.

Relief was denied in federal district court September 12, 1984. The Eleventh Circuit affirmed April 10, 1986. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). The Eleventh Circuit's analysis and denial of Mr. Thompson's Lockett claim was based upon that court's now vacated decision in Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985). That Court, and this Court, was wrong in Hitchcock, as the United States Supreme Court later ruled on April 22, 1987, when the Eleventh Circuit's en banc decision was unanimously vacated. Thus, the only judicial analysis that has occurred vis-a-vis the Lockett claim in Mr. Thompson's case has now been rendered nugatory by Hitchcock and the United States Supreme Court.

On June 18, 1987, a petition for writ of habeas corpus was filed in this Court and a Rule 3.850 motion was filed in the trial court. An amended Rule 3.850 motion was filed June 29, 1987. The State filed "answers" raising purported procedural and successor bars, which was all the State argued in trial court. The trial court denied the Rule 3.850 action on the merits June 29, 1987.

## III. THE TRIAL COURT RULED ON THE MERITS OF THE APPELLANT'S CLAIMS, AS SHOULD THIS COURT.

The Rule 3.850 motion raises ten claims for relief. During the nonevidentiary hearing conducted Monday, the Hitchcock, Mason and Brady claims were specifically discussed, and a request for

stay of execution on the other claims was submitted on the basis of the pleadings. The State argued "abuse of writ and successive petitions" and "collateral estoppel/res judicata." Response, p. 6. The trial court's denial was based upon the following:

> THE COURT: . . . I am satisfied that the aspect as it relates to the presentation of statutory mitigating circumstances and all those other factors[,] have been litigated in this point[,] case[,] much further than as presented before this Court[,] we have been litigated all the way to the Eleventh Circuit Court, I have one concern in the case and one concern only and that's the accuracy of the examinations given to this gentleman consisting of three court-appointed psychiatrists who in fact viewed him for 30 minutes roughly a piece and then entered an opinion then the fourth one at the habeas corpus proceeding and when you considered in light of the battery of tests and the other factors that have been submitted in your petition concern the Court.
>
> Now there is a difference in time, there is a difference in statute and there's some ten or so years of incarceration at the time these last bunch of tests are given. They say in the test in the conclusion of them as this Court read them that per se he was incompetent at the time of trial or at the time of the plea and its trial on the sentencing phase.
>
> The Court has concern with that. The Court has concern with the diagnosis in the sense that it is now retrospectively made in over ten years by psychiatrist conducting tests today in view of the examination of three psychiatrists often used by this Court at the time of the sentencing procedure. And I fail to see under which, under how this Court can measure a subsequent mental condition as it relates only to the issuance

> of the plea and the issuance of the sentence and the effectiveness or ineffectiveness of counsel in examination based on examinations conducted ten years hence.
>
> Now it might well be that it has some impact on the sentence, I don't rule on that because that's not before me. I will deny your petition for rule three for the reasons that we have indicated that I find very clearly in Thompson versus Wainwright which is cited throughout the briefs, it's 787 Fed Second 1447 Eleventh Circuit 1986, that all the claims except except the latter one have in fact been considered by that court that are before me now and that the latter claims in and of themselves do not in this Court's opinion raise to the point of contest the issue of the examining psychiatrist conducted at the time of the conduction of the sentence and hearing. Prepare an order consistent with that counsel.
>
> MR. KAPLAN: Okay. I have one order, had two orders, one flat denying it and one says--
>
> THE COURT: Well, I'm not flat denying it, I wanted something spelled out along the lines that we talked about.

(Transcript, pp. 55-58). The trial court did not refuse to hear any claims for any procedural reason. Instead, the trial court agreed (erroneously, it is argued below) with previous courts' legal analysis of the Lockett claim, denied that claim on the merits and denied other claims as not setting forth a basis upon which relief could be granted.

The court was correct in choosing to rule on the merits, but was incorrect in its merits resolutions, which will be argued in Section IV, infra. Because the State will probably still argue

procedural and successor bars before this Court despite the failure of the trial court to apply such bars, appellant will briefly discuss their inapplicability.

This is not Mr. Thompson's first motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The State argued that this factor ipso facto requires dismissal of the petition. The State's analysis is flawed. As will be shown, Mr. Thompson's claims cannot be barred because (1.) he was expressly told by the trial court in 1984, and it was the law, that he could file successive motions, (2.) the claims presented herein involve issues of fundamental new law, the very purpose for Rule 3.850 proceedings, and an express exception to successor bar rules, and (3.) even if the claims could be treated as "successive," the rules controlling analysis of successive claims require the hearing of the claims now on the merits.

Further, the fact that parts of the claims have been presented to courts in the past is not a separate basis for determining whether the claims should be heard anew. Res judicata law is inapplicable to these proceedings. "Successor" law controls, and subsumes all res judicata questions. The claims presented are properly before the court for merits rulings, and a stay of execution is in order.

A. At the Time of the Filing and Dismissal of Earlier Motions, No Successor Bars Applied, and Appellant

Relied Upon that State of the Law.

On May 15, 1984, Judge David M. Gersten stated the law, quite correctly, as follows:

> [D. Van Zamft]: . . . I will withdraw the motion to vacate pursuant to 3.850 and ask this Court to withdraw without prejudice.
>
> THE COURT: Fine.
>
> MR. FOX: State is in agreement with that.
>
> THE COURT: With or without prejudice, you can file them forever.

Judge Gersten was merely expressing, and the state was "in agreement with," that which was the law in 1984 -- there was no bar to the filing of second or subsequent Rule 3.850 motions until January 1, 1985. In re Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So. 2d 907 (Fla. 1984). The law at the time of the previous motion in this case was that successive motions for post-conviction relief would only be barred if they stated "substantively the same grounds as a previous motion attacking the same conviction." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983). There is only one claim presented in the motion which even arguably deals with an issue previously raised -- that Mr. Thompson was coerced to testify on behalf of Rocco Surace. However, that claim is not presented in this motion. What is presented here is that trial counsel was ineffective for

not investigating and presenting the fact that Surace dominated Mr. Thompson, that the state failed to reveal exculpatory evidence about Rocco Surace, and that Mr. Thompson is brain damaged which, along with other factors, rendered him incompetent in 1978. These are, in fact, new and different grounds than what was raised before. It should be noted that the first Rule 3.850 motion was filed by trial counsel, who could not therefore attack his own effectiveness. Further, the second Rule 3.850 motion was dismissed without prejudice.

The rules that were in effect when the previous action was dismissed naturally entered into the decision whether the action should have been dismissed. As the post-conviction judge stated, "you [Mr. Thompson] can file them forever." Now, the State may ask this Court to affirm the dismissal of the instant Rule 3.850 motion based upon rules that were not in effect when earlier decisions by Mr. Thompson or his counsel were made, rules the state then was "in agreement with." During that earlier period, Florida law governing Rule 3.850 proceedings permitted claims to be raised "piece meal." When Mr. Thompson acted earlier, there was no bar to raising new claims in a subsequent motion. McCrae, supra. It was not until 1985 that such a bar existed. Retroactive application of such a procedural bar thus violates the due process clause of the Fourteenth Amendment, creating no more than a "trap for the unwary." Jones v. Kentucky, 106 S. Ct.

1830, 1835 (1985).

B. Even if the Motion is A "Successor," "Merits" Determination is Proper.

The new Rule 3.850 successor bar rule states:

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

As the Advisory Committee noted, the successor rule is to be interpreted like its factual counterpart under Rule 9(b), Rules Governing Federal Habeas Corpus actions:

> 1984 Amendment. The committee felt that provisions should be added to allow the court to consider why a subsequent motion was being filed and whether it was properly filed, similar to subrule 9(b) of Rule 35 of the Federal Rules of Criminal Procedure.

Committee Notes, Rule 3.850. Thus we must examine federal law to determine whether the claims pled in the Rule 3.850 motion are cognizable.

Claims in a second Rule 3.850 motion fall within one of two categories -- the claim either was, or was not, raised in the earlier motion. The method of determining whether the claim will be heard in the second petition depends upon into which category (raised or not raised) the claim falls.

A denial of an application for habeas corpus is not res judicata with respect to subsequent applications. Sanders v. United States, 373 U.S. 1, 7 (1963); Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, 104 S. Ct. 510 (1983). Indeed, res judicata law is simply not applied in post conviction. Under 28 USC sec. 2244, and Rule 9(b), which codifies Sanders, the starting point for analysis of second or subsequent petitions is an analysis steeped in traditional notions of equity, and one specifically intended to prevent only vexatious withholding or needless repetition of claims and habeas corpus actions. Sanders, 373 U.S. at 18. That has most assuredly not occurred here.

Claims contained in second or subsequent petitions may be dismissed without merits consideration if the State specifically demonstrates and the petitioner fails to refute one of the following two matters: that the ground for relief is not a new ground, it was previously determined on the merits, and the ends of justice will not be served by revisiting the claim; or the claim is one not previously presented, and the failure to present the claim earlier is an abuse of the writ. Rule 9(b); Sanders. Old claims presented again are "successive;" new claims not previously presented may be "abusive."

> The terms "successive petition" and "abuse of the writ" have distinct meanings. A "successive petition" raises grounds

> identical to those raised and rejected on the merits on a prior petition. . . . The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus.

Kuhlman v. Wilson, 106 S. Ct. 2616, 2622 n.6 (1986)(emphasis supplied).

Certain important rules accompany, and insulate petitioners from the extraordinary use of, invocation of a "procedural successor" as opposed to a "merits" dismissal of a habeas corpus petition. First,

> [T]he burden is on the Government to plead abuse of the writ. "[I]f the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the prisoner has abused the writ of habeas corpus, it vests with the government to make that claim with clarity and particularity in its return to the order to show cause." Price v. Johnston, 334 U.S. 206, 291-92 (1948). The Court [in Price] reasoned that it would be unfair to compel the habeas applicant . . . to plead an elaborate negative.

Sanders, 373 U.S. at 10-11; Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982). Upon proper pleading by the State, petitioner must show, and must be provided the opportunity to show, that the interests of justice justify rehearing an "old claim," or that a new claim is not abusive. With regard to abuse, the petitioner should be permitted to demonstrate through evidence that the new claim was not earlier known and withheld, not earlier abandoned, or not for some other unjustifiable reason not presented. The gravamen is whether knowing conduct purposed to vex, harass,

delay, or cause piecemeal litigation has occurred. Sanders, 373 U.S. at 17-18. It was proffered below that no such intent existed here, and that no inexcusable neglect existed, a proffer unrebutted by the state.

With regard to claims previously raised, a plurality of the United States Supreme Court believes that "the 'ends of justice' require courts to entertain such petitions only when the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Kuhlman v. Wilson, 106 S. Ct. 2616, 2627 (1986) (plurality opinion). And "no matter into which classification a successive petition falls, a district judge always has the discretion -- and sometimes the duty -- to reach the merits." Potts v. Zant, 638 F.2d 738, 741 (1980).

Florida law applies these equitable principles. Successor petitions have been heard on the merits when they present "extraordinary circumstances," Darden v. State, 475 So. 2d 217 (Fla. 1985), "unique facts," State v. Sireci, 12 FLW 57 (Fla. 1987), and "unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." Florida v. Crews, No. 67,696 (S. Ct., Sept. 27, 1985). When the claim is one which was not raised before, the motion for post-conviction relief cannot be dismissed if "the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed."

Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986). This was pled, proffered and not denied in the trial court.

Of course, a change in law excuses the bringing of either type of claim in a second motion. New law may create a right that "could not have been known," and relevant new law which affects the outcome of a claim earlier brought satisfies any "ends of justice" analysis. Thus, claims based upon "new law" are never barred in Rule 3.850 proceedings. Witt v. State, 465 So. 2d 510, 512 (Fla. 1985).

C. Res Judicata is Plainly Not Applicable

The state asserted below that because a previous Rule 3.850 motion was litigated, and because a federal habeas corpus proceeding brought by Mr. Thompson raised some claims similar to those raised in this action, this Court must deny relief based upon "res judicata" grounds. A "successor" post-conviction analysis in fact has no res judicata component. If a claim was previously raised, the inquiry turns on whether new facts or law which were previously unknown are now available, and how that information bears upon the earlier resolution.

Traditional principles of res judicata and/or collateral estoppel do not apply at all in federal habeas corpus or Florida post-conviction litigation. This is so because

> [c]onventional notions of finality of

> litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government [is] always [to] be accountable to the judiciary for a man's imprisonment," Fay v. Noia, 372 U.S., at 402, 03 S. Ct., at page 829, access to the courts on habeas must not be impeded. The inapplicability of res judicata to habeas, then is inherent in the very note and function of the writ.

Sanders v. United States, 373 U.S. 1, 8 (1963); see also Preiser v. Rodriguez, 411 U.S. 475 (1973); Fay v. Noia, 372 U.S. 391, 422-24 (1963); Bearden v. United States, 403 F.2d 782 (5th Cir. 1968), cert. denied, 393 U.S. 1111 (1969).

The Supreme Court in Sanders, supra, did not, however, entirely immunize habeas corpus litigants from all rules designed to avoid wasteful and useless relitigation of issues already decided or ones that could have fully, fairly, and easily been decided in some earlier litigation; rather, the Court developed a separate and distinct set of rules, not nearly as strict as traditional res judicata proscriptions, to discourage bad faith or harassing relitigation of issues identical to those raised in a previous habeas corpus petition, or which could have been, but were not, raised in a previous petition. Dismissal of a habeas petition under these rules, unlike under traditional res judicata principles, is a "rare and extraordinary" procedure. Haley v. Estelle, 632 F.2d 1273 (5th Cir. 1980).

These rules have twice been codified by Congress since the Sanders decision. See 28 U.S.C. section 2244(b) and Rule 9(b) of

the Rules Governing Section 2254 cases. In both cases, Congress made explicit its intent to do no more than restate the Sanders' rules in a statutory form. See Paprakar v. Estelle, 612 F.2d 1003, and sources cited therein; United States ex. rel. Schnitzler v. Follete, 406 F.2d 319 (2d Cir. 1969), cert. denied, 395 U.S. 926 (1969); H.R. Rep. No. 1471, 94th Cong., 2d Sess. (1976) at 5-6. In fact, when proponents of the most recent codification attempted to introduce a stricter standard, Congress reacted swiftly both by rejecting any standard that "gave a judge too broad a discretion to dismiss a second or successive petition" and by insisting that the codification be in "conformity with existing law." H.R. Rep. No. 1471, 94th Cong., 2d Sess. (1976) at 506 (citing Sanders as the expression of "existing law").

Florida has taken the same approach in state post-conviction litigation. Fla. R. Crim. P. 3.850 was amended in 1984 to provide that

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

Fla. R. Crim. P. 3.850 (1986). The intent of this amendment was

to "allow the court to consider why a subsequent motion was being filed and whether it was properly filed, similar to sub-rule 9(b) of Rule 35 of the Federal Rules of Criminal Procedure." See Fla. R. Crim. P. 3.850, Committee Note (1984).

Thus, the law regarding criminal post-conviction proceedings remains that "conventional notions of finality," and therefore traditional res judicata principles, do not apply, and that dismissal of a claim or motion on the grounds that an earlier motion has already been litigated is a "rare and extraordinary" step that should not be lightly taken, Sanders, supra; Haley v. Estelle, supra, and which is governed by a separate and distinct set of rules.

Even if traditional res judicata and/or collateral estoppel principles applied in the criminal post-conviction context, they would not apply to the factual claims Mr. Thompson herein asserts. For res judicata and/or collateral estoppel principles to apply, there must be a prior judgment on the merits; the claims must be identical; and the parties must be identical. See e.g., Coral Realty v. Peacock Holding Co., 138 So. 622 (1931); Gray v. Gray, 107 So. 261 (1926); United States Gypsum v. Columbia Casualty, 169 So. 532 (1936).

Res judicata will not apply unless the judgment asserted as a bar to the second action is founded on the identical cause of action as the subsequent claim. Tait v. Western Maryland Railway

Co., 289 U.S. 620 (1933); Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313 (5th Cir. 1970); Hohweiler v. Hohweiler, 167 So. 2d 73 (2d DCA 1964); Cullogen v. Music, 226 So. 2d 240 (2d DCA 1969). When facts and conditions occurring after the initial judgment furnish a new basis for the claims and defense of the parties, the former judgment cannot be plead as a bar to the subsequent action. This is so because when new facts or conditions intervene before the second actions, the issues are no longer "identical." Neaderland v. C.I.R., 424 F.2d 639 (2d Cir. 1970); Green v. Illinois Dept. of Trans., 609 F. Supp. 1021 (N.D. Ill., E.D. 1985); Wagner v. Bacon, 64 So. 2d 267 (Fla. 1953); City of Miami Beach v. Prevatt, 97 So. 2d 473 (Fla. 1957).

> Case law abounds to the proposition that the rule of res judicata extends only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment. When other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defense of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action.

Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 210 So. 2d 750, 753-54 (Fla. 3rd DCA 1968); see also United States v. Wooten, 343 F.2d 214 (5th Cir. 1965); Estevey v. Nabers, 219 F.2d 321 (5th Cir. 1955). Any doubt as to the identity of causes of

actions, and therefore the application of res judicata or collateral estoppel, should be resolved in favor of the party against whom the preclusion is asserted. Northern Oil Co. v. Socomy Mobil Oil Co., 368 F.2d 384 (2d Cir. 1966).

Even in a case where the issues are identical, intervening judicial decisions that substantially alter the state of the law will preclude application of res judicata or collateral estoppel to bar consideration of those claims in a subsequent action. Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975). Thus, a change in the way upon which a judgment is based, will allow the same claim to be brought again in a subsequent action. See Greene, supra; Thompson v. Thompson, 93 So. 2d 90 (Fla. 1957); United States v. Zimmerman, 478 F.2d 59 (7th Cir. 1973).

Mr. Thompson has proffered new facts, in the form of the results of psychological testing never before performed, in support of his claims relating to his incompetence to enter a plea of guilty or to stand trial, and has set out new law governing those claims, his Lockett/Hitchcock based claims, and his claim that his sentencing jury was misinformed as to their role and responsibility regarding the capital sentencing decision. Thus, even if it could be said that res judicata or collateral estoppel principles applied to criminal post-conviction proceedings, those principles clearly would not bar consideration of Mr. Thompson's claims.

## III. CLAIMS FOR RELIEF

The claims upon which this appeal is based involve fundamental, core, nonfrivolous objections to a plea and sentencing proceeding which were not considered or contemplated in 1978. Hitchcock, Songer, Lucas, Ake, Mason, and other controlling cases post-date trial, and most of the controlling cases post-date previous post-conviction proceedings. At the very least a stay of execution is proper; appellant contends that if some expedited decision is warranted, then the result should be the reversal of the trial court's dismissal, and the granting of the motion to vacate.

### A. Mr. Thompson Was Denied A Meaningful And Individualized Capital Sentencing Determination, In Violation of the Sixth, Eighth And Fourteenth Amendments (Claim I).

It could not be clearer -- Mr. Thompson did not receive the benefits of unfettered sentencer consideration of non-statutory mitigating circumstances before he was sentenced to death, which is a patent violation of the eighth and fourteenth amendments. While Mr. Thompson's Rule 3.850 Motion sets out in great detail how sentencer consideration of mitigating circumstances was limited, the following quotation is particularly illustrative:

> MR. SOLOMON: I am going to review with you, just for a moment, certain worse, damaging, aggravating

circumstances shall be limited to the following and that's what you heard from Mr. McHale. It says, "Limited to the following."

Although it says, "mitigating circumstances shall be the following," it doesn't say, "Limited to." So, you can consider other elements.

MR. McHALE: Objection.

THE COURT: Sustained.

(R. 549, 550)(defense attorney, attempted argument to the jury). Mr. Thompson will demonstrate that this violation requires relief in this proceeding, and that no procedural bar exists.

1. Mr. Thompson Was Sentenced Pre-Songer, with Cooper-type Constraints on the Sentencing Process.

Today, "[t]here is no disputing," Skipper v. South Carolina, 106 S. Ct. at 1670 (1986), the force of the constitutional mandate: "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). The constitutional necessity of individualized sentencing in capital cases was not always so clear. The nine separate opinions in Furman v. Georgia, 408 U.S. 238 (1972), "[p]redictably . . . engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett, 438 U.S. at 599. States

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

Florida was among those states that followed the "reasonable" view that Furman required restriction of the mitigating factors. Prior to Furman, in March, 1972, the Florida Legislature had enacted a new capital sentencing statute which provided for a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be considered during the sentencing proceeding." Ehrhardt and Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & Criminology 10 (1973). Furman supervened, and this statute was never used. In the months after Furman, a mandatory sentencing scheme was seriously considered, but after intense debate over the meaning of Furman, the Florida Legislature chose the Governor's proposal, consisting

of a modified version of the Model Penal Code. The statute that emerged restricted discretion by listing certain exclusive aggravating and mitigating factors. The statute's plain terms mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist as enumerated in subsection [(5)]" and whether "sufficient mitigating circumstances exist as enumerated in subsection [(6)]"; then, "[b]ased on these considerations, whether the defendant should be sentenced to life or death." Sections 921.141 (2) and (3), Fla. Stat. (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered, the Legislature said that both were "limited to" those listed in the statute. "Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations." Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U. L. Rev. 108, 139 (1974).

In Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), the Florida Supreme Court affirmed exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable . . . and we are not free to expand that list." Id. at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list,

emphasizing that these were "words of mandatory limitation." Id. at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by Furman: "This [holding] may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. (emphasis in original). Accordingly, "[t]he sole issue in a sentencing hearing under section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have (sic) no place in that proceeding." Id. at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list." It was not until after Lockett that another view was recognized. In Lockett, the Court required as a constitutional prerequisite to capital sentencing that consideration of all proffered mitigation not be restricted.

There was, at the very least, tension between Cooper and Lockett. If sentencer consideration of all proffered mitigation was required, but the Florida statute operated to restrict consideration to a meager list, the death sentences imposed under the statute were unconstitutional. They were and are. After Lockett, the Florida Supreme Court decided Songer v. State, 365

So. 2d 696 (Fla. 1978), the Lockett part of which issued on December 21, 1978, after the sentencing herein. Said Songer: "Obviously, our construction of section 921.141 (6) has been that all relevant circumstances may be considered in mitigation." Id. at 700. Both the holding of Cooper affirming the preclusion of nonstatutory mitigating character evidence, and its rationale that the nonexpandable "list" of mitigating factors was a "mandatory limitation" required by Furman, was said to be "not apropos to the problems addressed in Lockett." Id. Cooper was said to have been concerned only with whether the mitigating evidence was "probative," not whether the evidence fell outside the statutory list of mitigating factors. Id.

Cooper and Songer simply were not so reconcilable, or at least other interpretations of Cooper were reasonable. It is plain that judges and lawyers in Florida before Songer could and did reasonably believe that the Cooper-law required preclusion. The United States Supreme Court and this Court have recognized this reality:

> Petitioner claims that the advisory jury and the sentencing judge were precluded by law from considering some of the evidence of mitigating circumstances before them. The Florida death-penalty statute in effect at the time (which has since been amended in various respects) provided for separate post-conviction proceedings to determine whether those convicted of capital felonies should be sentenced to death or to life imprisonment. Those proceedings were typically held before

the trial jury, which heard evidence "as to any matter that the court deem[ed] relevant sentence." Fla. Stat. sec. 921.141(1) (1975). After hearing that evidence, the jury was to render an advisory verdict by determining "(a) [w]hether sufficient aggravating circumstances exist as enumerated in [sec. 921.141(5)]; (b) [w]hether sufficient mitigating circumstances exist as enumerated in [sec. 921.141(6)], which outweigh the aggravating circumstances found to exist; and (c) [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." Sec. 921.141(2). The trial court then was to weigh the aggravating and mitigating circumstances itself and enter a sentence of life imprisonment or death. If it imposed a sentence of death, it was required to set forth in writing its findings "(a) [t]hat sufficient aggravating circumstances exist as enumerated in [sec. 921.141(5)], and (b) [t]hat there are insufficient mitigating circumstances, as enumerated in [sec. 921.141(6)], to outweigh the aggravating circumstances." Sec. 921.141(3).

Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e.g., Cooper v. State, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding. . ."), cert. denied, 431 U.S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in Songer v. State, 365 So. 2d 696 (1978) (per curiam, which expressed the view that Cooper had not prohibited sentencers

> from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law. We do note, however, that other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of nonstatutory mitigating circumstances. At least three death sentences have been overturned for this reason. See Songer v. Wainwright, 769 F.2d 1488 (CA11 1985) (en banc) (per curiam), cert. pending, No. 85-567; Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Harvard v. State, 486 So. 2d 537 (Fla.) (per curiam), cert. denied, 479 U.S. ___ (1986). We also note that the Florida Legislature has since removed the phrase "as enumerated [in the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances. See Fla. Stat. sec. 921.141(2)(b), (3)(b) (1985).

Hitchcock, 107 S.Ct. at 1824-25.

Indeed, this Court has, as of late, recognized the constitutional shortcoming of sentencing proceedings conducted with Cooper-type pre-Songer constraints on mitigating circumstances:

> In Harvard v. State, 486 So.2d 537 (Fla. 1986), we remanded for a new sentencing hearing in a post-conviction relief proceeding because Harvard's trial court believed that the mitigating factors were restricted to those listed in the statute. Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696

(Fla. 1978), cert. denied, 441 U.S. 956 (1979). Although Lucas' original judge cannot now say what he thought section 921.141 required, the record shows that he instructed the jury only on the statutory mitigating circumstances. Our review of the record shows a scant twelve pages devoted to the presentation of evidence by both the state and the defense at the sentencing proceeding. Moreover, in arguing to the jury defense counsel stated:

> As the judge will explain to you, the law is very specific in spelling out what you may consider in making your decision. You may not go outside the aggravating and mitigating circumstances in reaching your decision. . . . But you may not go outside the specifically enumerated aggravating and mitigating factors.

Because we would rather have this case straightened out now rather than, possibly, in the far future in a post-conviction proceeding, we remand for a complete new sentencing proceeding before a newly empanelled jury.

Lucas v. State, 490 So.2d 943 (Fla. 1986).

2. The Lockett Error is Patent, and Requires Resentencing

"[Thompson's] trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2185,

60 L.Ed. 2d 1060 (1979). Although [Thompson's] original judge cannot now say what he thought section 921.141 required,1/ the

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1/The sentencing judge in Lucas "could not say" because he had died. Mr. Thompson's sentencing judge could not say because he "could not remember." As the to proffer at Monday's nonevidentiary hearing revealed:

> MR. VON ZAMFT: Your Honor, I had a conversation with Judge Tanksley last Thursday. And after my conversation with Judge Tanksley he wanted to be sure that I related by conversation to the Court.
>
> It was along the lines of what we are speaking of except with some additional fact. He did make it fairly clear to me that he would prefer not to be handling this matter and thought you should and the other part.
>
> THE COURT: Everybody thinks I ought to handle it. I don't know why.
>
> MR. VON ZAMFT: I am just relaying that.
>
> Additionally, I had asked him a specific question which would have had an impact upon our determination as to whether or not he should really be handling the matter and that question was: Does he remember whether or not at the time of the sentencing he felt that mitigating circumstances were limited pursuant to the statute.
>
> And his answer to me was that he did not remember, how could he, it was a while back and he just couldn't be expected to remember and he does not remember.

(footnote continued on next page

record shows that he instructed the jury only on the statutory mitigating circumstances." Lucas, 490 So. 2d at 946. As is beyond cavil, "[a]n erroneous instruction may also provide

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footnote 1 continued

> Had he remembered, it probably would have been important at that stage to go back to him so he could have made a specific finding that I remember, X, Y and Z.
>
> Once he told me that he does not have a recollection and did not remember specifically whether he felt that the mitigating was limited or not by statute, there was no additional need because we'd have to do the same thing in front of him that we have to do for you, which is relate on the record. So with that on the record we are quite content I believe to stay here and go ahead with it, especially knowing that he is as I said not overly enamored with the idea of hearing it himself.
>
> THE COURT: I think you could take 59 names and come out with that same answer.

Of course, if a judge cannot remember whether he or she thought mitigation was limited at the time of trial, it is obvious that he or she, at some time, did believe so. One certainly would have no trouble remembering that he or she had always considered mitigation to be unlimited.

convincing evidence that the trial judge himself misunderstood or misapplied to law when he later actually found. . . . mitigating factors." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985).

It is unequivocally clear, clearer than in Hitchcock, that the judge and the jury believed limitation was the law, and they followed the law:

> MR. SOLOMON: I am going to review with you, just for a moment, certain worse, [sic] damaging, aggravating circumstances shall be limited to the following and that's what you heard from Mr. McHale. It says, "Limited to the following."
>
> Although it says, "mitigating circumstances shall be the following," it doesn't say, "Limited to." So, you can consider other elements.
>
> MR. McHALE: Objection.
>
> THE COURT: Sustained.

Before sentencing began, the trial court informed the jury:

> THE COURT: The State and the defendant may now present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence is presented in order that you might determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition

> of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> At the conclusion of the taking of the evidence, and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 297-98)(emphasis added). In the jury sentencing instructions, the Court did just that:

> THE COURT: [T]he mitigating circumstances which you may consider, if established by the evidence, are these: [reads statutory list].

(R. 556).

Earlier, during voir dire, the judge explicitly told a juror that that juror could not consider a guilty plea to be mitigating:

> THE COURT: The fact that you know the defendant has pled guilty, would this enter into your decision in any way, or would you follow the instructions of the Court as to what you should consider?
>
> MR. FREY: I'd follow the instructions.

(R. 104). Prosecutor McHale and the trial judge later cut off another non-statutory avenue of mitigation:

> MR. SOLOMON: Do each and every one of you

in here believe that even in the worst circumstances there is hope for everyone?

MR. McHALE: Judge, I am going to object, because it is a matter which is not part of the law and goes outside of the law as far as a sentencing proceeding.

THE COURT: Sustained.

(R. 174). Voir dire was conducted in the presence of all potential jurors, who heard all the questions, objections, and rulings. Later during the taking of evidence, the judge sustained objections to the admission of evidence which was not contained in the statutory list:

MR. McHALE: Judge, I'm going to object to anything about intoxication. It's irrelevant to this proceeding.

MR. SOLOMON: I don't know about that, Judge.

THE COURT: Well, she has answered the question; she said no.

MR. SOLOMON: Were they taking any pills during the ongoing period of time?

MR. McHALE: I'm making the same objections on the ground of relevance to this particular proceeding . . .

MR. SOLOMON: I don't know about that, Judge. It strikes me that the jury ought to know the entire physical and mental condition of the defendant. You'll see one of the mitigating

circumstances in there points directly to it.

THE COURT: Sustained.

(R. 446, 447).

This case matches Lucas, is controlled by Hitchcock, and is similiar in posture to McCrae v. Florida, 12 F.L.W. 310 (Fla. June 26, 1987). Mr. McCrae, in a successor Rule 3.850 action, received relief on the following basis:

> Appellant's remaining point on appeal has merit. In his rule 3.850 motion, appellant claimed that the trial judge who sentenced him to death believed that he was prohibited from considering, or was not required to consider, non-statutory mitigating circumstances. At the hearing on the motion, appellant made a substantial showing through testimony that the judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors. The order denying the motion for post-conviction relief does not state a reason for rejecting appellant's claim.
>
> A defendant in a capital case has a constitutional right to present to and have considered by the sentencing authority any competent evidence that is relevant to the sentencing determination, including information about the character and background of the defendant and the circumstances of the offense. Skipper v. South Carolina, 106 S.Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The record of the sentencing proceeding in this case shows a situation similar to that found in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). There the Supreme Court found that "the sentencing proceedings actually

conducted" showed that the sentencing judge operated under the assumption that nonstatutory mitigating circumstances could not be considered. Id. at 1823. Because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances . . . the proceedings . . . did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)." Id. at 1824.

The state points out that evidence was presented at appellant's original sentencing proceeding, not all of which was strictly related to statutory mitigating circumstances. It is true that some general background testimony was presented. We are not convinced, however, that it was given serious consideration by the court. Nothing the state has said has overcome the effect of the appellant's evidence and argument on this point.

Upon our review of the original trial record in this case and the testimony presented at the rule 3.850 motion hearing below, we find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors. This finding, based on the record, is sufficient to require a new sentencing hearing. We therefore order a new sentencing proceeding in this case. Because the jury at the original sentencing proceeding recommended life imprisonment, the more favorable to appellant of the only two recommendations available, we deem the error harmless with regard to its effect on the advisory verdict portion of the proceedings. Therefore, there will be no need to empanel a new advisory jury for the proceedings on remand. On remand the trial court will take

> into consideration the recommendation returned by the original trial jury in this case.

12 F.L.W. at 317. Mr. Thompson is entitled to a new sentencing proceeding before a jury.

### 3. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), Is Ruled Moot By Hitchcock, and Does Not Control

Parts of this claim were denied by the Eleventh Circuit based upon the following state of the law:

> This court recently has described the method for analyzing Lockett claims such as the one advanced by Thompson. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc). A court should consider all the circumstances, including the status of florida law at the time of sentencing, the trial record, and proffers of nonstatutory mitigating evidence claimed to be available. 770 F.2d at 157

Thompson, 787 F.2d 1447. The en banc court's Hitchcock analysis and result was unanimously rejected by the United States Supreme Court. The Thompson analysis and result is consequently flawed.

Specifically, the requirement of a "proffer[ ] of nonstatutory mitigating evidence claimed to be available" is not the law. Under Hitchcock, as this court has noted, once a restriction on the consideration of mitigating circumstances is identified, "[t]his finding based on the record, is sufficient to require a new sentencing hearing." McCrae, 12 F.L.W. at 313. The Eleventh Circuit's prejudice test -- "Thompson has not shown

any excluded evidence that could have affected the sentence," 787 F.2d at 1457 -- is not the law.

If not for one special factor, the state would be required to show that the error "had no effect on the jury or the sentencing judge." Hitchcock, 55 L.W. at 4569. With two statutory aggravating and two statutory mitigating circumstances found, it cannot be said that the exclusion of consideration of non-statutory, mitigating circumstances had no effect. The special factor in this case that makes even that inquiry irrelevant is that the jury that was chosen was not impartial, a fact which renders the proceedings unconstitutional and requires reversal without regard to what the state might show.

A condition of service on petitioner's jury was that the jurors agree to violate Mr. Thompson's fundamental eighth amendment rights. The state relentlessly tied the participants to consideration of only the statutory mitigating factors. The education process was simple: according to the judge and prosecutor, it is the judge who provides the law, the law is that only certain factors are mitigating, and the jurors could not supplement the law with extra circumstances they thought to be mitigating.

For example:

> MR. McHALE: All right. His Honor will outline certain circumstances for you. You have heard them

referred to as aggravating and mitigating circumstances, and he will instruct you how you should apply them and how you should weigh and compare them.

Will you abide by the circumstances which he gives you as a formulation for your decision in this case?

MR. EDGMAN: Yes.

MR. McHALE: And will that be the case, even though you may feel that other circumstances are far more important in deciding a case of this type?

MR. EDGMAN: Well, I will follow whatever the law is.

MR. McHALE: You may feel that the circumstances he outlines to you are unwise or perhaps unfair, whatever; can you still follow them and apply them in reaching your decision?

(R. 246) (emphasis added).

MR. McHALE: Judge Tanksley, at the end of the evidence that will be presented, will instruct you as to what the law is and I believe he'll tell you that your decision must be based upon the circumstances of law which he'll instruct you on. Can you, if you are selected as a juror, follow the law in reaching your decision?

(R. 272) (emphasis added).

MR. McHALE: There will be evidence presented as to the type of

murder that he committed, how it happened, what his role in it was, and why it happened. There will also be instructions by the Judge as to what you should consider in making your recommendation as to whether he be executed or sentenced to life imprisonment.

(R. 283).

MR. McHALE: . . . His Honor will instruct you as to certain factors which will be considered by the jury in determining what sentence to recommend to him.

Can you follow the law that he instructs you on, even though you may disagree with that law?

(R. 285)(emphasis added).

MR. McHALE: Of course, and His Honor will instruct you as to certain factors which should be considered by the jury in making the determination. Will you follow the law in making your determination as to what sentence should be recommended to the Court?

(R. 289)(emphasis added).

MR. McHALE: In this particular case, Judge Tanksley will instruct you at the end of this case as to certain factors, aggravating factors and mitigating factors, and I think he'll tell you that you may hear and weigh those and use those factors to determine what sentence to recommend to him.

Can you follow the instructions of law that he will give you, and base your verdict on those instructions as well as to the evidence that you'll hear?

(R. 293)(emphasis added).

MR. McHALE: . . . The Court will instruct you as to mitigating circumstances, and I will point out to you, at this very moment, that there is no evidence of any mitigating circumstances. I believe His Honor will tell you that the mitigating circumstances you should consider, if established by the evidence, if established by the evidence are these: [reads and argues against each statutory mitigating circumstance].

(R. 538-40)(emphasis added).

MR. McHALE: Let me also say something else: at the conclusion of the evidence that you will hear in this case, Judge Tanksley will instruct you as to what the law is in the State of Florida, and any recommendation by the jury will not be based upon your personal opinion, but will be based upon the law, and I believe he'll tell you that it is your duty to follow the law in reaching your recommendation.

Can you follow the law in this case, or will you come back with a personal opinion, a desire to see your own personal justice done in this case?

(R. 90, 91).

MR. McHALE: The question is: will you fairly listen to the evidence and will you follow the law that His Honor instructs you on so that you will return a just sentence and a sentence that reflects what the law in the State of Florida is, whether that sentence is life or death in the electric chair, but it is based on the law? Will you follow the law that the Court gives you as to what your sentence should be . . . there are certain circumstances which the law calls aggravating circumstances, and there are others which the law calls mitigating circumstances. It will be your duty to weigh and evaluate all the circumstances in this case, and His Honor will instruct you as to how they should be compared so that you can return a correct verdict . . .

(R. 101)(emphasis added).

MR. McHALE: Do you have any opinions at this time as to what type of case the death penalty should be imposed, or is your mind open at this time?

MS. MAMMANO: Well, it's . . . as I said, I would follow the law.

MR. McHALE: Would you follow the law His Honor gives you?

MS. MAMMANO: I'll follow the law.

(R. 114).

MR. McHALE: . . . Would you try to satisfy

yourself in this case whether there might have been any type of mental illness on the part of the defendant?

MS. BYRNE: No, not if they already pled guilty.

MR. McHALE: If His Honor's instructions of law did not include that for your consideration in any way, would you try to consider it? Would you go outside of his instructions?

MS. BYRNE: No.

MR. McHALE: To bring something else into the case?

MS. BYRNE: No.

MR. McHALE: Can you follow His Honor's instructions of law in reaching your final determination, whether it be life or death?

MS. BYRNE: Sure.

(R. 118, 119)(emphasis added).

MR. McHALE: In this case, will you follow His Honor's instructions? He'll give you aggravating and mitigating circumstances to form the basis for your decisions. Will you base your decision on the law, rather than trying to come out with some type of personal opinion or a personal justice as to what should happen in this particular case?

Will you follow the law?

MS. RAMBO: Yes.

(R. 121).

MR. McHALE: I believe in this case His Honor's instructions of law will not provide for the use of any sympathy or compassion for this defendant, but there will be a number of factors which you can consider in determining your recommendation.

Can you put aside your feelings that you are called upon to use in your everyday job, in this case and not allow any feelings of sympathy and compassion for the defendant in this case to enter into a just determination of what sentence he should receive?

Can you do that?

MS. RAMBO: Yes.

(R. 122)(emphasis added).

MR. McHALE: . . . Will you follow the law that he gives you as the basis for your decision and by that I mean not using personal sympathy or compassion or your own idea of what justice should be, your own personal justice in this case, but to follow the law in coming to your decision?

MS. PETRY: I think I could.

(R. 125).

MR. McHALE: The question is: will you be bound by it, remain bound by the law and the evidence and

not attempt to, for any personal reasons, to go outside of it?

(R. 126).

MR. McHALE: Do you feel you can base your decision, whether it be a recommendation of life or death, on the instructions that Judge Tanksley were to give you on the law? . . .

Can you do that? I say, can you do that, as opposed to just going into the jury room and doing what you wanted to do, period? Can you accept the responsibility of being a juror and base your decision on the law and on the evidence and not on your own feelings about what the law should be or what the sentence should be in this case, based just on your own thoughts? Can you put yours aside and follow . . .

(R. 145).

MR. McHALE: The law he instructs you on -- you feel you can follow that law in arriving at a just recommendation of the penalty?

MRS. McMILLON: Yes.

(R. 147).

MR. McHALE: Can you do it, even though the law that he gives you, the law in the State of Florida, may be different than what you think it is or what you think it should be as far as whether a person is sentenced to death or is given a life sentence?

Can you still follow that law?

MS. REILLY: Yes, I believe I can.

(R. 148).

MR. McHALE: In this case, will you be able to follow the law that Judge Tanksley instructed you and the rest of the jury on, in making your determination?

MRS. MAIRS: Yes, I will.

(R. 167).

MR. McHALE: Do you feel that you could follow His Honor's instructions in recommending the sentence to the Court, whether it be life imprisonment or death in the electric chair?

MR. LINGLE: I feel I could, yes.

MR. McHALE: Could you still follow those instructions of law even though you may not personally agree with them, or think they should be otherwise in determining or as a determinant of what sentence should be imposed?

MR. LINGLE: I feel I can.

MR. McHALE: Will you accept the law in this state as it is; accept the law from Judge Tanksley and follow it based on the evidence that you hear in this case?

(R. 182-83)(emphasis added).

MR. McHALE: And by that I mean not decide

what sentences should be from your own opinions or your own beliefs, but the instructions the Court gives you, and base that on the evidence that you hear about what happened.

(R. 187).

MR. McHALE: In this particular case, His Honor will instruct you on what the law is as to what sentence you should return. I believe he will tell you that your decision must be guided by the law that he gives you.

Will you follow it, even though, perhaps, you may, after hearing the law, say to yourself, "I don't like it. I think it should be something else," or whatever you may say -- will you still follow what he tells you the law is and use that to base your decision to?

(R. 196)(emphasis added).

MR. McHALE: Will you follow it even though you disagree with it, and you feel that the law should be otherwise -- that it is too strict or too harsh or whatever feelings you may have against what the law is that he tells you, would you still follow it?

(R. 204).

MR. McHALE: . . . which means that you are not completely a free man; that you are bound to follow the law . . .

(R. 205).

MR. McHALE: Will you follow His Honor's instructions of what the law is, in arriving at your recommendation? Will you base your recommendation on the law and the evidence?

MR. PORTELA: Yes.

MR. McHALE: Can you still do that, even though you may say to yourself, "I don't like the law, and I think it is too harsh. I think it is stupid, and I don't believe that anyone should have to come under this set of laws"? Would you still follow it, even though you might say that to yourself?

(R. 211).

MR. McHALE: Let me ask you this, Mr. McMillian, Judge Tanksley is going to give you the law and that law will include certain factors which must be considered in determining what sentence the defendant should receive. <u>Will you abide by that law and use those factors to determine what your recommendation will be,</u> . . .

(R. 217, 218)(emphasis added).

MR. McHALE: In this particular case, will you follow the instructions of the Court in making your determination as to what recommendation to give to Judge Tanksley, as a punishment?

MR. SHERF: Yes.

MR. McHALE: And can you follow the

instructions that he gives you as to the law, even though you may very strongly disagree with the law as it is today, and may feel that it is unfair and it should be something very different? Can you and will you still follow the instructions of the law and use it to base your decision on?

MR. SHERF: Yes.

(R. 223, 224).

MR. McHALE: . . . Do you understand that if there is any mercy to be given in this case, only Judge Tanksley can do that? Do you understand that, and that as a juror, you are not allowed to offer mercy, but you must follow the law in this case? . . .

MR. SOLOMON: Objection . . . we feel that it is not improper to say that a man seeks mercy and that the Court will, even though not bound to follow the jury, will follow the jury . . .

THE COURT: . . . I think the State has a right to ask individual jurors if they will follow the law as given by the Court . . . the question is that they must follow -- ask them if they agree to follow the law as given by the Court and apply it to the facts . . .

(R. 237-39).

A juror could not serve unless he or she agreed to violate Lockett. Mr. Thompson's sentencing proceeding was doomed before

it began. The jurors were required to promise that they would not consider the things they thought should be mitigating. A guilty plea could not be considered to be mitigating. "[F]eelings that you are called upon to use in your everyday job" were forbidden. Intoxication, drug ingestion, "any type of mental illness" -- these could not be considered. Mercy, compassion, understanding, were all precluded.

This is not just Lockett error: Mr. Thompson was denied a fair and impartial fact-finding proceeding. Imagine the following juror promises:

> "I will not consider the defendant to be innocent until proven guilty."
>
> "I will require the defendant to prove innocence."
>
> "I will presume that the defendant is guilty."
>
> "I will not require all the elements of the offense to be proven beyond a reasonable doubt."
>
> "I will require the defendant to testify, or I will convict him or her."
>
> "I will convict the defendant because he did not confess."
>
> "I will convict the defendant because he is represented by counsel."

None of these promises could be required, and if they occurred, reversal would be automatic.

Here, the jurors were required to state that they would

ignore just as basic a, or perhaps an even more factual, constitutional right. Jurors were required to say

> "I will not consider all mitigation that I think is important."
>
> "I will not consider something to be mitigating unless it is in the statutory list."
>
> "I will not be compassionate, merciful, or tolerant."

Rather than such ironclad beliefs being a proper reason for juror excusal "for cause," these promises became preconditions for jury service. The jury was consequently biased and skewed in favor of the state, and was chosen in a manner that absolutely violated the sixth, eighth, and fourteenth amendments.

Mr. Thompson was entitled to "jurors who [would] conscientiously apply the law and find the facts." Wainwright v.Witt, 469 U.S. ___ (1985), jurors who were "impartial" and "indifferent", Irvin v. Dodd, 366 U.S. 717, 723 (1961), and jurors who were not death-prone. In fact, the jurors, in order to serve, were required to promise not to follow the requirements of Lockett, and so not to "apply the law," were required to be partial and favor the state, and, consequently, the jurors were death prone. This is unacceptable in a capital sentencing proceeding, and injected an intolerable degree of risk that death was imposed in this proceeding despite the existence of factors calling for a lesser punishment. This violates the Eighth and

Fourteenth Amendments.

The jury plays a critical part in Florida's capital sentencing proceedings. Consequently, the Sixth, Eighth, and Fourteenth Amendment requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...." applies. Even before Duncan v. Louisiana, 391 U.S. 145 (1968), incorporated the Sixth Amendment's jury-trial right into the Fourteenth, it had long been settled that the Due Process Clause assures every criminal defendant the right to have his trial before an impartial tribunal. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). See, e.g., Taylor v. Hayes, 418 U.S. 488, 501 (1974) (citing authorities). Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (per curiam).

Where a State entrusts the determination of guilt or innocence to a jury, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influence." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors ... In the language of Lord Coke, a juror must be... 'indifferent as he stands unsworne.'" Irvin v. Dowd, 366 U.S. 717, 722 (1961); accord, Groppi v. Wisconsin, 400 U.S. 505, 509

(1971).

The courts have long held that any procedure that might predispose a criminal tribunal to convict (or sentence) violates due process. In Tumey v. Ohio, 273 U.S. 510 (1927) the Court held that:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

Id. at 532. See also, Ward v. Monroeville, 409 U.S. 57 (1972); Connally v. Georgia, 429 U.S. 245, 246 (1977) (per curiam).

Applying this constitutional rule to the record in the present case involves a task analogous to evaluating the consequences of pretrial publicity. In both situations, it is necessary to assess the danger that events preceding the presentation of the evidence will impair the jury's ability to judge that evidence fairly and neutrally. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court held that

> [T]he trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

Id. at 362.

This is so because "our system of law has always endeavored to prevent even the possibility of unfairness." In re Murchison,

349 U.S. 133, 136 (1955); accord, Estes v. Texas, 381 U.S. 532, 543 (1975). That basic canon of due process is recognized in a variety of situations which endanger the impartiality of the trier of criminal charges. Id. at 543-44; Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Estelle v. Williams, 425 U.S. 501, 504 (1976). No specific prejudice need be shown.

### B. MR. THOMPSON'S "SENTENCING" JURY WAS MISINFORMED ABOUT ITS SENTENCING FUNCTION AND WAS LED TO BELIEVE THAT RESPONSIBILITY FOR SENTENCING RESTED ELSEWHERE, AND THEREBY THE JURY HAD AN UNCONSTITUTIONALLY DIMINISHED SENSE OF ITS TRUE AWESOME RESPONSIBILITY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT (Claim II).

Information and instructions which mislead or misinform the jury as to its function, role, and, responsibility for the capital sentencing decision violate the Eighth Amendment, Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Mr. Thompson's jury was so misinformed, and his sentence therefore cannot stand under new Caldwell law.

Mr. Thompson's jury was repeatedly told that they could not serve as jurors, and that they would be violating their oath as jurors, if they considered any mitigating evidence which was not specifically addressed by the statutorally enumerated mitigating factors. See Section IIIA, supra. This is, of course, misinformation, and it's misinformation of the most significant

variety -- it goes to the heart of capital sentencing and deprived Mr. Thompson of his constitutionally mandated right to individualized consideration. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper v. North Carolina, 106 S. Ct. 1669 (1986); Zant v. Stephens, 462 U.S. 862 (1983); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Mr. Thompson's jury was also misinformed in a way that led them to believe that full responsibility for the capital sentencing decision lay elsewhere - they were repeatedly told that they were not to worry about mercy, because only the judge, and not they, could and would consider dispensing mercy:

> MR. McHALE: . . . Do you understand that if there is any mercy to be given in this case, only Judge Tanksley can do that? Do you understand that, and that as a juror, you are not allowed to offer mercy, but you must follow the law in this case?
>
> . . .
>
> MR. SOLOMON: Objection . . . we feel that it is not improper to say that a man seeks mercy and that the Court will, even though not bound to follow the jury, will follow the jury . . .
>
> THE COURT: . . . I think the State has a right to ask individual jurors if they will follow the law as given by the Court . . . the question is that they must follow -- ask them if they

> agree to follow the law as given by the Court and apply it to the facts . . .

(R. 237-39). This is exactly the type of misinformation condemned in Caldwell, in that it led the jury to believe that the responsibility for the sentencing decision did not lie with them. Indeed, a jury so instructed could not help but believe that they had no role in the sentencing decision. According to the state at trial, as reinforced by the court, the jury simply could not exercise discretion and recommend mercy. This is a fundamental misstatement of the law and completely derogated the jury's role.

Moreover, here, as in Caldwell,

> the prosecutor's remarks were quite focused, unambiguous, and strong. They were pointedly directed at the issue that this Court has described as "the principle concern" of our jurisprudence regarding the death penalty, the "procedure by which the State imposes the death sentence"

Caldwell, 105 S. Ct. at 2645, quoting California v. Ramos, 463 U.S. 999. As in Caldwell,

> In this case, the prosecutor's argument sought to give the jury a view of its role in capital sentencing procedure that was 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. at 305 (plurality opinion).

Because "[s]uch comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceedings as to violate the Eighth Amendment," Caldwell at 2645, Mr. Thompson's sentence must be reversed unless the State can show that the improper comments "had no effect on the sentencing decision." Id. (emphasis supplied). This the state cannot do.

This claim is cognizable in Rule 3.850 proceedings. First, Caldwell prohibits incorrect comments and instructions which cannot be said to have had no effect on sentencing and which could diminish the sentencers' sense of moral responsibility for its decision. The jury is "sentencer" in Florida, because the recommendation is entitled to great weight. Caldwell is new and controlling law which is cognizable in 3.850 proceedings -- statements by the prosecutor or court that diminish the jury's sentencing responsibility violate the eighth amendment to the United States Constitution:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognized the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore by vacated.

Caldwell at 2646. The Eighth Amendment was so violated here, and

Mr. Thompson's sentence therefore cannot stand.

The state argues that Caldwell is not new law, having been around in Florida since 1918. This same claim by the state has fallen on its face in two previous cases. In Adams v. Wainwright, the United States Court of Appeals for the Eleventh Circuit held that it was not an abuse of the writ for Mr. Adams to raise that claim for the first time in a successive federal habeas corpus actions. Of particular relevance is the following language from Adams:

> We find no evidence that Adams' failure to raise this claim in his earlier petition was the result of inexcusable neglect or deliberate withholding. The Caldwell decision, upon which the claim is based, clearly was not available to Adams at the time he filed his first petition in September 1984. Indeed, the Supreme Court did not grant certiorari in Caldwell until after the district court had denied Adams' first petition. Cf. Bowden v. Kemp, 793 F.2d 273, 275 & n.4 (11th Cir. 1986)(finding abuse of the writ when previous petition was filed after Supreme Court had granted certiorari in case upon which petitioner relied). Nor is the Eighth Amendment argument raised by Adams in this petition one of which he should have been aware at the time of filing his first petition. This claim is not one which had been raised and considered in a number of other cases at the time of that petition. Cf. Witt, 755 F.2d at 1398 (finding abuse of the writ when claim raised in case upon which petitioner relied "had been raised long before [that] case" so that failure to present the claim in his first petition was "necessarily attributable to abandonment or inexcusable neglect").

> Nor did Supreme Court precedent at the time of Adam's first habeas petition make it evident that statements such as those made by the trial judge in this case implicated the Eighth Amendment. In fact, if anything, that precedent indicated that the contrary was true.

Adams, No. 86-3207 (11th Cir. Nov. 13, 1986) as modified, April 23, 1987, slip op. pp. 2-3. That court also discussed the propriety of raising this type of claim in this forum:

> In fact, Adam's Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So. 2d at 927 (genesis of Rule 3.850 procedure was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law "where unfairness was so fundamental in either process or substance that the doctrine of finality has to be set aside. . . . .
>
> Further, we find that Adams has established cause and prejudice for any procedural default resulting from his failure to raise this claim on direct appeal. When "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's procedural default, the petitioner has cause for the failure to raise the claim in accordance with the state procedural rule. Reed v. Ross, 468 U.S. 1, 16 (1984). Conversely, when the "tools to construct [a] constitutional claim" are available, then the claim is not sufficiently novel to constitute cause for failure to comply with state procedural rules because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle, 456 U.S. at 133-34. "[T]he question is not whether

> subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S. Ct. 2661, 2667 (1986). Because we find that Adams' Caldwell claim was so novel at the time of Adams' trial in October 1978 and his sentencing and appeal in early 1979 that its legal basis was not reasonably available at that time, we find that Adams has established cause for any procedural default.

Id., pp. 9-10. Accord Mann v. Dugger, No. 86-3182 (11th Cir. May 14, 1987).

The Adams court completely rejected the proposition that "since the claim could have been constructed it is not a novel claim. Reed v. Ross supra." Response, p. 4. As Adams holds, Reed requires relief in this Court.

C. MR. THOMPSON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS DENIED THE COMPETENT ASSISTANCE OF MENTAL HEALTH EXPERTS (Claim X)

Mr. Thompson is brain damaged. Because he did not receive any mental health expert assistance in preparation for his 1978 plea and sentencing, and because his psychiatric evaluations that were conducted in 1976 were incompetently performed, his debilitating mental condition was not presented in 1978, resulting in myriad constitutional violations. The rule 3.850 motion contains a detailed analysis of how Mr. Thompson's illness crippled him and why the claims presented are cognizable. The claim will only be briefly discussed here, sufficient to

illustrate that a stay of execution and an evidentiary hearing were required, but the heart of the argument is contained in the motion, and the reader is referred there for the complete analysis.

It is a matter of settled record that Mr. Thompson's trial attorney committed unreasonable omissions and acted quite unreasonably regarding mental health and background issues:

> [H]ere, Solomon did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a matter of deference to Thompson's wish. Although Thompson's directions may have limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially disturbing in this case where Solomon himself believed that Thompson had mental difficulties. An attorney has expanded duties when representing a client, whose condition prevents him from exercising proper judgment. See Code of Professional Responsibility EC 7-12 (Fla. Stat. Ann. 1983). We conclude that Solomon's failure to conduct any investigation of Thompson's background fell outside the scope of reasonably professional assistance.

Thompson v. Wainwright, 787 F.2d at 1451-52. Ake v. Oklahoma was not law at the time of the federal district court action, however, and nothing was challenged under Ake. Mental condition was raised in two ways: (1) that trial counsel was ineffective

for failing to discuss mitigation with the 1976 examiners, and (2) that the trial judge should have conducted a hearing on competency based on the 1978 record. On appeal, Ake had issued. Counsel argued that the Ake required the appointment of a 1978 expert, and the claim was rejected.

The Mason claim has not been addressed. In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court recognized the due process clause entitles an indigent defendant to a professionally competent, court-funded evaluation of his capacity to stand trial. Mr. Mason's competence to stand trial, as well as his mental status at the time of the offense, had been evaluated prior to trial by three psychiatrists. All of them found Mr. Mason competent and sane, but on the basis of their reports, apparently did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior. . .," id. at 736, or his "history indicative of organic brain damage." Id. at 737. This history had not been "uncovered by defense counsel" during trial proceedings and was proffered for the first time in Mr. Mason's rule 3.850 proceeding. Id. at 736. Recognizing that the evaluations of Mr. Mason's mental status would be "flawed" if they "neglect[ed] a history" such as this, id. at 736-37, this Court remanded Mr. Mason's case for an evidentiary hearing in order to resolve the question, raised by the evidence proffered, of whether Mason's due process rights have been protected through

valid evaluations of his competency." Id. at 735. Accordingly, the Court recognized that the due process right to court-funded psychiatric evaluation includes the right to a professionally reliable and "valid" evaluation.

While Mason established the right to a valid evaluation of competence to stand trial, the right is equally available when mental status at the time of the offense is the focus of the evaluation. The due process clause itself requires protection of the interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake v. Oklahoma, ___ U.S. ___, 105 S. Ct. 1087, 1094-97 (1985). As the Court explained in Ake, the provision of competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," id. at 1093, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them," id. at 1096. Accordingly, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense." Id. at 1097 (emphasis supplied). Given its concern for fairness and accuracy, the Court plainly intended the right of "access to a

competent psychiatrist who will conduct an appropriate examination" to include access to a psychiatrist who conducts a professionally competent examination.

Independent of the requirements of the due process clause itself, Florida has created a state law entitlement to the valid evaluation of mental status that is protected by the due process clause. In Florida, a criminal defendant is entitled to evaluation of his or process mental status upon request unless the trial judge is "clearly convinced that an examination is unnecessary. . . ." Jones v. State, 362 so. 2d at 1336. Florida law, therefore, mandates evaluation of mental status upon the existence of specified factual predicates. When such an interest is created by state law, it is protected by the due process clause. See Hewitt v. Helms, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest"); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979)(due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual"). Since the function of the due process clause in this context is "to insure that the state-created right is not arbitrarily abrogated," Wolff v. McDonnell, 418 U.S. 539, 557 (1974), it protects a Florida defendant against professionally

incompetent and invalid evaluation of his or her mental status. Because such evaluations would be the functional equivalent of no evaluation at all, the State must be required to provide professionally competent and valid evaluation in order to effectuate the right it has created.

Accordingly, Mr. Thompson was entitled to a valid and professionally competent evaluation of his mental status at the time of the offense, at the time of "trial" and capital sentencing, and at the time of all events relevant to mitigation. In Mason v. State this Court set forth the criteria for determining whether an evidentiary hearing is necessary in order to decide a claim like Mr. Thompson's. If three criteria are satisfied, an evidentiary hearing must be held. First, the defendant must be shown to have a history of significant mental illness or disorder, such as mental retardation, drug abuse, psychotic behavior, or organiz brain damage. 489 So. 2d at 736-37. Second, the record must reveal at least the possibility that this history of mental illness was not considered by the evaluating psychiatrist. Id. at 736. Third, there must be a showing that, had the defendant's history been known and considered, there is at least a possibility that the examining psychiatrist would have reached a different conclusion as to the defendant's mental status. Id. The allegations in Mr. Thompson's Rule 3.850 motion demonstrate that an evidentiary

hearing is necessary under these criteria.

Similar to Mr. Mason, Mr. Thompson has "a history indicative or organic of brain damage." Id. at 737. Also similar to Mr. Mason's case, the history indicative of Mr. Thompson's organic brain damage was apparently not known or considered by the evaluating psychiatrists. Finally, also like Mr. Mason Mr. Thompson has demonstrated a likelihood that the evaluating psychiatrists' conclusions would have been different had they known anout and considered his medical and psychiatric history. With full knowledge of this history, an expert psychiatrist, neurologist, and psychologist have discovered organic brain damage. Accordingly, as in Mason v. State, an evidentiary hearing must be held "in order to resolve the question, raised by the evidence proffered [in the Rule 3.850 motion], of whether [Mr. Thompson's] due process rights have been protected through valid evaluations of his [mental status at the time of the offense]." 489 So.2d at 735.

In light of Mason v. State, there can be no legitimate question about the propriety of raising this claim in a Rule 3.850 proceeding., Like a claim under Brady v. Maryland, 373 U.S. 83 (1963), Mr. Thompson's claim is based on the ground that he was convicted in violation of the Due Process Clause of the Constitution, and is based upon facts that he did not have knowledge of until well after his conviction was final. See

Smith v. State, 400 So.2d 956, 962 (Fla. 1981). Such a claim is uniquely appropriate for presentation in a Rule 3.850 motion. Id.

The lower court simply did not like this Court's Mason decision. This trial court had "one concern in the case and one concern only and that's the accuracy of the examination given to this gentlemen consisting of three [sic] court appointed psychiatrists who in fact viewed him for 30 minutes. . . ." The court continued:

> Now there is a differene in time, there is a difference in statute and there's some ten or so years of incarceration at the time these last bunch of tests are given. They say in the test in the conclusion of them as this Court read them that per se he was incompetent at the time of trial or at the time of the plea and its trial on the sentencing phase.
>
> The Court has concern with that. The Court has concern with the diagnosis in the sense that it is now retrospectively made in over ten years by psychiatrist conducting tests today in view of the examination of three psychiatrists often used by this Court at the time of the sentencing procedure. And I fail to see under which, under how this Court can measure a subsequent mental condition as it relates only to the issuance of the plea and the issuance of the sentence and the effectiveness of counsel in examination based on examinations conducted ten years hence.

In fact, one of the examinations proffered was conducted in 1984, and, in fact, the effect on sentencing was before the

judge. The judge simply did not wish to apply Mason law, because "I fail to see under which, under how this Court can measure a subsequent mental condition as it relates only to the issuance of the plea and the issuance of the sentence and the effectiveness or ineffectiveness of counsel in examinations conducted ten years hence." Mason says how, and a stay was proper.

### D. MR. THOMPSON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND UNDER BRADY V. MARYLAND, WERE VIOLATED BY THE STATE'S WITHHOLDING OF FAVORABLE AND MATERIAL EVIDENCE (Claim IV).

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967), Agurs v. United States, 427 U.S. 97, United States v. Bagley, 105 S. Ct. 3375 (1985). Thus the prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, 105 S. Ct. 3375 (1985). Brady claims are clearly cognizable in a motion for post-conviction relief in Florida. See, e.g. Arango v. State, 467 So.2d 692 (Fla. 1985); Ashley v. State, 433 So. 2d 1263 (Fla. 1st DCA 1983); Press v. State, 207 So. 2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So. 2d 618 (Fla. 3d DCA 1965); Wade v. State, 193 So. 2d 454 (Fla. 4th DCA 1967), and an evidentiary hearing is proper.

In response, the state advanced the most novel of propositions -- speaking of the evidence hidden by the state, the state argued that Mr. Thompson cannot bring this claim because he should have found what was hidden sooner. It is incredibly disingenuous of the state to hide material facts, and then to complain because petitioner has not explained "why this evidence could not have been obtained earlier." Response, p. 12. The state then concludes: "[w]ithout a showing of due diligence or that the information was not available previously the claim is barred." Id. Petitioner, upon an evidentiary hearing will demonstrate both.

Regardless, this is a constitutional claim demonstrating innocence in fact. In such circumstances, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ...." Murray v. Carrier, 106 S. Ct. at 2650. A constitutional violation raises a concern over "actual innocence" if it "serve[s] to pervert the jury's deliberations concerning the ultimate question" before it. Smith v. Murray, ___ U.S. ___, 106 S. Ct. 2661, 2668 (1986). To demonstrate this concern, the habeas petitioner must show "'a fair probability that ... [in the absence of the constitutional violation] ... the trier of the facts would have entertained a reasonable doubt of his guilt.'" Kuhlmann v. Wilson, ___ U.S. ___, 106 S. Ct. 2616, 2627 n.17

(1986)(plurality opinion). A plurality of the Court would apply only the "actual innocence" requirement in the context of deciding whether to hear a successive habeas petition. Id. at 2624-27. No Justice would reject, however, the basic rationale that innocence claims are at least one type of ground appropriate for successive consideration. The "fair probability" determination of Kuhlman requires "references to all probative evidence of guilt or innocence," Id. at 2627 n.17 (emphasis in original), including "'evidence ... alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial....'" Id. When analyzed in these terms, the failure of the jury and court to hear the evidence impeaching outlined in the petition, "probably resulted in the conviction of one who is actually innocent....," and should be heard on their merits by this Court.

Solid facts specifying precisely why counsel could not have known the additional facts alleged here were pled in the 3.850 motion. The new facts were not withheld by counsel of Mr. Thompson during the first post-conviction proceedings. There can be no fair determination whether the motion is an abuse of Rule 3.850 without a hearing. See Sanders v. United States, 373 U.S. 1, 10-11, 17-18 (1983); Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982). If the circumstances precluding counsel's and

Mr. Thompson's ability to develop the facts as alleged in the motion to vacate are not sufficient to warrant an evidentiary hearing, and ultimately renewed consideration of his effective assistance claims, then Florida in effect has no forum for successive motions. See 28 USC sec. 2254(d). This result is not what is intended or contemplated in the successor bar in Rule 3.850. Mr. Thompson is entitled to an evidentiary hearing at least to demonstrate there is good cause for the failure to previously raise the newly-discovered facts.

1. THE CONSTITUTION PROVIDES A BROADLY INTERPRETED MANDATE THAT THE STATE REVEAL ANYTHING THAT BENEFITS THE ACCUSED.

Mr. Thompson alleged that the State's action of withholding exculpatory evidence "violated the sixth, eighth and fourteenth amendments." An explanation of how each amendment's guarantees were denied Mr. Thompson is appropriate. The cornerstone is the fourteenth amendment: hiding evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory

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

All these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in this case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). "Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, No. 85-1347, slip op. at 10 (U.S. S. Ct. February 24, 1987).

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

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

Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986). Thus, it is with

a very careful eye that the State's handling of star-witness co-defendant's statements should be scrutinized.

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

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

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

Counsel for Mr. Thompson requested pretrial "any and all evidence in the possession of the State which is favorable to the Defendant and material to the issue of guilt or innocence or to punishment," including "any information or material which would tend to . . . impeach the testimony of any witness whom the state intends to call." (ROA 178-79). Exculpatory and material evidence is evidence of a favorable character for the defense which creates any reasonable likelihood that the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence

because suppressed evidence relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence is one and the same.

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

Second, materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427

U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

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

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant or sentence him to death. Chaney v.

Brown, 730 F.2d 1334, 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981). For, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or a reasonable doubt as to his guilt, or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is for a jury, and not th[e] Court to determine guilt or innocence," Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981), materiality is established and reversal required once the reviewing court concludes that the suppressed evidence "might" or "could" have affected the outcome on the issue of guilt . . . [or] punishment," United States v. Agurs, supra, 427 U.S. at 105, 106, and that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [either phase of the capital] proceeding would have been different." Bagley, supra, 105 S. Ct. at 3383.

Promises and threats to witnesses are classically exculpatory. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Any motivation for testifying and all the terms of pretrial agreements with witnesses must be disclosed to the defense. Giglio. Impeachment of prosecution witnesses is often, and especially in this case, critical to the

defense case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a co-defendant witness:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Bagley, 105 S. Ct. at 3300 (emphasis added). And so it is here - whatever Barbara Garritz was promised or threatened with, and whatever effect those threats or promises had on her testimony, should have been disclosed.

2. THE STATE FAILED TO PROVIDE MATERIAL EVIDENCE TO THE DEFENSE.

The withheld evidence falls mainly into two areas. First, the thinly veiled threats against Mrs. Garritz to procure her testimony, discussed in the Motion, is clearly material and

favorable evidence. Second, information within the control of the state which tended to show Rocco Surace's documented history of violence, intimidation, and therefore his greater culpability, was the epitome of exculpatory evidence.

a. Material Evidence Relating to Barbara Savage Garritz

Barbara Savage Garritz was the only eye witness to testify for the state. Her testimony formed the basis for one of the two aggravating circumstances found by the trial judge (against two statutory mitigating circumstances). Barbara Garritz was present during the entire process which led to the death of Sally Ivester. She was present, according to her testimony, of her own free will: no one threatened her in any way to force her to stay in the room (R. 415, 426). Mrs. Garritz left the room at several points to buy food, beer, cigarettes, and medicine (R. 417), yet never made any attempt to call the police or seek assistance for the victim during her absences from the room. When the victim begged for water, Mrs. Garritz refused to give her any, telling her instead that she would "have to help herself." (R.425). Mrs. Garritz helped remove evidence of the beating, cleaning blood off the floor (R. 415) and later disposing of the chain and other items which had been used in the beating (App. E). The day after the beatings, she remained alone in the room for some period of time with the victim (R. 433), yet made no attempts to

seek help.

Although the defense, and thus the jury, was never so informed, it is now apparent that Mrs. Garritz's testimony was procured through thinly-veiled threats on the part of the state. Mrs. Garritz has recently informed undersigned counsel that George Yoss, the prosecutor in Mr. Thompson's case, told her that the grand jury had been very "disturbed" by her testimony, but that he had convinced them not to indict her so that she could be a witness. (See Affidavit of Barbara Garritz, App. Q). Mrs. Garritz also states that Yoss told her that if she asked to be represented by a lawyer, he would have her arrested. (Id.). Detective Ojeda, the homicide officer who investigated the crime, also threatened her with similar consequences if she did not testify as she had agreed. Mrs. Garritz's testimony was carefully tailored to avoid the consequences threatened by the state. (See Id.).

Mrs. Garritz was the state's key witness. The information and language which the trial judge used in his sentencing order to support his finding that the crime was heinous, atrocious, or cruel was taken directly from her testimony. (See Sentencing Order). Because defense counsel was not informed that the motive for Mrs. Garritz's testimony was based on something other than simply her desire to tell the truth, neither was Mr. Thompson's sentencing jury. The withheld information regarding the threats

employed by the state to obtain the testimony of Mrs. Garritz could have effectively impeached her testimony and thereby cast an entirely different light over the entire proceeding.

Evidence which tends to impeach a critical state witness is clearly material under Brady. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwright, 785 F.2d (11th Cir. 1986). This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such sublet factors as the possible interest of a defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). It matters not that the material evidence withheld by the state was relevant to the sentencing decision, rather than to guilt or innocence; in fact, the withheld evidence in Brady was relevant to sentencing.

The trial judge here found two aggravating circumstances and two statutory mitigating circumstances. Disregarding for the moment the fact that judge and jury were precluded from considering nonstatutory mitigating evidence, see Claim I, supra, this was a close case. Two aggravating circumstances against two mitigating circumstances is hardly an overwhelming mandate in favor of death. Under such circumstances, any evidence tending to impeach the critical testimony of Barbara Savage Garritz could not but have effected the balance, and therefore the outcome.

b) Material Evidence Relating To Rocco Surace

Rocco Surace was indicted for the same crime as Mr. Thompson, but plead not guilty and was tried separately. Mr. Surace did not receive the death penalty, despite ample indication that he was the instigator, the leader, and the primary participant in the crime, and therefore the more culpable.

Unbeknownst to the defense, Surace had a long and documented history of violence and intimidation. This information was not disclosed to the defense. Had it been, trial counsel would have been aware of a history of sexual violence; torture for purposes of coercion; a predilection for beating women; and the fact that people who knew him generally feared Rocco Surace.

This evidence could clearly have been material to establishing Rocco Surace's greater culpability, and could have been so used at the guilt-innocence phase of trial, as well as sentencing. Evidence which tends to point to another as the guilty party or the prime mover in the offense is always admissible. See Washington v. Texas, 388 U.S. 14 (1967).

Under Florida law, evidence of Surace's history of sexual violence and intimidation would have been admissible at the guilt phase of trial. "One accused of a crime may show his innocence by proof of the guilt of another". Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); Pahl v. State, 415 So.2d 42 (2d DCA

1982). In Moreno, the court reviewed where the trial court refused to permit the defense to show the probability that the state's key witnesses actually committed the crime because they had committed a similar crime some months later. Holding the defendant was not strictly bound by the Williams rule in Florida, the court reversed, finding that in such circumstances "all doubt should be resolved in favor of admissibility." Id. at 1225. See also Chandler v. State, 366 So. 2d 64 (Fla. 3d DCA 1979) ("where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission"). See also, Fla. Stat. 90.404, 90.405.

Had defense counsel been in possession of this information prior to trial, he could have built a powerful case of domination by a demonstrably violent man, a defense which could well have resulted in a jury returning a verdict of guilty of a crime of a lesser degree. Had defense counsel possessed this information, there is more than a reasonable probability that the decision to plead would not have been made, and that the outcome would therefore have been different.

There is no question of the materiality of this information to the sentencing decision. See generally Green v. Georgia, 442 U.S. 95 (1979); Chaney v. Brown, 730 F.2d 1334 (8th Cir. 1984). The use of the above mentioned materials at Mr. Thompson's sentencing proceeding would have established Surace's psycho-

sexually violent character and his capacity to orchestrate and control the sort of episode which led to the death of Sally Ivester. This evidence would have been clearly relevant to the statutory mitigating circumstance that the defendant acted under the substantial domination of another person. See Fla. Stat. 921.141 (6)(e). There is no question as to the admissibility of the materials, as all relevant evidence relating to mitigating circumstances is admissible in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 106 S.Ct. 1669 (1986). William Thompson had absolutely no previous history of violence and no significant prior criminal record: by contrast, Rocco Surace had a long and sordid history of criminal violence, and an effective comparison of the two would have shown Surace's mental and physical domination and Mr. Thompson's lesser culpability. Without the materials withheld by the state, the defense could not accomplish such a comparison, and the jury remained uninformed of Surace's violent and brutal character.

The trial judge found two statutory aggravating and two statutory mitigating circumstances. See Sentencing Order. There can be no doubt that in such a situation, the finding of an additional mitigating circumstance could not but have affected the balance in favor of life. There can thus be no doubt that the withheld evidence was material to Mr. Thompson's sentence of

death. It certainly cannot be said that the withheld evidence would have had no effect on the outcome. Neither can it be doubted that there is a reasonable probability that the outcome of the sentencing proceeding would have been different had the withheld evidence been provided to the defense.

### E. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS (Claims VI-IX).

In his first Rule 3.850 motion, Mr. Thompson was represented by his trial lawyer, who did not raise his own ineffective assistance as an issue. The second Rule 3.850 motion filed was dismissed without prejudice. The claims of ineffective assistance of counsel are thus excusably raised for the first time here -- trial counsel could not challenge his own trial actions, and no other motion has been filed which bars the claims now.

Mr. Thompson demonstrates in detail that trial counsel was prejudicially ineffective on a number of respects. The motion demonstrates that counsel failed inter alia, to investigate the facts and law regarding Mr. Thompson's competency to enter a plea and stand trial, to investigate the facts and circumstances surrounding the offense (particularly the background and character of Mr. Thompson's co-defendant) and that trial counsel failed to investigate and familiarize himself with basic

substantive and procedural criminal law and law in mitigation of punishment. The facts will not be repeated. The applicable law compels that an evidentiary hearing be conducted, and that relief be granted.

Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). When confronted "with both the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S. 300, 303 (1970), a defendant is entitled to counsel who will "bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 104 S. Ct. at 2065. The constitutional right is violated when the "counsel's performance as a whole," United States v. Cronic, 104 S. Ct. 2039, 1046 n.20, or through individual errors, Strickland, 104 S. Ct. 2064, falls below an objective standard of reasonableness, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2062. Petitioner must plead and prove 1) unreasonable attorney conduct, and 2) prejudice. Mr. Thompson has.

Investigation is the sine qua non of effective assistance of counsel. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). As detailed in the ABA Standards for Criminal Justice, "The

Defense Functions," Standard 4-4. (2nd Ed 1980), the duty to investigate exists regardless of a client's admissions:

> The lawyer's duty to investigate is not discharged by the accused's admission of a guilt to the lawyer or by the accused's stated desire to enter a guilty plea. The accused's belief that he or she is guilty in fact may not often coincide with the elements that must be proved in order to establish guilt by law.... The accused may not be aware of the significance of facts relevant to intent in determining criminal responsibility. Similarly, a well-founded basis for suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities will be determined by the lawyer's factual investigation, for which the accused's own conclusions are not a substitute.

Id. Here, counsel did no or grossly inadequate investigation, and so could offer Mr. Thompson no meaningful advice before he pled guilty, nor take the steps necessary to prevent his incompetent client from so pleading.

The duty to investigate means the duty to conduct an independent investigation. Goodwin v. Balkcom, supra; ABA Standards for Criminal Justice, "The Defense Function," (2nd Ed. 1980)(Standard 4-4.1). This duty attaches regardless of a client's statement to the lawyer of facts constituting guilt; the lawyer is the professional, and his or her investigation will determine whether and how the State (not the client) is able to prove every element of the offense charged beyond a reasonable doubt.

Finally, the most common and easiest defense to "ineffective assistance of counsel" claims is to counter with an allegation that the client lied to counsel, or was uncooperative, or controlled the litigation by dictating who could and could not testify. Counsel's duties should produce actions pretermitting such a question. Courts do not allow attorneys to "dodge" their failings by pointing to their clients. Effective counsel is not "a mere lackey or mouthpiece," but is in charge and has the responsibility for the conduct of the trial, including the selection of witnesses to be called. Decisions on whether to cross-examine a witness, and what avenues of investigation to pursue are not decisions for the client, but for the professional, who exists to advise, not mimic, the client. See United States v. Goodwin, 531 F.2d 347, 351 (6th Cir. 1976)("This appears to be a case of counsel relying on his client for legal advice. This is hardly reasonable representation."); see also Defense Function, Standard 4-4.1, Commentary, page 4.54; Standard 4-1.1, Commentary 4.9 (The lawyer is the client's advisor and representative, "not the accused's alter ego.")

It would never be appropriate to accede to the demands of a client when the client has not had the benefit of adequate advice, dependent on independent investigation. "[C]ounsel's investigation . . . [can] enable him [or her] to discuss with [defendant] prior to trial the implication of[the client's]

position." Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978). Advice requires investigation, and a client's decisions must be made after proper counsel. "Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advice." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983). "After informing himself fully on the facts and the law, the lawyer should advise the accused . . .", Defense Function, 5.1(a), and decisions made by clients without advice based on independent investigation are decisions made without "the guiding hand of counsel." Powell v. Alabama, 287 U.S. 45 (1932).

Finally, no attorney can hide behind the decisions of a client whose competency to decide legal questions is a matter of conjecture. "Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect." Brennan v. Blankenship, 472 F.Supp. 149, 156 (W.D. Va. 1979).

Of course, counsel's duty was to investigate mental condition as well. Counsel should have known of Mr. Thompson's long standing brain damage, the influence of Rocco Surace on his already affected psyche, and his consequent incompetence to enter a plea.

A mentally ill, mentally retarded, brain damaged, or insane client requires different treatment from reasonably competent

counsel than does a "normal" client. Preparation and investigation in such cases likewise takes on added dimensions. Mental health and mental state issues permeate the law, and careful investigation and assessment of mental health is necessary before strategy decisions are made.

While certain decisions are for the client to make, it is the lawyer's duty properly to advise a client after appropriate investigation. Thus, when 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); Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) or mental circumstances relevant to sentencing, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), ineffective assistance is demonstrated.

The sixth amendment right to counsel is inextricably entwined with the right to expert psychiatric assistance. There is in fact a critical dependency between the right to effective assistance of counsel and the separate right to competent mental health assistance for a criminal defendant. Mental health experts are essential for the preparation of a defense and for sentencing whenever the State makes mental health relevant to those issues. Ake v. Oklahoma, 105 S.Ct. 1087 (1905). This

independent due process right is necessarily enforceable through the right to effective counsel -- what is required is a competent mental health evaluation, and it is up to counsel to obtain it. Blake at 529. Thus, "where the facts known and available, or with minimal diligence accessible, to defense counsel raise a reasonable doubt as to defendant's mental condition, counsel has an affirmative obligation to make further inquiry." Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978) (case below 430 F.Supp. 107, 111 (E.D. Va. 1977).

Finally, as this Court has very recently recognized, independent investigation is essential to the proper resolution of complex mental health issues:

> 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, 736 (Fla. 1986). Independent data must be gathered by counsel, and then provided to experts. Blake, supra. When it is not, the sixth and fourteenth amendments are violated.

## V. CONCLUSION

The order of the circuit court, denying Mr. Thompson's motion for post-conviction relief, should be reversed. All matters raised in the Rule 3.850 motion and memorandum of law are incorporated herein and no claim is waived.

RESPECTFULLY SUBMITTED,

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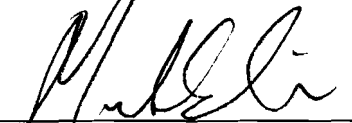
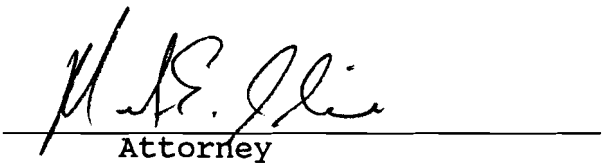
By: 
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by HAND DELIVERY to Robert Butterworth, Attorney General, Department of Legal Affairs, The Elliot Building, 401 South Monroe Street, Tallahassee, FL 32301, this 2nd day of July, 1987.



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