IN THE

SUPREME COURT OF FLORIDA

CASE NO. 70,835

ROBERT ANTHONY PRESTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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[CORRECTED BRIEF]

PRELIMINARY STATEMENT

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

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Mr. Preston was initially arrested and taken into custody in Seminole County, Florida, on January 10, 1978, for throwing a beer bottle at a car (R. 1009, 1468). While in custody, on January 11th, Mr. Preston was arrested in connection with the death of Earline Walker, who had been killed on January 9th. Mr. Preston was subsequently charged with, inter alia, premeditated and felony murder.

Pretrial, the defense challenged the admissibility of physical evidence obtained from Mr. Preston's home during a search purportedly consented to by his mother (R. 2262-76, 2280-81). The hearing court suppressed (R. 2316), and the State filed an interlocutory appeal in the Fifth District (R. 2371). The Fifth District transferred the matter to this Court, which declined jurisdiction. State v. Preston, 376 So. 2d 3 (Fla. 1979). The Fifth District, in State v. Preston, 387 So. 2d 495 (Fla. 5th DCA 1980), then reversed the suppression order.

Shortly after the trial court had suppressed the evidence seized from Mr. Preston's home, the State brought him to trial on the bottle-throwing charge. The charges in that case were elevated (by amended information) on June 9, 1978, to one felony count of throwing a deadly missile at an occupied vehicle, Fla. Stat. sec. 790.19, and one count of criminal mischief. After a jury trial, Mr. Preston was convicted. Judgments of conviction and sentence were entered on April 1, 1980. Mr. Preston was sentenced to six years.

Mr. Preston's trial on the capital charges commenced on June 1, 1981. The State presented exclusively circumstantial evidence to support its theory that Mr. Preston went into a convenience store and forced the clerk to turn over the contents of a safe, then left the store with her, and, later, killed her in an open field by inflicting multiple stab wounds. The prosecution was primarily based on the testimony of forensic experts, and on those experts' evaluation of physical evidence. There was no direct evidence connecting Mr. Preston to the offense: no inculpatory

statements; no identification evidence; no accomplice testimony.

During the State's case, a law enforcement officer who had processed the victim's car testified that among the items found in the car were a set of keys with a tag bearing the name "Marcus Morales," which was found in the ashtray (R. 690). Defense counsel had never heard the name, nor knew of the keys. During cross-examination of the remaining state witnesses, he attempted to ascertain the identity of "Marcus Morales," but no one was familiar with the name (See, e.g., R. 719, 945, 1085, 1112, 1119, 1372, 1380). Police officers testified that they had made no attempt to ascertain Morales' identity or whereabouts (R. 691, 1212).

Defense counsel presented Mr. Preston's testimony, and the testimony of a psychiatrist in support of the defense of temporary insanity, induced by chronic PCP abuse (R. 1446-1606). The doctor utilized to support this defense was admittedly not familiar with PCP or its effects (R. 1563-66), and counsel's requested insanity defense instruction was ultimately denied by the trial court (see R. 1729, 1750, 1906-07, 2691-94). The jury returned a guilty verdict (R. 1922-25, 2696-2706), and the penalty phase commenced before the same jury. There, the State introduced the judgment and conviction in the "deadly missile" case. The defense presented the testimony of Mr. Preston, a clinical psychologist, and an attorney who had represented Mr. Preston in earlier stages of the proceedings (see R. 1935-81). Defense counsel failed to question the expert about, and the expert failed to mention, the statutory mental health mitigating circumstances. Following deliberations during which the jury presented several questions regarding the law and procedures governing life sentences (R. 2031-35), it returned a recommendation of death by a vote of seven to five (R. 2036).

This Court affirmed Mr. Preston's sentences and convictions on direct appeal. Preston v. State, 444 So. 2d 939 (Fla. 1984). In July of 1985, Mr. Preston appeared before the Governor's Board of Executive Clemency. The Governor denied clemency and

signed a death warrant on October 9, 1985.

Mr. Preston, now represented by the Office of the Capital Collateral Representative ("CCR"), filed in the Circuit Court for the Eighteenth Judicial Circuit (Seminole County), a Motion to Vacate Judgment and Sentence (PC 954-86), and supporting pleadings (PC 989-91, 992-1005), including a Motion to Disqualify the Eighteenth Circuit Office of the State Attorney (PC 952-53). This motion was based on the fact that Mr. Preston had been previously represented by Assistant State Attorney Don Marblestone on an offense which was used to aggravate sentence in the instant capital offense (see PC 951-53). [Mr. Marblestone joined the State Attorney's after he represented Mr. Preston, and then participated as an Assistant State Attorney in the capital prosecution.]

The Circuit Court granted a stay of execution on October 31, 1985 (PC 1030). No ruling was made on the motion to disqualify the State Attorney's Office. On July 14, 1986, Mr. Preston's original post-conviction counsel, formerly staff members of the St. Petersburg branch CCR office, moved to withdraw because their employment with CCR was coming to an end due to the closing of the St. Petersburg office (PC 1152-53). On August 8, 1986, the trial court below entered an order setting an evidentiary hearing for October 21st (PC 1164). Undersigned counsel was initially assigned to Mr. Preston's case, and commenced preparation for the hearing, approximately one week prior to that date, shortly after commencing his own employment with the CCR (See PC 9).

At the evidentiary hearing counsel orally renewed the motion to disqualify the Eighteenth Judicial Circuit State Attorney's Office (PC 22-25). After oral argument, the court heard the testimony of Assistant State Attorney Don Marblestone (PC 86-88). Mr. Marblestone testified that he had "never" appeared in court in connection with the "prosecution" of Mr. Preston (PC 100), and that a copy of the court clerk's minutes which indicated his appearance on behalf of the State at a motions' hearing

in Mr. Preston's case on October 10, 1980, reflected "a mistake made by the clerk" (PC 101). A court reporter then was called to the stand and read from the notes of the court reporter who had been present at that hearing (PC 124-126). The notes showed that Mr. Marblestone did appear in court on October 10th, as the representative of the State Attorney's Office in the case of State v. Preston, that he negotiated with Mr. Preston's attorney a waiver of speedy trial in exchange for the State's agreement to a continuance, and that he had intimate knowledge of the details of the case. The Rule 3.850 court, however, denied the motion for disqualification (PC 137).

At the end of the three day hearing, the court ordered the parties to file memoranda within 30 days (PC 571). The State then filed its "Memorandum on Defendant's 3.850" (PC 1301-06), the only responsive pleading the State ever filed in this cause. Mr. Preston, on November 19, 1986, filed a Motion for a Continuance and for an Order Directing the Office of the State Attorney to Comply With Request Pursuant to Fla. Stat. Section 119 (PC 1196-1215), urging the court to enter an Order requiring the State Attorney's Office to comply with Mr. Preston's repeated but as-yet-unanswered requests for public records (Fla. Stat. Sec. 119). The court never ruled on Mr. Preston's motion. Counsel continued to investigate.

On November 24, 1986, Mr. Preston filed, along with his memorandum on the issues and evidence presented at the Rule 3.850 hearing, a pleading captioned "Defendant's Supplemental Support for Motion to Vacate Judgment and Sentence Pursuant to Fla. R. Crim. P. 3.850" (PC 1263-88). Through this pleading, Mr. Preston presented evidence to the court, in the form of sworn affidavits from several witnesses, which showed that Robert Preston was innocent, that his brother, Scott Preston, had confessed (and in fact bragged) to several people prior to trial that he was responsible for the murder at issue, that he (Scott) was in fact involved with Marcus Morales, and that a representative of the State Attorney's office had this information a year before Mr.

Preston's trial (See PC 1263-88). Mr. Preston's pleading explained that ongoing investigative efforts had uncovered the evidence presented therein, and that the evidence was submitted to the court as soon as it was discovered. Counsel urged that the court conduct further fact-finding proceedings concerning this evidence and the issues it implicated. The State never responded to these issues and evidence, and the court never ruled on the requests made.

On December 10, 1986, Mr. Preston filed another pleading renewing his request that the court re-open the hearing to allow further fact-finding proceedings regarding the evidence discussed above ("Defendant's Consolidated Addendum to Motion to Vacate Judgment and Sentence, and Renewed Request for Further Fact-Finding Proceedings," PC 1292-97). This pleading was never acknowledged or responded to by the State, and the court again did not rule.

On February 13, 1987, the Circuit Court entered an order denying the Rule 3.850 motion (PC 1307-1313). The order did not address Mr. Preston's supplemental pleadings, and made no reference to the evidence presented thereby or the requests for further proceedings made therein. Mr. Preston filed a Motion for Rehearing of the court's order on February 26, 1987, again urging the court to consider the evidence discovered after the hearing and presented in the supplemental pleadings, and renewing the request for further fact-finding proceedings regarding that evidence (PC 1314-43). The court denied rehearing, in a single-sentence form order, on June 18, 1987 (PC 1344). Mr. Preston's Notice of Appeal to this Court was filed on July 8, 1987 (PC 1345).

SUMMARY OF ARGUMENT

I. The lower court's resolution of the issues presented in Mr. Preston's case was fundamentally flawed. Mr. Preston presented substantial and compelling evidence of his factual innocence. This evidence, much of which was known to the state prior

to trial but not disclosed to the defense, was discovered after the evidentiary hearing and immediately presented to the court by way of supplemental pleadings, which were supported by sworn affidavits. The pleadings showed that the State's continuing efforts to suppress the evidence at issue accounted for the difficulty of its discovery and the timing of its presentation, and urged the court to hold further fact-finding proceedings on these matters. The court never responded to any of these pleadings, and ignored the substantial evidence included in Mr. Preston's submissions. In refusing to conduct the requested fact-finding proceedings on these issues, the lower court erred. The court also erred by refusing to direct the State Attorney to comply with Mr. Preston's reasonable requests for access to public records -- a refusal which denied Mr. Preston his rights to "access" to the post-conviction court, and to a full and fair resolution of the issues presented in this Rule 3.850 action. Finally, the court below totally abdicated to the State its duty to resolve Mr. Preston's claims -- its order was little more than a verbatim copy of the State's single responsive pleading, violating Mr. Preston's right to have the issues determined by the court. Patterson v. State. Because of the substantial flaws in the proceedings conducted below, this case should be remanded for a proper resolution of the evidentiary claims raised in this proceeding.

II. Don Marblestone represented Mr. Preston in connection with a 1974 offense which was used to aggravate this capital sentence. Don Marblestone was later employed by the same State Attorney's office that prosecuted Mr. Preston on this capital case. Marblestone participated in the prosecution of Mr. Preston in this case, both at the initial trial-level proceedings and post-conviction. The conflict of interest engendered by Marblestone's involvement rendered Mr. Preston's capital trial and sentencing proceeding fundamentally unreliable and violative of the fifth, sixth, eighth, and fourteenth amendments. The post-conviction proceedings were infected with the same conflict, and the same constitutional infirmity.

III. The State failed to disclose evidence which would have proven that its key expert witness was unqualified to act or testify as an expert, that that witness's testimony was misleading, unreliable, and in all probability erroneous, and, at a minimum, which could have been used by the defense to undermine and substantially impeach the witness's testimony. This witness's testimony was central to the State's case, and the State's suppression of evidence which would have precluded and/or discredited her testimony violated Brady v. Maryland, 373 U.S. 83 (1963) and the fifth, sixth, eighth, and fourteenth amendments.

IV. The State deliberately suppressed evidence of Mr. Preston's actual innocence of the capital crime for which he has been sentenced to die, evidence which would have shown (and can now show, if Mr. Preston is given a fair opportunity to prove his claim) that Mr. Preston is not guilty, that another, known individual committed the offense at issue, and that the State knew of Mr. Preston's innocence and the other individual's culpability. Mr. Preston's capital conviction and sentence therefore violate the fifth, sixth, eighth, and fourteenth amendments and Brady v. Maryland. At a minimum, this Court should remand this case to afford Mr. Preston the opportunity to present the conclusive evidence establishing his claim, evidence which the court below failed to consider.

V. Mr. Preston is innocent of the crime for which he was convicted and sentenced to die, and his innocence can be proven. Consequently, under the eighth and fourteenth amendments, this Court should not allow this death sentence to be carried out, but should remand the case for a full and fair hearing.

VI. Mr. Preston was denied effective assistance of counsel at the guilt-innocence and sentencing phases of these capital proceedings. At each stage, counsel failed to adequately investigate and prepare, and therefore did not effectively represent his capital client's interests. Counsel, for example, incomprehensibly sought to present an "insanity" defense through the testimony of an "expert" who

acknowledged from the outset that he was not qualified to provide expert testimony on the issue. Mauldin v. Wainwright. With regard to even his own chosen theory, counsel failed to provide the expert witnesses available evidence which would have resulted in substantially more favorable opinions regarding Mr. Preston's mental/emotional condition. Counsel's failures resulted in the trial court's refusal to even provide an insanity defense instruction. Other deficiencies included counsel's failure to litigate substantial issues, and his complete failure to present available evidence at sentencing which would have precluded the imposition of a death sentence. Mr. Preston was therefore denied his sixth, eighth, and fourteenth amendment rights, and is entitled to relief.

VII. The sentencing court aggravated sentence on the basis of a prior conviction which was obtained during proceedings at which Mr. Preston was denied his right to the effective assistance of counsel. Mr. Preston's death sentence was therefore obtained in substantial reliance on "misinformation of constitutional magnitude" in violation of the eighth and fourteenth amendments. The lower court's order, however, refused to grant relief by asserting that this Court's opinion in Mann v. State held that challenges to a prior conviction such as the challenge brought by Mr. Preston were "inappropriate". The lower court erred. Mann simply held that, under warrant, a stay of execution would not be granted solely to enable a defendant to litigate a previous conviction in another state. Mr. Preston's claim has been legitimately brought pursuant to Florida's traditional Rule 3.850 standards. Mr. Preston is now pursuing a separate Rule 3.850 proceeding litigating the constitutionality of the previous conviction. Because his sentence of death is unconstitutional, Zant v. Stephens, Mr. Preston is entitled to post-conviction relief.

VIII. Robert Anthony Preston's capital trial took place prior to Caldwell v. Mississippi. There, the trial court's instructions erroneously misinformed the

sentencing jury concerning the importance of their sentencing verdict. The judge's instructions, in fact, [mis]informed the jurors by telling them that their role was essentially meaningless. Because the jurors' sense of responsibility was thus diminished, Mr. Preston's death sentence violates the eighth and fourteenth amendments. Caldwell v. Mississippi. Mr. Preston's claim must be determined on the merits, and relief should be granted, in this post-conviction proceeding. Caldwell did not exist at the time of Mr. Preston's trial and direct appeal: Mr. Preston therefore lacked the "tools" upon which he could base such a claim. Caldwell represents a substantial change in eighth amendment law requiring Rule 3.850 consideration under Witt v. State. Relief should be granted.

IX. The trial court erroneously aggravated the capital offense and rebutted mitigating evidence on the basis of unconstitutional misinformation. The court relied on a prior conviction which it believed was a violent felony. However, Mr. Preston had only been charged with a non-violent misdemeanor. Mr. Preston's sentence of death was therefore substantially and fundamentally flawed. This Court should grant relief, because, inter alia, the court's constitutional error "perverted" the weighing process and the resolution of the "ulttimate question whether" Robert Preston should have been sentenced to die. Smith v. Murray.

X. The court directed the sentencing jury to find an aggravating circumstance. It thus violated Mr. Preston's eighth and fourteenth amendment rights to an individualized, reliable sentencing verdict, and to the protecttions of the Tedder v. State standard. This constitutional error resulted in the imposition of a capital sentence against a defendant for whom such a sentence was not appropriate, and who therefore was "innocent" in the only sense meaningful to the eighth amendment. This reason, among others, demonstrates that relief is warranted.

XI. Mr. Preston's capital jury was erroneously instructed that a life verdict required a majority vote. These instructions misled the jury, and created the

substantial risk that death may have been imposed despite factors calling for life. Caldwell v. Mississippi, which was not available at the time of Mr. Preston's trial and direct appeal, now demonstrates that providing such misleading information to a capital sentencing jury violates the eighth and fourteenth amendments. This jury struggled to reach a sentencing verdict, and voted for death by the slimmest of margins (7-5). Consequently, there can be little doubt that the error in this case was not harmless, and that the State cannot carry its burden of demonstrating that the error had "no effect" on the jury's sentencing verdict. On the basis of Caldwell v. Mississippi, Mr. Preston's sentence of death should be vacated.

XII. Robert Preston was subjected to examinations by State psychiatrists without being advised of his right to counsel. The statements obtained during those examinations were then introduced against him at his capital trial. Although Mr. Preston asserted an insanity defense, that assertion neither was a waiver of his right to counsel, Estelle v. Smith, nor of his right to not have the statements elicited during such state-initiated examinations introduced unless the defense itself "opened the door." Parkin v. State. Neither Mr. Preston, nor his counsel, "opened the door" by delving into the statements during the capital proceedings. Thus, although the state's experts could legitimately have testified as to their professional conclusions, once their testimony related Mr. Preston's statements to the tribunal, Parkin and the fifth, sixth, eighth, and fourteenth amendments were violated.

XIII. During the proceedings resulting in Mr. Preston's sentence of death neither judge nor jury provided any "serious consideration" to any non-statutory mitigating factor: the court's instructions precluded the jury; the court then limited its own review. Moreover, the sentencing court's improper refusal to find and weigh clearly established statutory mitigating factors violated the eighth and fourteenth amendments. Hitchcock v. Dugger represents a substantial change in law

making these issues cognizable in state post-conviction actions. Downs v. Dugger. Because Mr. Preston's sentence of death was not "individualized", he is entitled to relief.

ISSUE I

MR. PRESTON WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING ON COMPELLING CONSTITUTIONAL ISSUES, INCLUDING THOSE INVOLVING HIS FACTUAL INNOCENCE, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

> . . . Scott Preston told me that he killed "the Walker woman." . . . Bob was not with him when all this happened. Bob had passed out at home from getting high (PC 1272-74).

The Rule 3.850 court's resolution of the issues presented in Mr. Preston's case, including Mr. Preston's claims of factual innocence, was fundamentally flawed. The most obvious flaws are presented herein.

A. Current counsel uncovered, shortly after the conclusion of the Rule 3.850 evidentiary hearing, compelling evidence of Mr. Preston's innocence, evidence which was known to the state prior to trial (See Issues IV and V, infra). The failure to discover and present this evidence earlier was not due to a lack of diligence: as will be discussed below, and in Issue IV, infra, the State's continued efforts to suppress this evidence frustrated investigative efforts. As soon as it was discovered, the evidence was presented to the court, along with appropriate pleadings and motions requesting further fact-finding proceedings (See, e.g., Defendant's Supplemental Support for Motion to Vacate Judgment and Sentence, PC 1263-88; Supplemental Memorandum in Support of Motion to Vacate Judgment and Sentence, PC 1233-62; Defendant's Consolidated Addendum to Motion to Vacate Judgment and Sentence, and Renewed Request for Further Fact-Finding Proceedings, PC 1292-96; Motion for Continuance and for an Order Directing the Office of the State Attorney to Comply With Requests Pursuant to Fla. Stat. Section 119, PC 1196-1201; Supplemental Motion for an Order Directing the Office of the State Attorney to Comply with Request

Pursuant to Fla. Stat. Section 119, P.C. 1216-19). The court never responded to any of these motions and pleadings, and ignored in its final order the compelling evidence presented therein (See also Issues IV and V, infra).

The evidence presented in the above-listed pleadings demonstrated fundamental deprivations of Mr. Preston's rights, for Mr. Preston is innocent, and should not have been sentenced to die. The trial court, however, made no findings and conducted no hearing on these matters. Substantial factual issues were therefore not resolved by the Rule 3.850 court. Consequently, this Court does not have before it a sufficiently developed record upon which to rule.

The allegations and supporting evidence demonstrated, inter alia, that the State's deliberate suppression of exculpatory evidence deprived Mr. Preston of a fundamentally fair trial and sentencing determination. These matters involve precisely the type of non-record evidentiary issues which require full and fair evidentiary resolution before the trial court. See Demps v. State, 416 So. 2d 808, 809-10 (Fla. 1982); Smith v. State, 400 So. 2d 956, 963 (Fla. 1981); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983); Zeigler v. State, 452 So. 2d 537 (1984); Smith v. State, 461 So. 2d 1354 (Fla. 1985); Leduce v. State, 415 So. 2d 721 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983); Squires v. State, 12 FLW 512 (Fla. 1987). Such a hearing is integral to Mr. Preston's due process and equal protection rights to fairly establish his claims, Cf. Townsend v. Sain, 372 U.S. 293 (1963); Johnson v. Avery, 393 U.S. 483 (1969); Bounds v. Smith, 430 U.S. 817 (1977), and this Court should remand the case for full, fair, and complete evidentiary resolution.

B. Mr. Preston's efforts to fully present and support his claims were further frustrated by the continuing efforts of the State to suppress critical exculpatory evidence. Post-conviction counsel made repeated formal requests of the State

Attorney for access to public records concerning his case (See Fla. Stat. Section 119.01 et. seq.). The requested records were critical to a proper resolution of the Rule 3.850 issues. The State refused to comply, although Mr. Preston was undeniably entitled to the records. See Fla. Stat. Section 119.01 et. seq.; Tribune Co. et. al v. In re: Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986), cert. denied, ___ So. 2d ___, No. 69,379, (Fla., February 5, 1987). Mr. Preston then moved the trial court for orders directing the State Attorney's compliance (See PC 1196-1200, 1216-19). The trial court never responded to Mr. Preston's motions.

Had the State complied with Mr. Preston's Chapter 119 requests, the evidence presented to the court which is the subject of Issues IV and V, infra, and more, would have in all likelihood been uncovered earlier, and presented at the evidentiary hearing. The evidence now uncovered shows that the requested materials must have contained a wealth of information relevant and critical to Mr. Preston's Brady and related claims. Mr. Preston can prove factual innocence (See Issues IV and V, infra). The State's continued withholding of evidence, and the lower court's failure to direct the State to disclose such evidence, frustrated Mr. Preston's ability to fully develop and present his claims, and deprived him of his rights to a full and fair hearing.

Mr. Preston was entitled to the requested information prior to trial. He is entitled to it now. See Fla. Stat. Section 119.01 et. seq.; Tribune co. et. al, supra. See also Chaney v. Brown, 730 F.2d 1334 (10th Cir., 1984). Without the requested Chapter 119 materials, neither the hearing held before the lower court nor its decision can be deemed full, fair, and just under the Due Process and Equal Protection Clauses. Mr. Preston's fourteenth amendment rights to "access to the court" included, at a minimum, access to the materials which were and are necessary to prove that he has been wrongly and unconstitutionally convicted and sentenced to die. The records which Mr. Preston sought and still seeks are the essential and

basic "tools" needed for his defense; without them, he can never be said to have had "meaningful access" to the court. Bounds v. Smith, 430 U.S. 817, 825 (1977); Britt v. North Carolina, 404 U.S. 226, 227 (1971); see also, Brady v. Maryland, supra (due process right to exculpatory information contained in state's files). This Court must remand to the trial court with appropriate instructions to allow Mr. Preston the "access" to which he is constitutionally entitled and to enable him to vindicate his constitutional rights at a full and fair hearing.

C. Additionally, the trial court's order violated Mr. Preston's rights to a full and fair determination of the issues by the court. The court's "order" was little more than a verbatim copy of the State's single responsive pleading (Compare State's Memorandum on Defendant's 3.850, PC 1301-06, with Order of February 12, 1987, PC 1307-13). Although it is not inappropriate for a court to solicit proposed findings from the parties, the total abdication of judicial authority to the wishes of the prosecution (as in this case) is flatly intolerable. Cf. Patterson v. State, ___ So. 2d ___, Case No. 67,830 (Fla., Oct. 15, 1987). If nothing else, the Due Process and Equal Protection Clauses mandate that an indigent death-sentenced inmate's claims be fairly heard by the court. The lower court turned away from that task -- it simply abdicated to the State Attorney. See Patterson, supra.

The State's proposed order contained a plethora of factual and legal errors, which will be discussed as they arise in relation to individual claims. The court accepted those errors as its own. The court erred. This Court should remand to allow the trial court, after the necessary fact-finding proceedings, to reconsider and prepare an order which embodies that court's own views on the issues involved. The fact-finding procedures employed below rendered these entire Rule 3.850 proceedings unfair and unreliable, and, therefore, in violation of the Due Process and Equal Protection rights to a full and fair hearing.

D. Finally, Mr. Preston presented to the court below evidence of his actual innocence, evidence which was known to the State prior to trial but not disclosed to the defense (See Issues IV and V, infra.) The continuing misconduct of the State prevented and still prevents Mr. Preston from fully developing and presenting his claim and the supporting evidence. The trial court chose to ignore this evidence in its order denying relief. Consequently, this issue and the substantial factual disputes which it involves have yet to be resolved by any court. Mr. Preston respectfully urges this Court to remand to the trial court for the hearing which is necessary to a proper resolution of these issues. These issue involve no technical nicety: the life of a man who can prove his innocence is at stake.

ISSUE II

THE PROSECUTION OF MR. PRESTON BY THE OFFICE OF THE STATE ATTORNEY FOR THE EIGHTEENTH JUDICIAL CIRCUIT VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE AN ASSISTANT STATE ATTORNEY EMPLOYED BY THAT OFFICE PARTICIPATED IN THE PROSECUTION OF MR. PRESTON DESPITE THE FACT THAT HE HAD REPRESENTED MR. PRESTON IN CONNECTION WITH A PRIOR CONVICTION WHICH WAS USED TO AGGRAVATE THIS CAPITAL SENTENCE

Mr. Don Marblestone, Esquire, represented Mr. Preston in 1974 on a charge of resisting arrest without violence (Circuit Court case no. 74-1354; see R. 2734). Mr. Preston was convicted after a jury trial in that case. That conviction was used to aggravate sentence and rebut mitigation during the proceedings resulting in Mr. Preston's sentence of death.

Mr. Marblestone became an Assistant State Attorney in the Eighteenth Judicial Circuit in 1976, and has been employed there continuously since that time. In 1980, Mr. Marblestone appeared in court in connection with the prosecution of Mr. Preston for the instant offense (see PC 869) and zealously litigated on behalf of the State (See PC 124-25). Moreover, Mr. Marblestone continued his involvement in Mr. Preston's case throughout the post-conviction proceedings: Mr. Marblestone, on his

own initiative, marshalled evidence intended to rebut claims contained in the Rule 3.850 motion, and turned this evidence over to the Assistant State Attorney who had the responsibility of representing the State in this matter.

It is apparent that an "actual" conflict of interest has always existed in this case. Baty v. Balkcom, 661 F.2d 391 (5th Cir.), cert. denied, 456 U.S. 1011 (1981); see also, Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Wood v. Georgia, 450 U.S. 261 (1981); United States v. McKeon, 738 F.2d 26 (2d Cir. 1984). Mr. Preston has therefore been denied his fifth, sixth, eighth, and fourteenth amendment rights. In addition, under the heightened reliability requirements applicable to capital cases, this conviction and sentence cannot stand, for they have resulted from a conflict which is fundamentally at odds with the eighth and fourteenth amendments. See Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

Under any ethical standard a lawyer may not represent interests adverse to those of a former client. Mr. Preston was entitled to the protection of such rules. See, e.g., United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979); see also, Code of Professional Responsibility, Canon 4. To establish a "conflict" claim, all that need be shown is that the matters involved in the previous representation are substantially related to those in the action in which the attorney represents an adverse interest. See United States v. Kitchin, 592 F.2d at 904; see also In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964). Mr. Preston undeniably can make such a showing, and a great deal more: the prior case in which he was represented by Mr. Marblestone was used to aggravate sentence in this case, and thus became an integral part of Mr. Preston's sentence of death.

Under State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), when such a "conflict

of interest" involves a government prosecutor's office, the individual prosecutor who had the prior relationship must be screened from any direct or indirect participation in the former client's prosecution. See Fitzpatrick, 464 So. 2d at 1187 (expressly approving ABA Formal Op. 342). However, the entire State Attorney's Office is precluded from proceeding in the prosecution if the disqualified attorney has either: 1) "provided prejudicial information relating to the pending criminal charge," or 2) "personally assisted, in any capacity, in the prosecution of the charge." Fitzpatrick, 464 So. 2d at 1188 (emphasis supplied).

Don Marblestone, undeniably did "personally assist," in an active "capacity," in the prosecution of the instant murder case. The Eighteenth Circuit State Attorney Office's involvement in Robert Preston's prosecution thus violated Fitzpatrick. The conflict rendered this capital prosecution fundamentally unfair and unreliable.

The lower court denied relief, ruling that Mr. Marblestone's participation in the prosecution of Mr. Preston was not "assistance in the prosecution" under Fitzpatrick (PC 1308). The lower court's order ignored the plain evidence of Marblestone's participation presented at the hearing.

Mr. Marblestone testified at the Rule 3.850 evidentiary hearing that he had never appeared in court in connection with the prosecution of Mr. Preston (PC 100), that the copy of the court clerk's minutes for October 10, 1980, which indicated that he did appear on that day and that he argued against a motion made by Mr. Preston's attorney, reflected "a mistake made by the clerk as to my participation . . . in this particular case on that day" (PC 101), and that he "would not have appeared on this case on that day, or any other day, and represented the State of Florida" (Id.). The evidence presented minutes after Mr. Marblestone's testimony plainly indicates otherwise. Don Marblestone did appear on behalf of the State on that day, and did actively participate in the prosecution:

Q Would you please read the notes of the events that occurred on October 23rd, 1980?

A Yes. This is Mr. Greene [former counsel for Mr. Preston] speaking. "I have a short motion to continue, if I could go before the pleas. That way, Mr. Robinson agreed to, or Mr. Marblestone for Mr. Robinson, as long as I affirmatively put on the record that we waive speedy trial, which I'm ready and prepared to do."

Then Mr. Marblestone says, "Slight difference of semantics, Your Honor. There is a motion to continue in the Preston first degree murder case. Mr. Robinson indicated to me that, on his behalf, and on behalf of the State, we would object to a continuance. However, he probably does have some valid grounds there due to the nature of the case. His client is still in the custody of the Department of Corrections. The only thing Mr. Robinson requested is that Mr. Greene write in, on the original motion to be filed with the Court, his specific waiver of speedy trial as a more to an oral indication on the record."

And Mr. Greene says, "I will do that."

And the court said, "Okay. No other objection, I will grant the motion as amended."

And Mr. Greene says, "Your Honor, we, through agreement with Mr. Robinson, agreed to set that, the trial, the first week of December. This is a case we're going to have in excess of" -- Oh. Mr. Marblestone is speaking. Excuse me.

"This is a case we're going to have in excess of one hundred witnesses, and either a date certain of the first week in December, or perhaps that further down the road, but. . ."

And the court says, "Well, I'd like to set it for that trial term."

And Mr. Marblestone said, "that would probably make it, Your Honor, I think during the third week of November, the 10th, trial docket sounding November 10th. Is that right, Tom?"

And Mr. Greene says, "November 10th, right." And the court says, "How about just continuing it to the 10th, and Judge Williams will be back then and give you some specific date. That would be appropriate."

And Mr. Marblestone said, "Okay.

And the court says, "Is that agreeable?"

> And Mr. Greene says, "That's agreeable, Your Honor."
>
> And the court says, "Okay. Just continue to November, the 10th of November, which would be the beginning of the new trial period."

(PC 124-26 [minutes read by court reporter])(emphasis supplied). It is thus apparent, contrary to his sworn testimony, that Mr. Marblestone not only appeared in court on behalf of the state, but that he also actively participated, making deals, discussing the prosecution of the case, litigating a motion, and detailing specific facts he could only have knowledge of through an intimate involvement in the prosecution ("we're going to have in excess of one hundred witnesses").

Fitzpatrick holds that assistance in the prosecution "in any capacity" by the disqualified attorney disqualifies the State Attorney's Office. No "screening" of Don Marblestone from participation in this prosecution, Fitzpatrick, supra, was even attempted here. The evidence adduced at the hearing below conclusively demonstrated that Mr. Marblestone "personally assisted" in the prosecution in a substantial "capacity", and thus, contrary to the lower court's order, that the State Attorney's Office had a substantial conflict which operated to Mr. Preston's disadvantage. See Fitzpatrick, supra; United States v. Kitchin, supra; cf. Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980). The lower court's assessment of the merits of this issue and its resultant findings were simply incorrect. This Court should vacate Mr. Preston's convictions and sentences.

The lower court's order was fundamentally flawed for another reason as well -- the conflict continued throughout the proceedings on Mr. Preston's Rule 3.850 motion and infected the post-conviction process. The evidence adduced at the hearing below demonstrated that Mr. Marblestone is still intimately involved in matters relating to Mr. Preston, and is still "assisting in the prosecution" of his former client. Mr. Marblestone testified below that he discussed the allegations in the 3.850 motion

concerning the conflict issue with the prosecutor assigned to the case, and that he then, on his own initiative, investigated and gathered rebuttal evidence which he provided to that prosecutor (See PC 96, 102-04, 114). Mr. Preston, at the commencement of post-conviction proceedings, made a written motion requesting that the Eighteenth Circuit State Attorney's Office be disqualified from any further involvement in this action (PC 951-53). Mr. Preston again made, at the commencement of the evidentiary hearing, an oral motion to disqualify that office (PC 22-25). The court denied the motion, despite ample evidence demonstrating that Mr. Marblestone had participated in the initial prosecution and was still participating in the instant post-conviction proceedings (See, e.g., PC 22-25, 33-34, 38, 89-115). The trial court's order made no reference to this issue as it affected the post-conviction proceedings (see PC 1308). But it is apparent that the conflict which infected the initial prosecution (and rendered Mr. Preston's convictions and sentence unconstitutional) continued throughout the post-conviction process, rendering those proceedings, inherently flawed, and violating Mr. Preston's due process and equal protection rights to a full and fair hearing.

This Court should now grant relief. Alternatively, the Court should remand for a full and fair hearing at which the State Attorney's Office for the Eighteenth Circuit is precluded from participating.

ISSUE III

THE STATE'S KNOWING USE OF INCOMPETENT, UNQUALIFIED, AND UNRELIABLE EXPERT TESTIMONY WITHOUT REVEALING TO THE DEFENSE AVAILABLE INFORMATION RELATING TO THE EXPERT WITNESS'S INCOMPETENCE AND LACK OF QUALIFICATIONS VIOLATED MR. PRESTON'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

The case against Mr. Preston was wholly circumstantial. No eyewitness testimony placed Mr. Preston at the scene, no accomplice testimony implicating him existed, and Mr. Preston had made no incriminating statements.

The State's case was primarily based on scientific evidence in the areas of hair, fingerprint, and blood analysis. Diana Bass, a hair and fiber analyst who in 1978 was employed by the Florida Department of Law Enforcement, Sanford Crime Lab, testified regarding her comparisons of hairs taken from Mr. Preston's clothing with samples taken from the victim's body. According to Ms. Bass, a single hair removed from the buckle of the belt Mr. Preston was wearing when he was arrested, and one of several found on a jacket seized from the Preston family home, were microscopically "consistent" with the victim's pubic hair standard (R. 1105).

Ms. Bass' "positive" comparisons of the hairs were powerfully and repeatedly emphasized by the prosecutor as "direct and positive" evidence of guilt (R. 1815). According to the State, the hairs taken from Mr. Preston's clothing were "microscopically indistinguishable" (R. 1791) from the victim's known pubic hair standard -- the hairs were "in no way distinguishable from the victim['s]" (R. 1785):

> [t]he hair is direct and positive [evidence] to the extent that it comes off clothing associated with the Defendant . . . . [I]t's just in no way distinguishable [from the victim's], and don't you think if there was any question in their [the defense's] mind as to whether or not it was in any way distinguishable, that they wouldn't have had an expert in there?

(R. 1815-16)(State's closing argument)(emphasis supplied).

The evidence provided through Bass was so powerful, in the State's estimation, that her failure to make a positive comparison of either of the two hairs would have resulted in Mr. Preston's acquittal:

> We have not one finding that microscopically the hairs are indistinguishable, we have two. They've come off different items, separate and apart. Either one of those could have cleared or served to exculpate the Defendant.

(R. 1791). According to the prosecutor, not only did the hair evidence conclusively prove guilt, it also corroborated the testimony of other state witnesses. Diana Bass' testimony was the lynchpin of the State's case.

The State's pointed emphasis was not misplaced: the hair evidence was indeed

critical. Virtually all of the evidence against Mr. Preston was circumstantial in nature, and as presented by Ms. Bass, the hair evidence was the compelling "circumstance."

According to her trial testimony, Diana Bass had been employed by FDLE as a hair analyst for three and one-half years prior to the time she performed her analysis of the evidence at issue. As far as Mr. Preston's jury knew, Ms. Bass was an eminently qualified, experienced, and competent expert, whose opinions and conclusions were entitled to great weight. We now know differently.

Although trial counsel elicited during cross examination the fact that Ms. Bass no longer worked for the FDLE, he did not know and had no reason to know the reasons for and the circumstances surrounding her departure. Evidence known to the state but undisclosed to defense counsel paints an entirely different picture of Ms. Bass' career at FDLE than that presented to Mr. Preston's jury, and casts an entirely new light on her qualifications as an expert, her competency, her testimony in this case, and Mr. Preston's guilt.

Evidence presented at the evidentiary hearing below demonstrated that Ms. Bass' "expert" testimony, her opinions and conclusions, simply could not be trusted, and that this was known to the State. (Obviously, the evidence was known to the FDLE -- it came from their files.) Her testimony was no better than that of a lay person operating in a complex, highly-specialized field. The State did not disclose the evidence revealing Bass' incompetency and total lack of expert qualifications, and hence Mr. Preston's jury was allowed to believe that her testimony was highly credible. But this was simply not true.

Unknown to defense counsel, the jury, or the trial judge, an employee performance evaluation conducted after Bass performed her work in Mr. Preston's case (but before Mr. Preston's trial) demonstrated her complete lack of training, expertise, and knowledge, and raised real and substantial questions concerning her

abilities and qualifications as an expert. For example, following an "unsatisfactory" rating in evidence handling procedures, the evaluation stated:

> Evidence Handling Procedures
>
> Evidence handling is one of Ms. Bass' most problematical areas. She does not appear to have the proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory table top overnight. This failure to protect the items by repacking them when not actually involved in an analysis leaves a very strong probability of extraneous contamination, cross-contamination among items, and possible loss of trace evidence.
>
> Ms. Bass fails to realize that the integrity of the evidence must be maintained even after the laboratory examination is complete. In a recent case, Ms. Bass conducted a paint comparison between an automobile fender and a bumper. At the conclusion of her laboratory examination, Ms. Bass stored these items of evidence outside in back of the laboratory in an unpackaged condition, and in an unprotected area, thereby, subjecting them to the frequent rains occurring at that time of year. These items quickly became dirty and rusty before she was directed to protect them by the microanalysis section supervisor.

(PC 800-01)(emphasis supplied). While her long-standing defective procedures raise substantial and serious questions as to whether or not Ms. Bass even analyzed the correct hairs in this case, more troubling questions are presented by the evaluation's startling revelation of Bass' lack of the most basic abilities, including the ability to perform an accurate and valid hair comparison:

> Job Skill Level
>
> Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been acquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting, should be indicative of a lack of adequate background training in this area. Her general

> scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is considered to be a serious default.
>
> Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third-year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, Aa, and other instrumental methods. The inability to chose appropriate methods of instrumental analysis and the lack of knowledge needed to competently perform these analyses should be considered an extremely serious deficiency.

(PC 799-800)(emphasis supplied). None of this was made available to defense counsel, the jury, or the Court.

As demonstrated at the hearing below, Ms. Bass' training, skill, and expertise were of such a deficient level that none of her opinions or conclusions could be trusted: she simply lacked the qualifications of an expert in this highly complex and technical field (See, e.g., PC 139-207; 481-93). Robert Kopec, the FDLE supervisor who conducted the performance evaluation discussed above, testified that at the time he evaluated Ms. Bass, six months after she conducted her analysis in Mr. Preston's case, he concluded that her performance was

> bordering on . . . basically an incompetence that I felt was ... she was not performing to the standards that we've set for ourselves in this profession, that she lacked sufficient amount of training to do this work adequately, and that she certainly required more training, certainly, to be able to do the job which she was supposed to be doing.

(PC 488). Among other deficiencies, Mr. Kopec was particularly troubled by Bass' consistent failure to use a comparison microscope in her work, a basic failure which created the high probability of erroneous result (PC 485). He was also disturbed by her continuing refusals to detail morphological descriptions as she performed her analyses (PC 486), and her substandard evidence handling procedures, which, as he testified, created a real danger that critical evidence would be contaminated or lost (PC 487).

After Mr. Kopec completed his evaluation of Ms. Bass, in July of 1978, she was barred from doing any further casework, as it became apparent that "she was not adequately trained to do the work competently" (PC 493). Bass left the employ of FDLE, and the field of microanalysis, shortly after the evaluation was completed (Id.).

James Halligan, an expert in hair analysis and former director of FDLE's Tallahassee Crime Lab whose duties included training and supervising microanalysts, testified as to how Bass' gross professional deficiencies manifested themselves in the work she actually performed in relation to the Preston case. Mr. Halligan initially noted that her report in this case indicated a lack of proper training (PC 165), a conclusion confirmed by the performance evaluation discussed above. Her report in this case also indicated to Mr. Halligan that she was not aware of the origin of certain of the exhibits upon which she performed her tests and analyses (PC 163-64), again, a problem identified in the performance evaluation. Mr. Halligan went on to identify numerous specific deficiencies in Ms. Bass' actual performance: for example, he noted that Bass still employed "scale patterns" as comparison criteria, a technique long-ago abandoned by experts in the field as completely valueless (PC 170-72). Mr. Halligan, like Mr. Kopec, found Bass' failure to consistently use a comparison microscope a glaring deficiency (PC 173), as was her failure to take detailed notes of her observations and conclusions (PC 175).

Mr. Halligan was also troubled by Bass' trial testimony (PC 176) which in his opinion was "misleading" (PC 207). Mr. Halligan was particularly concerned with her failure to provide specified details in support of her opinions (PC 176-77), and with the failure of her report to arrive at a specific conclusion supported by a valid and documented evaluation of appropriate underlying data (PC 180).

One of the most glaring deficiencies was Ms. Bass' failure to compare the hairs taken from Mr. Preston's clothing to Mr. Preston's own hair in order to determine if

Mr. Preston was the source of the hair. This, according to Mr. Halligan, was "a very serious defect," demonstrating a lack of expert qualifications (PC 182-83). Because of her lack of training, failure to employ valid and accepted techniques, and general professional inadequacies, any conclusions arrived at by Bass, in Mr. Halligan's opinion, were in all probability erroneous (PC 170).

Mr. Preston is not the only person put on death row through the testimony of Diana Bass -- she also gave the crucial testimony in the capital trial of Anthony Peek, who, like Mr. Preston, was convicted and sentenced to die on the basis of circumstantial evidence, including hair analysis performed by Diana Bass. See Peek v. State, 395 So. 2d 492 (Fla. 1982). The prosecutor at Mr. Preston's trial cited Peek numerous times in support of his arguments against Mr. Preston's motion for judgment of acquittal and in support of imposition of the death penalty (R. 1339, 2069-71).

Following direct appeal, Peek filed a Rule 3.850 motion. Based on the performance evaluation of Diana Bass discussed above, and evidence similar to that adduced at Mr. Preston's hearing, Judge John Dewell of the Tenth Judicial Circuit granted Mr. Peek's motion. Because the misleading and unqualified testimony given by Bass at Mr. Peek's trial "clearly . . . would have a great impact on the decision of any reasonable person," Judge Dewell vacated his conviction and sentence and ordered a new trial.

The transcript of the Peek hearing and related materials were appended to Mr. Preston's Rule 3.850 motion, and are part of the record before this Court (See PC 594-820). The evidence there adduced makes even more obvious the claim that Diana Bass' lack of training, expertise, and professional skills rendered any expert opinion tendered by her totally unreliable and invalid. As she did at Mr. Preston's trial, Ms. Bass testified at Peek's trial that there were 30-35 points of comparison that she could have conceivably taken into account in arriving at her conclusions: a

totally erroneous assertion, as a maximum of only 20-25 such points of comparison exist (PC 815; see generally testimony of James Halligan). Again, as in Mr. Preston's case, in performing her analysis of the Peek evidence, Bass used antiquated and invalid techniques, and failed to use proper equipment (PC 815-16). In short, as was her usual mode of operation, in both cases she performed as a beginner in a field where beginners are wrong one in three times. (Id.)

Robert Kopec testified at the Peek hearing that when he assumed his duties as the head of the microanalysis section of FDLE's Sanford Crime Lab in May of 1978, he quickly recognized the severe problems Ms. Bass was experiencing in her performance as a microanalyst (PC 644). Prior to Mr. Kopec's arrival at FDLE Ms. Bass was supervised by individuals who were not microanalysts and who had no training in hair analysis (PC 647). Mr. Kopec's analysis of her performance indicated an acute lack of appropriate training, and he conducted a series of tests to measure her abilities to do hair comparisons (PC 646). Because of her poor performance on these tests, misidentifying and/or altogether failing to identify the provided sample hairs, Mr. Kopec recommended that she receive further training and that she conduct no further hair analysis without direct supervision (PC 646). (She had no supervision when she conducted her analyis in Mr. Preston's case.) As discussed previously, Ms. Bass never again conducted laboratory hair analysis after Mr. Kopec's critical evaluation of her performance.

The 3.850 court held that Mr. Preston was not entitled to relief, finding that Ms. Bass' testimony was not misleading or based on improper technique; that the defense expert (James Halligan) could not state that her testimony was misleading or that she had not used proper techniques; and that Mr. Kopec, "the author of the critical evaluation," indicated that he had no knowledge of her work on this case (Order denying Rule 3.850 relief, PC 1307). The trial court erred: the wealth of evidence provided with Mr. Preston's 3.850 motion and presented at the hearing on

that motion demonstrated that Bass used improper techniques as a matter of course, and that her lack of professional skill and expertise meant that any testimony she gave in the guise of an expert in hair analysis could not but be misleading. Moreover, although Robert Kopec had no direct knowledge of her work in this case, neither did he have any direct knowledge of her work in Anthony Peek's case; regardless, his testimony in both cases made it clear that he was intimately acquainted with Ms. Bass' qualifications, skills, level of training, and usual practices and procedures, and that any opinions and conclusions she offered as an expert were highly suspect at best. Finally, Mr. Halligan did explain that her testimony at Mr. Preston's trial was misleading (see PC 207), and found her techniques consistently improper (PC 170-83).

The trial court's order made absolutely no findings with regard to the effect which the information relating to Ms. Bass' lack of expertise and competence would have had had it been disclosed to the defense at trial. This evidence was classically exculpatory, as its disclosure would have prevented the presentation of the crucial hair evidence or, at a minimum, would have severely impeached and undermined key-witness Bass' credibility. Given the circumstantial nature of the case against Mr. Preston, there can be no doubt as to the materiality of the hair evidence and, a fortiori, the evidence indicating that the hair evidence was virtually worthless. As such, Mr. Preston's rights under the fifth, sixth, eighth, and fourteenth amendments and Brady v. Maryland, 373 U.S. 83 (1963), were violated by the State's failure to provide this highly exculpatory evidence.

The State presented Diana Bass to the jury, and she presented herself, as a highly qualified "expert." The State never informed the defense that her qualifications were, at best, highly questionable. No one informed the defense that her expertise was not to be trusted, although the State possessed such evidence. The information contained in the Sanford Crime Lab's own files, the views of her

supervisor, Robert Kopec, and the other evidence developed at the Rule 3.850 hearing, would have thoroughly impeached any credibility ascribed to Diana Bass' testimony. In fact, had this evidence been turned over to the defense, the Court would likely not have qualified her as an expert. Mr. Preston's trial attorney testified at the hearing that none of this evidence was ever provided to the defense (PC 458), despite the fact that appropriate Brady requests were made prior to trial. As trial counsel testified at the 3.850 hearing, had this information been provided, he most certainly would have used it (Id.).

The Constitution provides a broadly interpreted mandate that the state reveal anything that benefits the accused, and the state's withholding of information such as that contained in its files concerning Diana Bass renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 105 S.Ct. 3375 (1985); Arango v. State, 497 So. 2d 1161 (Fla. 1986). A defendant's right to confront and cross-examine witnesses against him is violated by such state action. See Chambers v. Mississippi, 93 S.Ct. 1038, 1045 (1973); see also, Giglio v. United States, 405 U.S. 150 (1972). Counsel cannot be effective when deceived; consequently, Mr. Preston's sixth amendment right to effective assistance of counsel was also violated. Cf. United States v. Cronic, 466 S.Ct. 648 (1984). The resulting unreliability of a guilt or sentencing determination derived from proceedings such as those in Mr. Preston's case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Counsel for Mr. Preston made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence of a favorable

character for the defense which creates a reasonable probability 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). The evidence regarding Diana Bass met that test, but it was not turned over.

The Bagley materiality standard is met, and reversal required, once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." Bagley, supra, 105 S.Ct. at 3833. Such a probability undeniably exists here. As discussed above, the State's case was almost completely circumstantial, and Diana Bass was the central piece of the puzzle.

An even more serious due process violation occurs when the State deliberately presents false and/or misleading testimony. See Bagley, supra; Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Miller v. Pate, 386 U.S. 1 (1967); Giglio v. United States, supra, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 91 (1976). When such is the case, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony "could have" affected the judgment of the jury. United States v. Bagley, 105 S.Ct. at 3382, quoting Agurs, 427 U.S. at 103 (emphasis supplied).

The State presented the testimony of Diana Bass as if it were unassailable. She presented herself in that same light. Yet, the State knew that her "expert" testimony was not only unreliable and misleading, but that it was wholly devoid of credibility, for she lacked "expertise" in her field. The State misled the jury and Court as to Diana Bass' qualifications and expertise, and presented her unreliable and misleading testimony as if it were unassailable truth. The State's actions in this case squarely fall within the range of prosecutorial misconduct condemned in

Napue, Alcorta, Miller v. Pate, and Agurs. That the State knew that Diana Bass was simply not the qualified expert paraded before the jury cannot be disputed: the information was in their files.

There can be no question but that the testimony of Diana Bass was critical to Robert Preston's conviction and death sentence. It is equally beyond question that her substantial deficiencies raised substantial doubts regarding her status as an expert witness and the validity of her opinions and conclusions. Had this evidence been disclosed, her testimony would have been severally discredited and in all likelihood precluded altogether.

The preclusion or impeachment of Bass' testimony could not but have affected the jury's decision at the guilt and penalty phases. As it was, Mr. Preston's jury recommended death by the slimmest majority possible, 7-5. The errors discussed herein simply cannot be deemed "harmless." Mr. Preston therefore urges, that as in Arango, this Court grant relief.

ISSUE IV

THE STATE'S DELIBERATE WITHHOLDING OF EVIDENCE INDICATING MR. PRESTON'S INNOCENCE VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The evidence detailed in the preceding claim was not the only exculpatory evidence withheld by the State. The State knew, long before trial, of evidence indicating that persons other than Robert Preston killed Earline Walker. It is hard to imagine more exculpatory evidence, or a more egregious violation of Mr. Preston's rights under Brady v. Maryland and the fifth, sixth, eighth, and fourteenth amendments.

A. Marcus Morales

Keys bearing the name "Marcus Morales" were found in the ash tray of the victim's car on the morning that the murder occurred. Although defense counsel made

appropriate Brady requests, the name Marcus Morales was not contained in the State's witness lists and no reference to the keys bearing that name was made in any of the discovery materials provided by the State (See, e.g., R. 2210-11, 2230, 2279).

Trial counsel learned of the existence of these keys in the middle of trial, quite by accident, and far too late to effectively use the information. The matter first arose during the State's case-in-chief, while Fred Roberts, a police officer who assisted in processing the victim's car, was testifying as to his inventory of items removed from the car. One of these items was "a key ring identified by a tag as belonging to Marcus Morales with two keys" that had been found in the car's ashtray (R. 684). Taken by surprise, defense counsel interrupted the direct examination and interjected, "Identified as what?" (Id.)

Trial counsel attempted to adjust to this abruptly "discovered" evidence in his subsequent cross-examination. Officer Roberts testified on cross-examination that he had made no effort to find out who Morales was and what his keys were doing in the car (R. 691). Another investigator, Lieutenant Martin Labrusciano, testified that he did not check his files for a Marcus Morales (R. 1212). As subsequent witnesses testified, defense counsel asked each if they knew of Morales. All said no (See R. 719, 945, 1085, 1112, 1119, 1372, 1380).

The defense raised the Morales matter, in a motion for a new trial, as a discovery violation. The court asked whether anyone knew who Morales was, and the prosecutor, at the time, answered "no" (R. 2987). Defense counsel and the court both agreed that had the defense known about the keys prior to trial, the defense would have found out who Morales was, and would have investigated this issue (R. 2996). However, the court denied Mr. Preston's motion for a new trial, holding he had failed to demonstrate the materiality of the keys (R. 2998).

Trial counsel could not demonstrate the materiality of the Marcus Morales evidence because of the State's deliberate efforts to withhold it. By the time a

state's witness fortuitously blurted out the information, trial was already underway. Defense counsel from that point made every effort to determine the identity of Marcus Morales and the nature of his involvement in the offense, but it was simply too late.

B. Scott Preston

Evidence uncovered since the trial demonstrates the materiality of the withheld Marcus Morales evidence and the magnitude of the constitutional violation engendered by the State's deliberate suppression of such evidence and other related, even more compelling evidence of Mr. Preston's actual innocence.

We now know that Marcus Morales lived in the immediate area at the time, that he was a drug dealer, and that he was the frequent companion of Scott Preston, the brother of Robert Preston (See PC 1281). This information alone would have been critical to the case, and could have been developed and effectively employed by the defense had the state not deliberately withheld "Marcus Morales." There is much more, however: the state successfully withheld evidence indicating that Scott Preston, the brother of Robert Preston, himself committed the offense for which Robert Preston was convicted and sentenced to death, and that in all likelihood Scott Preston was in the company of Marcus Morales at the time (See PC 1263-78).

In April of 1980, more than one year prior to the trial, the Seminole County State Attorney's Office received a letter from Steven Hagman, an inmate at the Lake Butler Correctional Institution (See Affidavit of Steven Hagman, PC 1268-70.) Mr. Hagman informed the State Attorney's Office that Scott Preston, a fellow inmate at Lake Butler, had confessed to him that he, and not his brother Robert, had abducted and killed Earline Walker:

> In 1980, I was incarcerated at the Lake Butler, Florida, Correctional facility. At the time, Scott Preston was also incarcerated at Lake Butler and slept in the bunk across from mine.
>
> While we were at Lake Butler, Scott Preston told me that he and another person had robbed, raped, and murdered the "Walker woman." Scott Preston told me that he

kidnapped the woman from a convenience store and then took her to where he raped and killed her. Scott Preston, when he described what he did, gave me a number of specific details about what he did to the Walker woman.

* * *

Scott Preston and I played cards together while at Lake Butler. While we were playing cards, he would describe how they "did" the "Walker murder." He would then laugh about it. He would go into it in detail. He described the area where he killed the woman -- he told me that it was done in a field and he even described how the leaves looked on the ground when he did it. He specifically told me about the stabbing. He explained how he took the woman out of the store to the area where she was stabbed, and gave me many details about the stabbing. When he discussed the stabbing, he would get excited and he would act the stabbing out for me, raising his arm and bringing it down as if he was stabbing the woman. Scott told me that he hid his bloody clothes and some of the money he had taken from the woman after the murder. The way Scott laughed about what he did bothers me even today.

In April of 1980, I wrote a letter to the Seminole County State Attorney explaining that I had this information from Scott Preston which, I believed, would be helpful to the investigation of the Walker murder. I knew the State Attorney was putting a case together against Scott's brother, Robert, because that was what Scott told me. I wrote to the State Attorney that Scott had told me specific things about the murder that only the real killer would know.

No one answered my letter until about a year after I wrote it. Then, in 1981, I was taken to the Seminole County Jail. I was then taken to a room and interviewed by a person who introduced himself as an Assistant State Attorney. There was a third person in the room. I don't remember anyone telling me what his name was. This other person did not say anything. Only the Assistant State Attorney asked me questions.

The Assistant State Attorney asked only a few questions. I told him what I had heard from Scott. The whole thing lasted no more than a half hour. He then said the interview was over and they sent me back to my cell. The Assistant State Attorney looked very upset while he talked to me.

(Affidavit of Steven Hagman, PC 1268-70). Steven Hagman did not and does not know Robert Preston; his only knowledge of the circumstances surrounding the offense and

the arrest of Robert Preston was that which he had learned from his conversations with Scott (Id.).

Thus the State knew as early as April, 1980, that Scott Preston had confessed to the murder of Earline Walker, and that he had committed it with another. Of course, the State had long known of Marcus Morales' potential involvement. The State was much more successful in suppressing the Scott Preston evidence. No witness blurted out that Scott Preston had confessed to the crime. The defense had no idea that such evidence existed.

Steven Hagman was not the only person to whom Scott Preston confessed: present counsel has uncovered others who knew of Scott's involvement in the offense. Had the State disclosed the information in its possession to the defense prior to trial, trial counsel could have developed and presented even more compelling evidence of Mr. Preston's innocence to the jury. The evidence can be presented now.

John Yazell knew both Bob and Scott Preston from the neighborhood, and was incarcerated with Scott Preston at Lake Butler in 1980. John Yazell tells us:

> During the 1970's and early 1980's, I resided in the State of Florida in Altamonte Springs. My brother Glenn and I lived in a neighborhood near where Scott and Bob Preston lived. This was near the Bear Lake Elementary School.
>
> During this time I knew both Scott and Bob Preston. Scott and I were friends.
>
> From 1978 to 1980 Scott Preston and I were incarcerated together at the Lake Butler Correctional Facility for a number of months. We were in the same dormitory. While at Lake Butler, we hung around together and talked a lot. We often played cards together, and we also played cards with other inmates.
>
> While we were at Lake Butler, Scott Preston told me that he killed "the Walker woman." He told me that the night that the woman was murdered, his brother, Bob, was drunk and high and that Bob passed out.
>
> Scott told me that he planned the robbery for 4-5 days before he did it. When he went to rob the convenience store where Earline Walker worked, he decided that he was also going to kill her.

> Scott told me the details of how he "did" the robbery, rape and murder. In fact, he would brag about it. He would also laugh about it. I always thought Scott was a sick man. To him, the whole thing was something to laugh about. He told me about the thing over and over again while we played cards.
>
> He told me that on the night he killed Earline Walker he went to her store and waited outside for hours for the traffic to die down. When nobody was around, he went into the store and robbed her. He then made her leave the store with him, and made her drive the car out. He then took her to a field where he raped her and "cut her up." He said that when he was killing her he "wanted to make her tit into a tobacco pouch." He gave me all of the details of how he "chopped her up" over and over again. He would say, "I put X's on her head and body because I wanted it to look like a freak did it." He would tell me how he liked making the cops think it was some kind of freak sacrifice.
>
> When I would ask him why he killed her, instead of just robbing her, he told me that a few days before the murder he had gone barefoot into the store with a girl and Earline Walker had said to him, "Get out of the store you long-haired hippie bastard." Other times he would say that he killed her the way he did because he "liked doing that to women."
>
> The way he talked about it, it sounded like he did it with somebody else. He did tell me a lot of times that Bob was not with him when all this happened. Bob had passed out at home from getting high.

(Affidavit of John Yazell, PC 1272-74). Scott Preston had also told Yazell of his involvement with "a guy named Morales":

> Not only has Scott described to me the details of how he robbed, raped, and murdered the "Walker woman," he has also told me about other murders he has done. He says that he likes raping and murdering women. After he got out of jail, he told me that he and a guy named Morales picked up a girl who was hitchhiking Highway 1792 around Altamonte Springs and raped her and killed her. He said they were driving around in a white van that night. This happened, according to Scott, around 1982 or 1983. He never said a name, just she was young 19-20 had cash and weed on her and that he was very worried because the law found her purse the very next day and his prints were all over it. He said that he raped her and "cut her up" behind a condo subdivision in Altamonte. . . He gets off on talking about how he has done all these things. He is proud of how the cops have never caught him for killing Earline Walker or any of the other

women.

(Id., PC 1275-76).

James MacGeen was also acquainted with the Preston brothers and with Marcus Morales. Scott Preston had also discussed the "Walker Murder" with MacGeen:

> Everyone who knew the Preston boys at the time Bob got arrested for murder suspected that Scott either did it himself or was involved in it. Knowing what kind of person Scott was, it was easy to believe that he could and would do that kind of thing. By the same token, everyone that knew Bob couldn't believe that he was capable of such a thing.
>
> I don't just suspect that Scott was involved in the murder -- I know he was, because he told me so several days after Bob was arrested. It didn't surprise me one bit when Scott came by my house right after Bob was arrested and told me that he was involved in the murder and asked me if he could stay at my house so the police wouldn't find him and arrest him. When I told him to get lost, he asked me if I would take him to Ocala instead, so he could hide out. I told him to get lost again. I also wasn't surprised to hear that Marcus Morales' keys were found at the scene of the crime. Morales was a Puerto Rican drug dealer in our neighborhood and he was always hanging around with Scott.

(Affidavit of James MacGeen, PC 1281). Mr. MacGeen also provided information regarding one of the State's key witnesses, Donna Maxwell, information which severely undermines the credibility of her trial testimony:

> I knew Donna Maxwell real well, too. I was going out with her at the time the murder occurred. I know that at least part of the story that I now understand she told at Bob's trial wasn't true, because I was with her that night. She and I were at Crown Lounge in Altamonte Springs drinking together until at least 10:30 the night before Earline Walker died. She left and I stayed, but I don't know where she went when she left. I do know that she didn't have any transportation at the time, and was dependent on other people to take her places. She didn't even have a bicycle, much less a car. Wherever she went after she left the Crown, she would have had to go with someone else. If she did go to Scott and Bob's house after she left the Crown, it's not likely that she walked, because it was about 4 or 5 miles from the bar to their house.

(Id., PC 1282).

The law regarding the State's deliberate suppression of exculpatory evidence was

discussed at length in the preceding section, and will not be repeated here. It is hard to imagine evidence more material or more exculpatory than this. The evidence raises substantial questions concerning Robert Preston's guilt, and would have, had it been disclosed to the defense, led to the development of evidence which would have established Mr. Preston's actual innocence of the offense charged. (The State obviously knew about Hagman. Had even that evidence been turned over, defense counsel would have had the key to uncovering the rest.) There can be no doubt but that the presentation of this evidence to Mr. Preston's jury would have changed the outcome of the trial. There can be no starker or more egregious violation of Brady v. Maryland and its progeny than that which occurred here. Mr. Preston was innocent, but the State denied him the opportunity to prove his innocence.

The evidence relating to Scott Preston detailed herein was not discovered by present counsel until shortly after the conclusion of the evidentiary hearing below. As counsel explained to the court at that hearing, he had been assigned the case one week prior to the hearing (PC 19). Proper investigation on Mr. Preston's behalf had only been underway for that short period of time (and had been ongoing during the hearing itself). In addition, as discussed in Issue I, supra, counsel's investigative efforts were substantially frustrated by the State Attorney's consistent and deliberate refusals to comply with Mr. Preston's good faith requests for access to public records concerning his case. See Fla. Stat. Section 119.01 et seq. (1985). Counsel made repeated requests for a court order compelling the State's compliance (See PC 1196-1200, 1216-19), but those requests were never ruled on by the court. Had the State complied with Mr. Preston's requests, the evidence discussed herein would likely have been uncovered prior to the hearing and presented there.

As it was, the evidence was discovered in the weeks immediately following the hearing. It was presented to the court as soon as it was uncovered, and additional fact-finding proceedings were immediately requested (See P.C. 1263-1288, 1298-1300,

1292-96). This evidence and the related pleadings and motions were submitted to the Court three months before the court issued its order denying relief. None of Mr. Preston's requests for additional fact-finding proceedings were acted on by the court below.

The lower court's order denying relief on this issue ignored a plethora of substantial evidence, and spoke only to the "Marcus Morales" evidence. The court ruled that the matter should have been raised on direct appeal, and that the matter had been "litigated before this court at a motion for new trial and decided against the Defendant and no new evidence has been presented which would alter this court's previous ruling" (Order, P.C. 1307).

The court's order was fundamentally erroneous as a matter of fact and law for a number of reasons. First, as to the finding that issue should have been raised on direct appeal, the law in Florida has always been that claims arising under Brady v. Maryland are to be brought in a Rule 3.850 proceeding. See Demps v. State, 416 So. 2d 808, 809-10 (Fla. 1982); Arango v. State, 437 So. 2d 1099, 1104-05 (Fla. 1983)(remanding to trial court for Rule 3.850 Brady hearing), subsequent history in, 467 So. 2d 692 (Fla. 1985)(granting post-conviction relief), 106 S.Ct. 41 (1985)(vacating and remanding for reconsideration in light of Bagley), 497 So. 2d 1161 (Fla. 1986)(adhering to previous ruling after reconsideration under Bagley); Smith v. State, 400 So. 2d 956, 963 (fla. 1981). See also Ashley v. State, 444 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. 4th DCA). Due process and equal protection are violated by procedural rulings such as that made by the lower court: a court cannot refuse to rule on a defendant's federal constitutional claim by relying on a rule that is not applied against other litigants. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964).

Secondly, and most importantly, contrary to the lower court's order, ample "new"

evidence in support of Mr. Preston's claim was presented (See PC 1307). As detailed above, counsel pursued investigation throughout and after the conclusion of the hearing, and presented what was uncovered the court at the earliest possible moment (See PC 1263-88, 1292-96, 1298-1300). Counsel presented to the court a great deal of evidence demonstrating Mr. Preston's actual innocence, evidence which had been withheld by the state and evidence which could have been developed by trial counsel prior to trial had the state disclosed the exculpatory information in its possession when requested to do so. This "new" evidence amply demonstrates the materiality of "Marcus Morales," and proves that the State violated Mr. Preston's rights. (The court below, however, did not even rule on the motion to have Marcus Morales produced.)

Mr. Preston requested that the court hold further fact-finding proceedings regarding this evidence (See, e.g., P.C. 1292-96), but these requests too were ignored. The lower court therefore denied Mr. Preston his constitutional rights to a full and fair hearing and reasonable "access" to the court (see Issue I, supra).

The evidence presented to the lower court undeniably establishes that the prosecution knew of the existence of exculpatory evidence, evidence of Mr. Preston's actual innocence, which would have completely undermined the State's theory at trial. This evidence was not provided to the defense. Mr. Preston is, at a minimum, entitled to a hearing on these issues. This Court should reverse his conviction and sentence, or, alternatively, remand for full and fair fact-finding proceedings.

ISSUE V

MR. PRESTON IS INNOCENT OF THE OFFENSE FOR WHICH HE WAS CONVICTED AND SENTENCED TO DEATH, AND HIS SENTENCE THEREFORE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

The evidence discussed in Issues I, IV, and V, demonstrates that Mr. Preston is factually innocent of the offense which led to his sentence of death. Under the

eighth and fourteenth amendments this death sentence cannot, should not, and must not be carried out. No more arbitrary and capricious result can be imagined than the execution of an innocent man. Cf. Furman v. Georgia, 408 U.S. 238 (1972). Due process and the eighth amendment forbid such freakishness. Cf. Green v. Georgia, 442 U.S. 95 (1979); Woodson v. North Carolina, 428 U.S. 280 (1976); Enmund v. Florida, 458 U.S. 782 (1982).

The lower court did not even acknowledge, much less consider, this compelling evidence. But Mr. Preston can now prove his innocence, and the Constitution demands that he be heard. These issues involve no technicalities: an innocent man's life is at stake. The opportunity to be heard on (and prove) this claim must not be foreclosed -- Mr. Preston's claim should be heard. Cf. Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986); Murray v. Carrier, 106 S. Ct. 2639 (1986); Smith v. Murray, 106 S. Ct. 2661 (1986). Mr. Preston can establish much more than a "colorable claim" of innocence, see Kuhlmann, supra; Smith, supra; Carrier, supra -- he can prove it, if given an adequate opportunity.

Accordingly, Mr. Preston urges that the Court remand for a full and fair hearing on the compelling evidence presented in support of this and the related claims.

ISSUE VI

MR. PRESTON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND PENALTY PHASES OF HIS TRIAL, AND HIS CONVICTIONS AND DEATH SENTENCE THEREFORE VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) a defendant presenting an ineffective assistance of counsel claim must show: 1) deficient attorney performance, and 2) prejudice. Mr. Preston can.

The files and records in this case and the evidence presented at the hearing below demonstrate that Mr. Preston was deprived of the effective assistance of counsel, to his substantial prejudice, and that his trial and sentencing proceedings

were therefore not the "reliable adversarial testing process" required by the Sixth Amendment. The court below erred in its resolution of these issues, and this Court should reverse.

THE GUILT/INNOCENCE PHASE

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). Cf. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Likewise, courts have recognized that an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence, for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible testimony, e.g., Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of inadmissible evidence of other crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); for taking actions which result in the introduction of inadmissible evidence, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, supra, 684 F.2d at 816-17; and for failing to object to improper jury argument, Vela, supra, 708 F.2d at 963.

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

Counsel's performance at the guilt-innocence phase of Mr. Preston's trial was deficient under the sixth amendment in a number of respects:

1. Failure to Develop and Present Evidence of Mr. Preston's Innocence

Mr. Preston detailed compelling evidence of his actual innocence in Issues IV and V, supra. That evidence makes clear that the prosecution knew that exculpatory evidence existed which would have wholly undermined the State's case against Mr. Preston. The evidence withheld would have also led to a plethora of supporting testimony and evidence, detailed in Issue IV, supra, demonstrating Mr. Preston's innocence. Mr. Preston has alleged that the evidence which was known to the State was not disclosed to the defense. That being the case, Mr. Preston's fundamental rights were shockingly violated. See Brady v. Maryland, supra; United States v. Bagley, supra.

However, if the existence of witnesses such as Steven Hagman (see Issue IV, supra) was disclosed to the defense, trial counsel was ineffective for failing to investigate, prepare, and use such evidence. See Strickland v. Washington; United States v. Cronic; Kimmelman v. Morrison. Such failures undermine any reliability which may have been attributed to the results of Mr. Preston's trial and sentencing proceedings, for an innocent man would have been convicted and sentenced to die because of his attorney's substantial failings. In this case, counsel's failure to discover witnesses who could have provided information concerning his client's

innocence may well be ascribed to his inadequate investigation of Mr. Preston's background (discussed infra.) In short, failures and omissions of this sort would have resulted in a complete breakdown in the adversarial process. Cronic, supra. Needless to say, if such evidence was not withheld from the defense, trial counsel's failure to develop, prepare, and present it resulted in sentencing proceedings whose results are unreliable. Cf. Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986).1/

In any event, whether through state misconduct (as we assert), or counsel's ineffectiveness (which we alternatively plead out of an abundance of caution) it is plain that Robert Anthony Preston is innocent. Yet, he awaits execution. We again respectfully urge that the Court remand this case for a full and fair hearing on these issues, so that they may be resolved, and so that Mr. Preston can prove what he has pled.

2. Failure to Adequately Develop Insanity Defense By Fully Developing and Presenting Evidence of Mr. Preston's Long-Standing Chemical Dependency and PCP Addiction

In this regard, the issue is clear: Mr. Preston's most essential rights were abrogated both at trial and sentencing because counsel failed to competently develop the defense which even he himself had recognized -- the effects of long-term PCP abuse on Mr. Preston's mental and emotional state, sanity, ability to distinguish right from wrong, and capacity to conform his conduct to the requirements of law; i.e., on Mr. Preston's ability to act or think normally. Cf. Ake v. Oklahoma, 105 S.Ct. 1087 (1985); see also, Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984);

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1 As discussed in Issues I and IV, supra, no hearing was ever held on this evidence and the compelling constitutional issues it raised. The determination of the extent of the exculpatory evidence involved and of the State's suppression can only be made after a full and fair hearing, and Mr. Preston again respectfully urges this Court to remand for the needed fact-finding proceedings. Given the importance of the claim (that Mr. Preston is innocent) and the fact that the issues were not resolved at a hearing, counsel has no choice here but to plead in the alternative -- the stakes involved command no less.

Blake v. Kemp, 758 F.2d 523, 529-33 (11th Cir. 1985); Burch v. State, 10 FLW 540 (Fla. 1985). Counsel failed to obtain an expert who was qualified to test Mr. Preston, see Mauldin, supra, and failed to properly develop and present the plethora of lay evidence that would have corroborated Mr. Preston's insanity and diminished capacity defenses at trial and sentencing -- he failed to present this evidence to the jury, the Court, and even to the experts -- resulting in expert opinions which were flawed. See Mauldin, supra, 723 F.2d 799. Cf. Ake, supra.

In order to properly pursue counsel's own chosen defense of temporary insanity (the defense theory that Mr. Preston was unable to form the specific intent necessary for a conviction on the charge of first degree murder, kidnapping and robbery) trial counsel had to demonstrate several things: that Mr. Preston had a long-standing history of drug abuse, particularly PCP; that Mr. Preston had in fact injected PCP on the night of the offense; and that PCP can and does produce temporary "insanity" and/or diminished capacity, especially in light of long-term usage.

Neither of the attorneys who worked on the case in the pre-trial stages sought to have tested the single most important physical evidence which would have corroborated Mr. Preston's use of PCP on the night of the offense. Syringes, a spoon, and other drug paraphernalia were seized from Mr. Preston's room shortly after his arrest, but were never tested for the presence of PCP residues. PCP is not noted for its instability and residues would have been present for weeks or even longer after the items were seized (see PC 870-940). Moreover, PCP continues to be excreted in the urine for quite some time after its injection (Id.). Had Mr. Preston's urine been properly tested, it would have revealed the previous PCP usage. Counsel's failure to make use of corroborating evidence of his client's PCP use resulted in the State's ability to argue that Mr. Preston's testimony as to his drug use was all self-serving (see R.1820, 1822).

Counsel's failure to adequately consult with mental health experts resulted in

his inability to properly cross-examine the State's experts and to bring to the attention of the jury the gross deficiencies in the evaluations conducted by those psychiatrists. For instance, one psychiatrist (Dr. Kirkland) reached his adverse conclusions about Mr. Preston's mental state on the night of the crime after an interview that lasted one hour (R. 1616), and took absolutely no account of Mr. Preston's medical and social history. Cf. Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). State psychiatrist Wilder's evaluation also consisted of an interview lasting about one hour (R. 1645), and the doctor had no records at the time which he could use to formulate his opinion (R. 1645). No psychiatrist learned the substantial background facts concerning Mr. Preston's excessive, long-term use of PCP and other drugs. The State experts were allowed to believe [wrongly] that Mr. Preston did not use PCP on a daily basis (R. 1631). They were not asked to (and did not) consider the wealth of available background information demonstrating that that belief was factually wrong. They were not asked to (and did not) conduct any of the required testing. They were not asked to (and did not) consider as influencing their opinion the fact that Mr. Preston had been given Mellaril and Thorazine by the State for nearly two and one half years prior to their interviews. See generally, Acad. Psych. & L. 267, 274 (1973); Kaplan, H. & Sadock, B., Comprehensive Textbook of Psychiatry/IV 487-88 (4th Ed. 1985). The nearly exclusive use of the clinical interview by the State psychiatrists, and the failure of all the experts to consider information aside from self-reporting, rendered their diagnoses professionally inadequate. The ease with which expert opinions based so exclusively on self-reporting can be undercut is widely recognized. See, e.g., Mason, 489 So.2d at 737; Kaplan and Sadock, 488, 550; American Psychiatric Association, 202; Arieti, S. American Handbook of Psychiatry, 1158-60 (2nd Ed. 1974). But counsel did not undercut the State experts' factually erroneous conclusions. The overwhelming evidence showing that those conclusions were factually wrong was not given to the

jurors, judge, or the experts. Neither were the facts provided to the defense expert -- resulting in the obvious vulnerability of his conclusions (R. 1589-90).

Extensive testimony from Mr. Preston's contemporaries was presented at the Rule 3.850 evidentiary hearing. Every witness testified to Mr. Preston's extensive and excessive long-term abuse of drugs, particularly PCP (see PC 213-254). Because trial counsel made no effort to seek out such evidence of drug abuse prior to trial, neither the State's nor the defense's mental health experts, nor the judge and jury, had any independent evidence of Mr. Preston's long-standing and debilitating use of PCP. All of the witnesses who testified at the hearing below were available at the time of trial. They all testified that they would have spoken to Mr. Preston's attorney or his investigators had they been approached. Counsel's failure to to approach them was unreasonable and substantially prejudiced Mr. Preston. After all, an attorney's paramount constitutional duty is the duty to investigate and prepare. The record of the proceedings before the Rule 3.850 court shows how compelling the testimony of these witnesses truly would have been at trial and sentencing.

In a case where the viable defenses were insanity or voluntary intoxication, defense counsel failed to retain an expert who was even qualified in the relevant field. The first bit of sworn testimony defense expert Vaughn had to offer was that "I am not an expert in PCP, per se. There are elements of the pharmacology with which I am not familiar. . . ." (R. 1563-6). This admission and subsequent voir dire by the State resulted in the failure of the trial court to recognize the defense expert as an expert in PCP and significantly diminished the value of any opinion he would give.

Had a professionally qualified expert in the field been retained by counsel, and a proper and thorough evaluation conducted, Mr. Preston could have unequivocally established the defense of insanity. Dr. Peter Macaluso, certified addictionologist and an expert in the area of PCP abuse, testified at Rule 3.850 hearing as to the

results of his thorough evaluation of Mr. Preston, which included an extensive review of the appropriate background materials and interviews with family and friends.

We now know, although the trial jury did not, that Mr. Preston suffered from the primary disease of chemical dependency, the result of which was his uncontrolled and excessive abuse of drugs (see PC 269-80). We now know that as a result of his long-term abuse of PCP, which Dr. Macaluso independently verified (PC 297), Mr. Preston at the time of the offense suffered from Chemical Organic Brain Syndrome and toxic psychosis, conditions which caused him to be out of touch with reality, unable to distinguish right from wrong, and unable to control or understand the nature and consequences of his actions (PC 298). We now know that long-term PCP abuse causes amnesia, psychosis, blackouts, schizophrenia, and insanity (PC 288, 292), and that Mr. Preston was suffering from these conditions at the time of the offense (PC 298-303, 308-11, 333-34, 354-55). Mr. Preston's jury learned none of this, because of counsel's inadequate representation. Moreover, Dr. Macaluso's testimony would have unquestionably established the need for a jury instruction on insanity. As it was, because the defense expert at trial was unacquainted with Chemical Dependency, Chemical Organic Brain Syndrone, and, most importantly, the pharmacology of PCP, he could not identify a specific condition or mental defect sufficient to require an insanity instruction (See R. 1715-29).

Dr. Macaluso, or a similarly qualified expert, could also have seriously refuted the testimony of the State's expert witnesses. Neither State expert developed a substance abuse history, and neither was aware of the disease of chemical dependency: their conclusions therefore were baseless and fundamentally erroneous (see PC 311-16), as were the conclusions of the defense expert, who was likewise unfamiliar with chemical dependency and admittedly unknowledgeable about PCP and its effects (see R.1563-66; PC 321-23). Both State experts testified that purposeful behavior, such as the type exhibited by the perpetrator of the offense, was indicative of "sanity".

However, because neither was familiar with PCP and its effects, neither was aware that a person in a PCP-induced psychotic state could behave in a goal-directed, purposeful manner, but nevertheless be totally irrational and acting with substantially impaired or non-existent judgment (see PC 317-19). Mr. Preston's jury knew none of this, and the testimony of the State's experts went unimpeached, because of counsel's deficient performance.

Dr. Macaluso and similarly qualified experts were amply available in Florida at the time of Mr. Preston's trial (see PC 332). A reasonable search, focusing on local drug treatment centers, could have lead to an expert familiar with PCP abuse, chemical dependency, and Chemical Organic Brain Syndrome (see PC 330-32). Mr. Preston's trial counsel conducted some inquiries, but he nevertheless chose to present his selected defense by using an expert who was not qualified to establish it (as the defense expert himself admitted). Qualified experts in the field, however, were available, and trial counsel's failure to locate such an expert could not but have been the result of unreasonable efforts -- his incomprehensible choice to present the defense theory by using an expert who could not establish it. See Mauldin v. Wainwright, supra; cf. Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987).

3. Failure to Consult With Experts and Otherwise Adequately Prepare to Challenge the State's Wholly Circumstantial Case

The State's case was wholly circumstantial, based primarily on the testimony of forensic experts in the areas of fingerprints, blood, and hair analysis. Even though Mr. Preston's trial was to be based on expert testimony in these areas, trial counsel made no attempt to consult with independent experts to prepare to challenge the findings of those experts.

Such basic preparation would have had obvious and demonstrably favorable results in at least one area: as fully discussed in Issue II, supra, the testimony of the

State's hair expert, Diana Bass, was eminently impeachable. Her conclusions were unreliable and in all probability erroneous, and her testimony was fundamentally misleading (see Issue II). Any qualified expert in hair analysis could have so testified, and even Ms. Bass' supervisor (Mr. Kopec) would have provided favorable testimony. Ms. Bass' testimony was wholly incredible and worthy of no weight, but it was not challenged by defense counsel. Counsel simply failed to look.

4. Failure to Advise Mr. Preston of His Rights Regarding State-Directed Psychiatric Evaluations

As discussed fully in Issue XII, infra, Mr. Preston was evaluated by State psychiatrists without being informed of his rights under the fifth and sixth amendments. His uncounseled and unwarned statements to the State psychiatrists, made during the course of court-ordered evaluations, were then used against him at trial (see Issue XII, infra). Trial counsel never even informed Mr. Preston that he was to be evaluated by State psychiatrists, and much less explained the constitutional protections which Mr. Preston had in the context of those evaluations. Trial counsel then neither filed a motion challenging the unconstitutional procedures employed by those psychiatrists, nor attempted to preclude the testimony of those experts regarding Mr. Preston's unconstitutionally obtained statements (See Issue XII, infra). The testimony of the State's psychiatrists hurt: it was used to rebut Mr. Preston's defense of insanity. Counsel's failure to preclude that evidence resulted from stark ineffectiveness. Cf. Kimmelman v. Morrison, supra.

5. Other Failings

Other substantial failings of counsel were detailed and presented to the court below. [For example, counsel failed to challenge the constitutional infirmities resulting from the Eighteenth Circuit State Attorney's Office's prosecution of the

case (see Issue II, supra), and failed to present substantial constitutional issues (discussed herein and presented below).] Because space limitations preclude a full discussion of all those issues herein, the issues are incorporated by reference and thereby also presented for the Court's review.

THE SENTENCING PHASE

Defense counsel must discharge very significant responsibilities at the sentencing phase of a capital trial. In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die . . ." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In Gregg and its companion cases, the Supreme Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Courts have expressly and repeatedly held that in the context of capital sentencing, an attorney has a duty to investigate and prepare mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 104 S. Ct. 3575 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 85 L.Ed 2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 82 L.Ed.2d 874, 879, 104 S.Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, ____ U.S. ____, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Young v. Zant, 677 F.2d 792, 797 (11th Cir. 1982); Holmes v. State, 429 So. 2d 297 (Fla. 1983). Mr. Preston's trial counsel failed to meet these constitutional requirements.

This Court and the federal courts have repeatedly recognized the importance of uncovering, investigating, and presenting "humanizing" mitigating evidence to a capital sentencing jury. See, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); see also King v. Strickland, supra; Douglas v. Wainwright, supra. In Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Court held that trial counsel must thoroughly investigate, prepare, and present a full mitigation defense in capital cases, stating:

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

Tyler, 755 F.2d at 743 (citations omitted). See also, Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986).

Mr. Preston's trial counsel committed numerous errors, omissions, and failures at the sentencing phase, and his unreasonable, ineffective performance directly resulted in Mr. Preston's death sentence. Additionally, it should be remembered that the failures discussed above in connection with the guilt-innocence trial also "bled over" into the penalty phase, and had a direct effect on the jury's sentencing. See, e.g., Magill v. Dugger, 824 F.2d 879, 888 (11th Cir. 1987) ("Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter"); see also Smith (Dennis) v. Wainwright, 741 F.2d 1245, 1255 (11th Cir. 1984). In this respect, counsel's failure to locate and use an expert on PCP in support of Mr. Preston's insanity defense at the guilt phase also had a substantial effect on the jury's sentencing determination. Substantial mitigating evidence based on Mr. Preston's

background, a background involving substance abuse and its resulting long-term mental/emotional/psychological deficiencies, was ignored. Trial counsel simply failed to adequately investigate and prepare any coherent penalty phase defense. Qualified expert testimony regarding the long-term effects of PCP would have established substantial mitigation, but trial counsel presented no such testimony. In addition, it is obvious that trial counsel should have requested, and would have been entitled to, a penalty-phase jury instruction on the issues raised by Mr. Preston's PCP abuse. The grounds relied on by the trial court in its refusal to provide an insanity defense instruction at guilt-innocence would not have applied at sentencing. Counsel's failure to request a penalty phase instruction on the theory of defense which he had selected was stark ineffectiveness. Cf. Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1975).

Trial counsel also failed to provide any guidance regarding mitigating factors to the one mental health expert he did call at the penalty phase, Dr. Mussenden. It wasn't until the prosecutor questioned his witness that the statutory factors were mentioned, and then the defense witness could only conclude that one existed based on odd speculation concerning possible sexual comments by the victim (R. 1968-71). As the psychological report appended to Mr. Preston's Rule 3.850 motion attested, adequate guidance would have resulted in the clear and unequivocal testimony of a qualified psychologist supporting the existence of at least two statutory mitigating factors (see Report of Dr. Harry Krop, PC 826-38). The testimony presented at the hearing below would obviously have established a great deal more.

Counsel's failure to develop Mr. Preston's social and family history deprived the jury of humanizing information which would have affected the outcome of the penalty trial (see, e.g., PC 839-69), and deprived the sole defense expert of the critical background information which is essential to an accurate and meaningful psychological profile.

Trial counsel, in fact hurt more than helped at the penalty phase by calling to the witness stand Mr. Preston's former attorney, who was questioned about the relative severity of the crime in this case compared with others he had handled, enabling the State to rely on inferences from the attorney's invocation of the attorney-client privilege that Mr. Preston's crime was worse than others he had been involved in (R. 1978-86).

Counsel also failed to object to a plethora of substantial constitutional errors at the penalty phase (discussed throughout this brief).

In short, counsel failed his client, and deprived Mr. Preston of his right to an individualized sentencing determination. [Other aspects of counsel's penalty phase ineffectiveness were also presented to the court below. Space limitations make it impossible to detail each aspect herein. Those issues are therefore incorporated by specific reference.]

CONCLUSION

The record before this court establishes that Mr. Preston can meet the deficiency and prejudice prongs of Strickland v. Washington. Taken individually, and collectively, the deficiencies in counsel's performance demonstrate that Mr. Preston is entitled to the relief he seeks. A single error of counsel may establish an ineffective assistance claim. Kimmelman v. Morrison, supra. The many errors in this case establish that Mr. Preston is entitled to the relief he seeks. The court below erred in denying relief, and this Court should now correct that error. To the extent that any questions concerning Mr. Preston's claim remain open, this Court should remand the case for evidentiary development.

ISSUE VII

THE SENTENCING COURT'S FINDING OF AN AGGRAVATING CIRCUMSTANCE ON THE BASIS OF A PRIOR CONVICTION RESULTING FROM PROCEEDINGS DURING THE COURSE OF WHICH MR. PRESTON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. Preston was arrested for throwing a beer bottle at an automobile on January 10, 1978, the day before his arrest on this capital offense. He was then charged by amended information with one count of throwing a deadly missile at an occupied vehicle, in violation of Fla. Stat. sec. 790.19, and one count of criminal mischief, in violation of Fla. Stat. sec. 806.13, on June 9, 1978. Mr. Preston was convicted on both counts after a trial by jury on August 22, 1978, but judgments of conviction and sentence on the charges were not entered until April 1, 1980. Mr. Preston was sentenced to six years on the "deadly missile" conviction and time served (812 days) on the criminal mischief conviction.

At the capital sentencing proceeding in this instant case, the court instructed the jury that the crime of throwing a deadly missile into an occupied vehicle is a felony involving the use of violence to another person and that such conviction constituted an aggravating circumstance (R. 2026). This same reasoning was reflected in the court's findings in support of the death sentence (R. 2814). However, Mr. Preston was deprived of his rights to the effective assistance of counsel at that prior proceeding, and that conviction therefore should never have been used.

The facts of that case were quite different than the picture which counsel's ineffectiveness allowed the State to present. The true facts would have shown that Mr. Preston was not guilty; he threw an empty beer bottle at an automobile in a desperate attempt to avoid being run over by that same automobile (see PC 1151). Mr. Preston was not the aggressor. He was defending himself. An impartial witness (Frank E. Richard) would have so testified, and would have explained that the bottle bounced harmlessly off the hood of the car. This witness, however, was never called,

and the jury that convicted Mr. Preston was not informed of the true circumstances of the offense. Counsel's deficiencies kept the true facts from the court.

During that trial, Mr. Preston attempted to dismiss his court-appointed attorney for failing to subpoena that crucial witness, (See Transcript, State v. Preston, No. 78-38-CFA, August 22, 1978 (Fla. 18th Cir.), at p. 80; see also PC 1321-43). Mr. Preston moved pro se that new counsel be appointed, alleging that trial counsel was ineffective (Id. at 80). Trial counsel responded to the allegations and effectively admitted his ineffectiveness:

> My instructions to the secretary were to subpoena the man that Neils testified whose yard the bottle landed, who saw part of the incident, Frank E. Richard. The secretary never sent that subpoena out. And we tried to get the guy today and discovered that he's out of town. So that part of the Public Defender's Office has been lax on at some point in time. We should have had the guy here, he's not here.

Id. at 82 (emphasis added). The trial court never ruled on the request for new counsel. Mr. Preston was then convicted by a jury which never heard the testimony that would have unequivocally established that he was not guilty of the crime.

Numerous United States Supreme Court precedents establish that an unconstitutionally obtained prior conviction cannot be used to enhance sentence. See Burgett v. Texas, 389 U.S. 109, 115 (1967)(emphasis added); Loper v. Beto, 405 U.S. 473, 483 (1972)) United States v. Tucker, 404 U.S. (1972). The use of the unconstitutionally obtained prior conviction at the penalty phase of Mr. Preston's trial resulted in a sentence of death imposed on the basis of "misinformation of constitutional magnitude." Tucker, supra, 404 U.S. at 443, 447-49. Mr. Preston's death sentence thus stands in stark violation of the eighth and fourteenth amendments as interpreted in Zant v. Stephens, 462 U.S. 879, 887-88 (1983),

Tucker, 404 U.S. at 447-49, and Burgett, 389 U.S. at 115. The eighth amendment's heightened "need for reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), cannot countenance a death sentence imposed under such unconstitutional circumstances.

The Supreme Court expressly mentioned the constitutional infirmity of submitting uncounselled prior convictions to a capital jury in Zant v. Stephens, 462 U.S. at 887 n.23, holding that "even in a noncapital sentencing, the sentence must be set aside if the trial court relied at least in part upon . . . prior uncounselled convictions that were unconstitutionally imposed." A conviction obtained with ineffective representation of counsel is clearly "uncounselled" for the sixth amendment purposes.

The law in Florida has always been that the use of a prior conviction to enhance sentence "must be predicated upon a prior conviction not obtained in violation of one's constitutional rights." Lee v. State, 217 So. 2d 861, 865 (Fla. 4th DCA 1969); see also, Allen v. State, 463 So. 2d 351, 356-59 (Fla. 1st DCA 1985)(prior conviction obtained in violation of any one of several fundamental rights may not be used during subsequent prosecution); Rasul v. State, 498 So. 2d 1022, 1023 (Fla. 2d DCA 1986).

This issue is clearly cognizable and appropriately brought in collateral proceedings. Mann v. State, 482 So. 2d 1360 (Fla. 1986); see also Lee, supra, 217 So. 2d at 865 (challenging constitutionality of prior conviction used to support a "second offender" conviction); Hicks v. State, 336 So. 2d 1244 (Fla. 4th DCA 1976). However, the Mann opinion establishes that as a matter of state law, the issue must be brought in a separate collateral proceeding challenging the underlying conviction itself. Mr. Preston followed the state-law procedures established by this Court in Mann. A Rule 3.850 Motion in Case No. 78-38-CFA (the underlying conviction) was filed in the appropriate court, and a request for an expedited evidentiary hearing on the claims raised therein was made. A copy of that motion was provided to the court below and is part of the record before this Court (See PC 1321-443).

No ruling had been made on the underlying 3.850 motion at the time the court below entered its order denying relief. The court denied this claim without a ruling on the constitutionality of the underlying conviction. The court's order stated: (1) that this issue should have been raised on direct appeal, and (2) that this Court's decision in Mann "holds that it is inappropriate in a collateral attack on a sentence of death to attempt to collaterally attack a prior conviction of a crime of violence in another state or to delay execution prior to a ruling on that attack" (PC 1311).

The lower court's interpretation of Mann was wholly erroneous: Mann holds simply that, under warrant, a stay of execution is not warranted pending litigation of an underlying conviction from another state. Mann does not address or in any way affect Florida's traditional recognition of a defendant's right to challenge, by Rule 3.850, such a conviction obtained in another Florida case. See Lee, supra; Hicks, supra. Mr. Preston has followed the appropriate Rule 3.850 procedures. Cf. Mann, supra. The court below erred. Mr. Preston has been denied his fifth, sixth, eighth, and fourteenth amendment rights, and he is entitled to the relief he seeks.

Mr. Preston is presently pursuing his challenge to the underlying conviction. He will provide this Court with reports on the progress of that litigation2/.

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2. This procedure is cumbersome, but must be followed because of this Court's ruling in Mann. Mr. Preston suggests that this may be the appropriate time to reconsider the Mann holding, and to permit capital post-conviction applicants to litigate the constitutionality of a challenged underlying conviction at a hearing in the capital case itself -- a less cumbersome procedure, and one in keeping with the standards enunciated in United States v. Tucker and Zant v. Stephens.

ISSUE VIII

THE TRIAL COURT'S INSTRUCTIONS TO MR. PRESTON'S SENTENCING JURY ERRONEOUSLY MISINFORMED THEM AS TO THEIR PROPER ROLE AT SENTENCING AND THE WEIGHT TO BE ACCORDED THEIR VERDICT UNDER THE LAW, AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY FOR THEIR SENTENCING DECISION, IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The trial court's instructions to Mr. Preston's capital jury mislead them as to the significance to be attached to their sentencing verdict. See Caldwell v. Mississippi, 472 U.S. 320 (1985). Under Florida's trifurcated capital sentencing scheme, a jury's sentencing verdict is entitled to great deference, and can be overridden by the sentencing judge only in the most extreme circumstances. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Preston's jury, however, was instructed by the sentencing court that the judge had the final and sole responsibility for the imposition of sentence (See, e.g., R. 1928, 2026). The jurors were given no information or instructions concerning the great weight that the court is required to give their recommendation, or the extremely limited circumstances under which a Florida capital sentencing judge can impose a sentence inconsistent with the jury's decision. The sentencing judge here improperly and inaccurately minimized the jury's role and its sense of responsibility for sentencing, in violation of the eighth and fourteenth amendments.

At the commencement of the sentencing phase, the sentencing judge informed the jury that the decision they were to make would be essentially meaningless, as "the final decision as to what punishment shall be imposed rests solely with the Judge of this Court" (R. 1928). At the conclusion of argument, during his final instructions to the jury before they retired to deliberate, the judge again instructed the jury that he, not they, had "responsibility" for the "final decision" regarding punishment (R. 2025).

Defense counsel did nothing to correct the erroneous instructions. Indeed, trial counsel, operating under the same pre-Caldwell misinterpretation of the eighth amendment and Florida capital sentencing law as the trial judge, informed the jurors that their sentencing decision "can be overruled by the judge and it is simply an advisory opinion" (R. 46), and that

> the advisory verdict or opinion of the jurors can be accepted by the Judge or overruled by the Judge . . . . You would be condemning this person in a sense, but not in actuality or in factuality (sic) because the Judge could always override whatever you or the rest of the jurors voted for one way or the other.

(R. 70)(emphasis supplied).

The trial judge's and defense counsel's statements were wrong, as Caldwell and this Court's opinion in Garcia v. State, 492 So.2d 360 (Fla. 1986), make clear. It is the jury that has the primary responsibility for sentencing under Florida's capital sentencing scheme. Although the jury's sentencing verdict is technically a "recommendation," which under extremely limited circumstances the sentencing judge need not follow, the jury's role at the sentencing phase of a capital trial is nevertheless an extremely critical one. See, e.g., Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987). Thus, any intimation that a capital sentencing judge has the ultimate or sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she sees fit, is inaccurate, and is a misstatement of the law. The judge's role, after all, is not that of the 'sole' or 'ultimate' sentencer; rather, it is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, 804 So. 2d 1526 (11th Cir. 1986). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's

recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529; see also, Tedder, supra. Mr. Preston's jury however, was led to believe that its determination as to the appropriate sentence meant nothing, as the judge was free to impose whatever sentence he wished.

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the Eighth Amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by prosecutorial references to appellate review 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. 280, 305 (1976), the Court vacated Caldwell's death sentence.

The constitutional vice of the type of misinformation condemned by the Caldwell Court is not only the substantial unreliability it injects into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer. The jury is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S.Ct. at 2641. Moreover, a jury "confronted

with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S.Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id at 2641-42 (emphasis supplied).

In Mr. Preston's case, the error is even more substantial because the misinformation was imparted by the court. The error is thus even more egregious than that in Caldwell:

> because... the trial judge... made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would would have no effect and to have minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d at 1531.

This Court has recognized that the concerns expressed in Caldwell are particularly applicable to Florida's capital sentencing scheme: "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation, . . . [t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v.

State." Garcia v. State, 492 So. 2d at 367 (citations omitted). The Eleventh Circuit has also recognized the critical role played by the jury in Florida capital sentencing and the applicability of Caldwell. See Adams v. Wainwright, supra.

Here, as in Adams, the jury was left "with a false impression as to the significance of their role in the sentencing process," 804 F.2d at 1531 n.7, a false impression which "created a danger of bias in favor of the death penalty." Id. at 1532.

Mr. Preston's jury recommended death by a margin of seven to five. One additional vote would have resulted in a life recommendation, a recommendation which the trial judge would have been obligated to follow. It is apparent from the record in this case that Mr. Preston's jury was indeed very close to recommending life, even closer than their razor thin majority in favor of death independently indicates. Following completion of sentencing instructions, the jury deliberated for some time, then sent two questions to the judge -- first, the jury asked whether it was "possible for a judge or parole board to give Mr. Preston credit for any years he has served in jail towards his 25 years for murder?"; second, the jury asked: "There are five counts of which three are capital. Will they be served consecutively, 75 years, or concurrent, not more than 25 years?" (R. 2032). The jury's questions indicate that they were seriously debating whether to return a life verdict. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of misinformation it had received. Under such circumstances, it cannot be said that the "error" had "no effect" on Mr. Preston's sentence. See Caldwell, supra; Adams, supra.

The Rule 3.850 court ruled that this claim should have been raised on direct appeal. However, it is manifest that this claim could not have been raised on direct appeal. At the time of Mr. Preston's appeal, the "tools" with which to raise the claim were simply not available, See Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir.

1987) (on rehearing), citing Reed v. Ross, 468 U.S. 1, 6 (1984). Caldwell did not then exist. Now it does, and because Caldwell represents a substantial change in law, see Witt v. State, 387 So. 2d 922 (1980), the claim was before the court below, and is now before this Court on the merits. The merits call for relief.

ISSUE IX

MR. PRESTON'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY AGGRAVATED THE OFFENSE AND REBUTTED MITIGATING EVIDENCE ON THE BASIS OF UNCONSTITUTIONAL MISINFORMATION

In sentencing Mr. Preston to death, the trial court used what it perceived as a prior conviction of a "felony . . . on the charge of resisting an officer with violence" in 1974 (R. 2816). [This was the same case on which Mr. Preston was represented by now Assistant State Attorney Don Marblestone (See Issue II, supra)]. As established by the record in this case (See R. 2179) and by the evidence presented during the Rule 3.850 proceedings, the trial court erred. Mr. Preston was charged only with a misdemeanor (resisting an officer without violence) in 1974.

The court's error was substantial and fundamental, one of constitutional magnitude: Mr. Preston was sentenced to death on the basis of misinformation, Zant v. Stephens, 462 U.S. at 876 and n.23, and was therefore deprived of an individualized sentencing determination, in violation of the eighth and fourteenth amendments.

This issue is cognizable on the merits in these post-conviction proceedings. First, the sentencing court's error was fundamental, and therefore can be corrected in post-conviction proceedings. See, Flowers v. State, 351 So. 2d 387, 390 (Fla. 1st DCA 1977); Dozier v. State, 361 So. 2d 727, 728 (Fla. 4th DCA 1978); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975); Burnette v. State, 157 So. 2d 65, 67 (Fla.

1963); Nova v. State, 439 So. 2d 255, 262 (1963); Benitez v. State, 230 So. 2d 190 (Fla. 2d DCA 1970). See also, Adams v. Dugger, supra, 816 F.2d 1493.

Second, this Court has recognized that this type of judicial error in the capital sentencing process is precisely the type that should be recognized and corrected in Rule 3.850 proceedings. Harvard v. State, 486 So. 2d 537 (Fla. 1986). The trial judge in Harvard expressly recognized his errors. Mr. Preston's trial judge refused to recognize his error; this Court now should.

Finally, most importantly, the constitutional error challenged herein directly resulted in a capital proceeding at which the sentencer's weighing process was "perverted", i.e., the error directly affected the sentencer's consideration "concerning the ultimate question whether in fact [Robert Preston should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). Consequently, the merits of the claim should now be heard, and relief should be ordered. Alternatively, the case should be remanded for a proper determination of any factual issue attendant to this claim on which questions may remain open.

ISSUE X

MR. PRESTON'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT "DIRECTED" THE JURY TO FIND AN AGGRAVATING CIRCUMSTANCE

The trial court instructed the jury that an aggravating circumstance applicable to Mr. Preston's case was that "the Defendant has been previously convicted of . . . another felony involving the use of violence to some person" and that "the crime of throwing a deadly missile into an occupied vehicle is a felony involving the use of violence to another person" (R. 2026) (emphasis supplied).

Due process forbids a trial court from directing a jury finding in the State's favor. See Rose v. Clark, 106 S.Ct. 3101, 3106 (1986). The court did just that in

its instructions regarding this aggravating circumstance. In Florida, the state bears the burden of proving aggravating circumstances beyond a reasonable doubt. See State v. Dixon, 283 So. 2d 1 (Fla. 1973). The court's instruction here, however, relieved the State of its burden of proof at the penalty phase. Even in non-capital cases, this is patently impermissible. See Rose v. Clark, 106 S.Ct. at 3106; United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). In a capital case, this is flatly intolerable. Beck v. Alabama, 447 U.S. 625, 637 (1980). It is therefore obvious that, in Mr. Preston's case, the eighth amendment was abrogated.

The court below erred in refusing to grant relief. This claim involves the most fundamental of errors -- a directed verdict for the state in a criminal trial by jury. See Rose v. Clark, supra. The claim therefore was and is cognizable in these proceedings. Cf. Flowers v. State, supra; Nova v. State, supra; Dozier v. State, supra.

Moreover, the trial court's aggravating circumstance instructions deprived Mr. Preston of an individualized sentencing determination from the jury, See Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985)("[e]very error in instructions which makes it less likely that the jury will recommend a life sentence . . . deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's [life] verdict . . ."), and resulted in a jury penalty verdict which was simply not reliable. There can be little doubt that, had this jury which expressed obvious reservations concerning the death verdict it would eventually reach been properly instructed on this question, a life verdict would have been highly probable, if not certain. The constitutional violation presented herein therefore may well have resulted in the death sentence of a defendant who was "innocent" in the only sense relevant to the eighth amendment -- i.e., in the death sentence of a defendant against whom the imposition of such a sentence was simply not appropriate. In short,

the court's directed verdict "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Robert Preston should have been sentenced to die]." Smith v. Murray, supra, 106 S.Ct. at 2668 (emphasis in original). Consequently, this Court should reach the merits, and correct the fundamental miscarriage of justice presented herein.

ISSUE XI

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE IMPRISONMENT MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLEAD THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. PRESTON'S SENTENCE OF DEATH THUS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Preston's juror's were consistently misinformed as to the required vote for a recommendation of life imprisonment. Although they were correctly instructed that a majority of their number was required to recommend a sentence of death, this same majority instruction was erroneously applied to a life recommendation as well -- as instructed, Mr. Preston's jury could not return a recommendation of life imprisonment unless a majority of them so voted, an illegal restriction of their function under the law. See Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983).

After the conclusion of argument, and immediately prior to their sentencing deliberations, the jurors were instructed:

> Your decision may be made by a majority of the Jury. The fact [that a] determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily.

(R. 2029) (emphasis supplied). This error was repeated in the verdict form:

> We, the jury, by a vote of the concurrence of a majority of

_____ jurors recommend to the Court that the defendant be sentenced to LIFE IMPRISONMENT.

(R. 2734) (emphasis supplied).

Neither the prosecutor nor defense counsel did anything to correct this fundamental misstatement of the law. Indeed, defense counsel too shared this erroneous interpretation of the law -- in his closing argument at sentencing, he also (mis)informed the jury regarding their duties and function at sentencing (R. 2008).

The trial court's erroneous instructions, supported as they were by the verdict forms which the jurors took into the jury room, were in no way ameliorated by a later correct instruction. The jury was sent back to deliberate with a final instruction:

> When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your Foreman and returned to the Court.

(R. 2030) (emphasis supplied). As forementioned, according to the instructions, both "form[s] of recommendation," both that for death and that for life imprisonment, required a majority vote of the jury (See R. 2734).

In Harich, supra, this Court condemned that part of the then standard penalty phase instruction which incorrectly indicated that a majority of the jury was required to recommend life, as it had done before in Rose. The death sentence in Harich was upheld only because, as his jury had returned a nine to three recommendation of death, there was no indication that they had had difficulty achieving a majority consensus. The Harich court found that there was nothing in the record to indicate that the jury was confused by the improper instruction or that the appellant was prejudiced thereby.

It is apparent from the record that Mr. Preston's jury, unlike Mr. Harich's, did have substantial difficulty reaching a verdict, and did so only by the narrowest of margins -- 7-5. Following the completion of the sentencing phase instructions, the jury deliberated for some time, then sent two questions to the judge. First, the

jury asked: "Is it possible for a judge or parole board to give Mr. Preston credit for any years he has served in jail towards his 25 years for murder?" (R. 2032). Second, the jury asked: "There are five counts of which three are capital. Will they be served consecutively, 75 years, or concurrent, not more than 25 years?" (R. 2032). The Court answered the two questions in writing (R. 2032-35). The jury's questions show that the jury was seriously considering the recommendation of a life sentence, and was struggling during the deliberations. Thus, the error actually mattered in Mr. Preston's case, and mattered in a way that could have been determinative of the sentence ultimately imposed. Even with the erroneous instruction, the jury was within one vote of a life recommendation. In Mr. Preston's case, the erroneous instruction was simply not a minor or technical error. It went to the heart of the death sentencing process: but for the erroneous instruction, the jury's verdict most probably would have been for life imprisonment. Thus, unlike Harich, the erroneous instruction here was determinative of the outcome. The error went to the very core of the accuracy of the jury's findings.

In this case, the instruction was prejudicial, and denied Mr. Preston the protections afforded under the Tedder standard. The jury "represent[s] the judgment of the community as to whether the death sentence is appropriate." McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). There thus may be "no denigration of the jury's role" in capital sentencing. Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983).

Mr. Preston may well have been sentenced to die only because his jury was misinformed and misled. Such a procedure violates the Eighth and Fourteenth Amendments, for it creates the substantial risk that the death sentence was imposed in spite of factors calling for a less severe punishment. Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of

whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. at 642. The erroneous instruction encouraged Mr. Preston's jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643. The instruction created the clear danger that one of the jurors may have changed his vote to death in order for a majority verdict to be reached -- not because of equivocation as to the appropriate penalty, but because of a belief that a majority vote had to be reached (the record here clearly supports such an inference). The instruction, like an improper "Allen charge," falsely pressured the jurors to reach a verdict. A verdict on life or death should not be the product of such unreliability.

The Rule 3.850 court, however, refused to grant relief. The court erred. Relief should be granted by this Court on the merits of Mr. Preston's claim. That the merits are now properly before this Court is demonstrated by the following.

1. Fundamental Error

This unconstitutional instruction involved an error of fundamental constitutional dimension, for the instruction served to "pervert" the jury's sentencing deliberations. Smith v. Murray, supra, 106 S.Ct. at 2668. The error here at issue is "fundamental" because the erroneous instruction in all probability deprived Mr. Preston of a life sentence. It is hard to imagine an error whose results are more egregious.

2. New Law: Caldwell v. Mississippi

Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), announced that inaccurate and misleading instructions regarding the jury's role and function in capital sentencing proceedings violate the eighth amendment. See id. at 2646 (O'Connor, J.,

concurring). Caldwell's concerns were implicated by the erroneous instructions given Mr. Preston's jury, and the constitutionally mandated "heightened need for reliability in the determination that death is the appropriate punishment in a specific case," id. at 2645, quoting Woodson v. North Carolina, 428 U.S. at 305 (1976), was irrevocably frustrated when his jury was misinformed.

Caldwell lessened the burden on litigants who complain of misinformation supplied sentencing jurors regarding their role, function, and responsibility. When jurors receive such information, the State must demonstrate that the error had no effect on the sentence. Id. at 2645. This the State cannot do in Mr. Preston's case. The jurors were repeatedly informed that the judge would ultimately "sentence." The misleading "judge review" instructions went hand-in-hand with the improper jury vote charge. These instructions obviously could cause deadlocked (6-6) jurors to "nevertheless give in." Caldwell, 105 S. Ct. at 2642. A capital sentence cannot be subject to such dice rolling. Mr. Preston's death sentence fails under Caldwell.

Caldwell is new law[3], decided after Mr. Preston's direct appeal. See, e.g., Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). On the basis of Caldwell, a precedent which represents a substantial change in law, and which was not available at the time of Mr. Preston's direct appeal, the claim should now be heard and determined on the merits by this Court. Witt v. State, 387 So. 2d 922 (Fla. 1980).

Mr. Preston's sentencing jury was unconstitutionally misinformed. His resultant sentence of death is fundamentally unreliable, and violates the eighth and fourteenth amendments. Caldwell v. Mississippi. The Court should grant relief.

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3. As "new", in fact, and as "substantial" as Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

ISSUE XII

MR. PRESTON WAS SUBJECTED TO TWO EXAMINATIONS BY STATE PSYCHIATRISTS WITHOUT BEING ADVISED OF HIS RIGHT TO COUNSEL, AND STATEMENTS OBTAINED DURING THE COURSE OF THOSE EVALUATIONS WERE USED AGAINST HIM DURING THE COURSE OF THE CAPITAL PROCEEDINGS, IN VIOLATION OF THE LAW OF THIS STATE AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The sixth amendment right to counsel is undeniably applicable in the context of state-ordered psychiatric examinations. Estelle v. Smith, 451 U.S. 454 (1981); Godfrey v. Francis, 613 F. Supp. 747 (N.D. Ga. 1985). Robert Preston placed his sanity at issue. He was then examined by State psychiatrists. As shown at the Rule 3.850 hearing, Mr. Preston did not know that he had the right to an attorney at those examinations (PC 306-09). In fact, he thought the State's psychiatrists were part of the defense (PC 509). Counsel never informed him of his rights in the context of those evaluations (id.), and the State's psychiatrists did not provide him with his rights under Estelle v. Smith.

The open question -- one not resolved at the time Mr. Preston was forced to undergo the evaluations by the State's psychiatrists (the evaluations took place before Estelle v. Smith was decided), nor at the time of Mr. Preston's direct appeal -- is whether Estelle v. Smith is applicable in the context of State-sponsored psychiatric evaluations of a defendant who has placed his sanity at issue. The defendant in Estelle v. Smith did not place his sanity at issue. Mr. Preston did.

No court had ruled that, as a matter of federal constitutional law, a state-court defendant who placed his sanity at issue was entitled to the Fifth and Sixth Amendment protections afforded under Estelle v. Smith until after Mr. Preston's trial and direct appeal were completed. For the first time, in 1985, a court recognized that even a defendant relying on an insanity defense was entitled to consult with counsel during state-sponsored psychiatric evaluations. Godfrey v. Francis, 613

F.Supp. 747 (N.D. Ga. 1985). This evidentiary claim is based on law which did not exist at the time of Mr. Preston's trial. See Moore v. Kemp, 824 F.2d 847, 850-54 (11th Cir. 1987) (en banc). Consequently, failure to preserve the issue at trial is excusable -- the "tools" with which Mr. Preston could have litigated this claim were not then available. See Reed v. Rose, 468 U.S. 1, 16 (1984); Moore v. Kemp, supra, 824 F.2d at 850-54. In turn, this evidentiary claim could only be raised post-conviction, once the "tools" became available. (Clearly, such evidentiary issues cannot initially be presented on direct appeal.) The court below ruled against Mr. Preston on the merits. In denying relief, the court erred.

Psychiatrist Robert G. Kirkland (a state expert) testified specifically that on January 8-9, 1978, the time of the offense, Mr. Preston "knew right from wrong . . . based on the information that I had and have, and based on my own interview [with the defendant] . . ." (R. 1618-19, emphasis added). His interview lasted about 45 minutes, with the defendant doing most of the talking (R. 1627).

Lloyd Wilder, also a state psychiatrist, testified that he interviewed Mr. Preston for about an hour (R. 1645), during which time the defendant discussed the night of the crime (R. 1648). According to Dr. Wilder, Mr. Preston told him the following version of the events:

> He told me that he had been out, in his words, cruising with a dude, and that they had been using PCP, and that they went to the Parliament House where they did a robbery. . . . [H]e told me that he declined to go near where the . . . where he had heard that there had been a murder because he had drugs on him and to expose himself to where all the law enforcement officials were would be dangerous.

(R. 1648). Dr. Wilder also testified that Mr. Preston was, while discussing the events leading to his arrest, "a little glib for the gravity of the thing he was discussing" (R. 1647). Mr. Preston also told Dr. Wilder during the interview "some things I'm [Dr. Wilder] not sure I should mention here" (Id). Furthermore, Dr. Wilder testified regarding what Mr. Preston told him about his ingestion of

intoxicants on the night at issue (R. 1649), and the doctor's version markedly conflicted with Mr. Preston's own version (Cf. R. 1471-73).

The use at trial of Mr. Preston's statements, elicited as they were during the course of uncounseled State-ordered psychiatric exams, made Mr. Preston the "deluded instrument of his own demise." Estelle v. Smith, 451 U.S. 454, 462-63 (1981). In this State the law has long been that even where a defendant relies on an insanity defense and/or expert testimony, any statements made to court-appointed or prosecution experts remain confidential and cannot not be used against the accused or disclosed, unless the statements themselves are first elicited by the defense (here, the defense did not "open the door" by eliciting testimony concerning the statements.) See Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970)("[T]he Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview"); Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974)(Once defense introduces insanity defense, "the State could call the psychiatrist as a witness and elicit from him his opinion as to the sanity of the defendant, so long as the questions did not elicit from the psychiatrist what the defendant had told him about [the offense.]"); McMunn v. State, 264 So. 2d 868, 870 (Fla. App. 1972)("An inquiry directed to court-appointed psychiatrists by the State must be limited to insanity or sanity. . . ." Using the statements made to the psychiatrist against the defendant would be "a device for extracting a confession from a defendant . . . no less effective than the use of thumbscrews, racks and third degree," and "would transgress the defendant's constitutional guarantee against self-incrimination."); Smith v. State, 314 So. 2d 226, 229 (Fla. 4th DCA 1975). The Eleventh Circuit has also recognized this principle of Florida law. Isley v. Wainwright, 792 F.2d 1516, 1518-19 (11th Cir. 1986), citing Parkin v. State.

Mr. Preston had no opportunity to consult with counsel prior to or during the State-ordered evaluations. See Estelle v. Smith, supra; Godfrey v. Francis, supra. (As discussed in the preceding portions of this brief, counsel rendered ineffective assistance in failing to properly advise his client, or to litigate the issue at trial.) The statements made by Mr. Preston during those evaluations were used against him trial in violation of state and federal constitutional law. See Parkin, supra; McMunn, supra; Jones, supra; Pouncey v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984); see also Estelle v. Smith, supra. The lower court's assessment of the merits of this issues was simply incorrect, and this Court must reverse.

ISSUE XIII

THE SENTENCING COURT'S FAILURE TO ADEQUATELY, FAIRLY, AND FULLY CONSIDER ALL AVAILABLE NON-STATUTORY AND STATUTORY MITIGATING EVIDENCE RENDERED MR. PRESTON'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Today, "[t]here is no disputing," Skipper v. South Carolina, 106 S.Ct. 1669, 1670 (1986), the force of the Lockett v. Ohio, 438 U.S. 104 (1978), constitutional mandate: a sentence of death cannot stand when the defendant has been denied an individualized sentencing determination by the sentencer's failure to consider mitigating evidence. See Hitchcock v. Dugger, 107 S.Ct. 1821 (1978); Skipper supra. In Hitchcock, supra, Songer v. Wainwright 769 F.2d 1488 (11th Cir. 1985), and Harvard v. State, 486 So. 2d 537 (Fla. 1986), this Court and the federal courts vacated the death sentences of Florida capital inmates when the trial court failed to fully and properly consider non-statutory mitigating circumstances. See also, McCrae v. State, 510 So. 2d 874, 880-81 (Fla. 1987). The instant claim is properly brought in Rule 3.850 collateral proceedings because of the fundamental Eighth Amendment concerns involved, and because Hitchcock represents a substantial change in law. See Morgan

v. State, 12 F.L.W. 433 (Fla. 1987); see also, Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987).

The federal courts and this Court have held that capital defendant's fundamental constitutional rights to an individualized sentencing determination are abrogated by the improper rejection of statutory mitigating circumstances established by the record. Magwood v. Smith, 791 F.2d 1438 (11th Cir., 1986). Cf. Herring v. State, 446 So. 2d 1049, 1056 (Fla.), cert. denied, 469 U.S. 989 (1984).

In Mr. Preston's case, the sentencing court failed to fully instruct the jury on the non-statutory mitigating evidence adduced, and then failed to take any account of this evidence in its sentencing order and findings. The evidence was simply not "serious[ly] consider[ed]." McCrae, supra, 510 So. 2d at 880. This non-statutory evidence included, inter alia: (i) the circumstantial nature of the State's case; (ii) the "Marcus Morales" evidence elicited at trial (the court itself had expressed its substantial concerns about this matter [R. 2996], yet the court failed to consider it at sentencing); (iii) the level of long-term PCP consumption to which Mr. Preston had subjected himself which, even if not sufficient to establish statutory mitigation clearly supported non-statutory mitigation which should have been considered; (iv) the jury's close vote (7-5); (v) doubt about guilt (see, e.g, R. 2098); in fact, the court failed to consider even its own expressed doubts (R. 2067-69) and the jurors were provided with no instruuctions informing them that they could consider such evidence; (vi) neither was Mr. Preston's family and social background considered. In addition, even if Mr. Preston's mental health and substance abuse evidence, in the Court's view, may not have been sufficient to establish an "insanity defense" or to warrant such an instruction at guilt-innocence, consideration of the mental health questions which Mr. Preston's evidence had raised, and a jury instruction on such non-statutory mental health issues, was appropriate at sentencing under the eighth amendment's heightened reliability requirements. Cf. Green v.

Georgia, 442 U.S. 95 (1979).

None of this was seriously considered by the court, and none of this was presented to the jury by way of appropriate sentencing instructions. Cf. Hitchcock v. Dugger, supra.

Moreover, the sentencing court substantially erred in rejecting three specific statutory mitigating circumstances: (i) Under Fla. Stat. Section 921.141(6)(b), Mr. Preston had unequivocally established "extreme mental/emotional disturbance" on the evidence as a whole -- e.g., due to his longstanding substance abuse (PCP) -- as was explained at trial and sentencing; (ii) Under Fla. Stat. Section 921.141(6)(f), Mr. Preston had clearly established that his capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" on the evidence as a whole -- again, examples of this were abundant in the trial and penalty phase evidence concerning Mr. Preston's long-term substance abuse; and (iii) Under Fla. Stat. Section 921.141(6)(g), Mr. Preston's age at the time of the offense. With respect to the latter, the court's sentencing order (rejecting this mitigating circumstance because Mr. Preston had reached the "age of majority" -- eighteen -- at the time of the offense) simply cannot be squared with the eighth amendment. Cf. Eddings v. Oklahoma, 455 U.S. 104 (1982)(although the defendant was old enough to be prosecuted as an adult, his age should have been considered in mitigation by the sentencing court). Certainly, under the eighth amendment, a nineteen-year-old, such as Robert Preston, is entitled to consideration of, and a finding on, this mitigating circumstance.

Accordingly, Mr. Preston respectfully submits that the sentencing court's failure to properly consider the three statutory mitigating circumstances discussed herein, like the court's failure to seriously consider non-statutory mitigating factors, resulted in a sentencing proceeding flawed by substantial eighth amendment error. The claims are now cognizable on the basis of Hitchcock v. Dugger. See,

e.g., Downs v. Dugger, supra (Hitchcock is a fundamental change in law altering eighth amendment analysis to a focus on the quality and sufficiency of the consideration given to mitigating evidence by the sentencer); Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987)(same); see also, Morgan v. State, supra. On the basis of Hitchcock, Mr. Preston is entitled to relief.

CONCLUSION

Because the Circuit Court erred, its order should be reversed. Because factual issues where never fully and fairly resolved, this case should be remanded. Because Mr. Preston has shown that his state and federal constitutional rights have been violated, his convictions and sentences should be vacated, and a new trial should be ordered.

RESPECTFULLY SUBMITTED,

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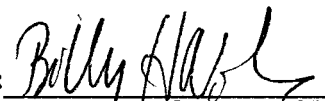
By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, Beck's Building, 4th Floor, 125 North Ridgewood Drive, Daytona Beach, FL 32014, this 30th day of October, 1987.

Attorney