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

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

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

COUNSEL FOR APPELLANT

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.

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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

Robert Preston is innocent of the capital offense for which he has been sentenced to die. Witnesses with no motive to lie provide the compelling evidence of his innocence:

> 1. My name is Steven F. Hagman and I reside at the Martin Correctional facility.
>
> 2. 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.
>
> 3. 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.
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> 4. I never met or talked to Robert Preston, Scott's brother. Scott did tell me that Robert was indicted for the murder.
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> 5. Scott Preston and I played cards together while at Lake Butler. While we were playing cards, he would describe how he "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.
>
> 6. 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.

7. 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.

8. 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 because what I was saying did not "jive" with the story that he had about what happened to the Walker woman.

9. No one else ever asked me anything about any of this. No other State Attorney, or police officer, or defense attorney, asked me anything or talked to me except for what the Assistant State Attorney asked me in that interview.

10. No one has talked to me about any of this until Mr. Jerry Justine of the West Palm Beach Public Defender's Office talked to me on November 20, 1986. If anyone had asked me, I would have told them what I knew.

(PC 1267-70).

1. My name is John A. Yazell and I reside at 506 West Allen, Springfield, Illinois.

2. 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.

3. During this time I knew both Scott and Bob Preston. Scott and I were friends.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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."

10. 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.

11. It really freaked me out when I heard all this stuff. I didn't think it was right for Scott to let his brother take the rap for something he never did. I would ask Scott how he could let his brother take the rap for this, and Scott would answer that "Bob can beat the case on appeal because there are flaws in the case, I made sure of that." He would also say that he had "secret evidence" that "will get Bob out on appeal." He would tell me, "I can

prove Bob did not do it," and that, "I am just waiting for seven years to go by for the statute of limitations to run so that when the secret evidence gets Bob out they can't come after me for it."

12. Scott would brag about how he had the cops fooled. He said that on the night he killed Earline Walker, he wore Bob's jacket. He told me that the cops had found a pack of Marlboros in the woman's car with Bob's fingerprints on it. Scott said that everybody knew he smoked Marlboros and Bob didn't, Bob smoked Kools. The cops hadn't figured this out. Scott explained that the reason the cops found Bob's fingerprints on the pack was that he had asked Bob to buy him some Marlboros earlier in the day. Bob had left the cigarettes in his jacket after he came back from buying them. After Bob passed out, Scott put on Bob's jacket. He said that it "worked out conveniently" for him, and that it was "like an accidental plan," because the Marlboros fell out of Bob's jacket in the car. The cops then thought Bob did the murder, although Scott did it. He would brag about how the cops never figured anyone of this out.

13. While we were in Lake Butler together, and even afterwards when we got out, Scott has talked about this murder to me and over the details about how he did it.

14. I've known Bob for a long time and he is not the kind of person who would do something like this. Everyone who knows Scott, on the other hand, knows that he is the kind of person who would do this kind of thing.

15. 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. Also mentioned they dumped her behind some kind of apartment or condominium that was under construction nearby. He said that he raped her and "cut her up" behind a condo subdivision in Altamonte. He has also told me that he has raped and killed other women. He has told me about 6 or 7 women he has killed. He said that one woman put up a fight so he killed her first, then he raped her. Scott says that he does it because it's better. 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.

16. Scott is a very sick person. Many people are very afraid of him. I am afraid, too. I have a wife and kids to worry about, and Scott is very dangerous.

17. Scott has always been sick. When we were young, he used to torture cats and dogs. He would pour kerosene on cats and set them on fire. He would hang cats from a clothesline.

18. As we grew up, Scott became even worse. We all knew that he could kill anybody -- he is very dangerous. Once, when we were sitting in a group together, he tried to burn the feet of a friend, Walter Ising, of ours. We all tried to stop him from doing that kind of stuff.

19. Scott sometimes talks about how he makes a living by pulling robberies. If anyone tries to get in his way, we all know that he would have no problem killing them.

20. I am sure that other guys who were locked up at Lake Butler with us would know that Scott killed Earline Walker -- he used to talk about it. Scott gets very excited when he talks about how he has killed women. He enjoys telling these stories. Not so much enjoys telling stories as, telling the story to certain individuals he trusts, to get feed back and partners. The talks were fairly private.

21. No defense attorney ever asked me anything about any of this at the time of Robert Preston's trial. If someone would have asked me, I would have told them. My brother, Glenn Yazell, and our friends could have explained these things about Scott.

22. On November 20, 1986, Robert Preston's lawyer, Billy H. Nolas, called me on the phone at my home in Springfield, Illinois. That was the first time I spoke to Mr. Nolas. I told him then what is contained in this affidavit. He asked if I would be willing to put these things in writing and I said "yes". None of Robert Preston's other lawyers had ever contacted me about any of this. My conversation with Mr. Nolas was the first time any lawyer had asked me about any of this information. Before that, I did not know how to reach any of Robert Preston's lawyers.

23. I know that the wrong person has been sentenced to die for Earline Walker's murder. I know that Bob Preston is innocent and I know that Scott Preston is guilty. I know this because Scott Preston told it to me -- he told me how he killed that woman many times. I believe in the death penalty, but I don't think that it is fair to execute a person for something he never did. Scott Preston is the murderer, not Bob. Scott Preston is also very dangerous.

If he is allowed to remain free, I know that he will kill more women. Something has got to be done about all this.

(PC 1271-78).

1. My name is James Tait MacGeen and I am 28 years old. I live in Apopka, Florida, where I have lived most of my live.

2. I lived in the same neighborhood as Scott and Bob Preston from 1973 until 1978, and knew them both very well. Bob and I were close friends, and spent a lot of time together during those years. I only knew Scott because he was Bob's brother -- because I spent a lot of time with Bob, at his house and in the neighborhood, I necessarily came into contact with Scott Preston frequently.

3. Bob was an friendly, outgoing guy, and was real easy to get along with. Scott, on the other hand, was a sick person. Scott didn't seem to have any friends -- everyone was either disgusted by him or afraid of him -- that's how weird he was. Scott's favorite activity was inflicting pain on people, small animals, or anything else he could find. Bob and I and the rest of the guys in the neighborhood were just into having a good time and hanging out, so Scott never really fit in with our group.

4. One of Scott's favorite pasttimes was torturing small animals. I remember one time when he caught two stray cats behind his house -- he tied their tails together and hung them over the clothesline, watching and laughing until they clawed each other to death. This was not an isolated occasion -- he used to do this sort of thing all the time. Another one of his favorite tricks was to catch cats, pour gasoline on them, set them on fire, and let them go. Scott wasn't a young kid when he did these things, either -- he was sixteen or seventeen the last time I saw him do it. I wouldn't be su[r]prised if he still does it.

5. 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.

6. I don't just suspect that Scott was involved in the murder -- I <u>know</u> he was, because he told me so several days after Bob was arrested. It didn't su[r]prise 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 su[r]prised 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.

7. I knew Donna Maxwell real well, too. I was going out with her at the time that the murder occur[r]ed. 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 the 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.

8. Donna and I talked some about what happened to Bob after that. I didn't know any of the specifics about his trial or anything, so I believed her when she told me that she didn't testify at his trial because they didn't need her. I didn't know that she actually did testify, and what her testimony was, until the second time I talked to Bob's current lawyers in November of this year. Donna Maxwell told me that she was scared of Scott, which I can certainly understand, and that Scott had told her exactly what to say in case anybody asked her about that night. All I know is that if Donna was with Scott or Bob that night, she couldn't have been there before 11:30 that night.

9. I knew Bob well, and still can't believe that he could have killed anyone. I knew him well enough to know that at the time the murders occurred, Bob was doing incredible amounts of PCP on a daily basis. I know this because I had done it with him on numerous occasions. If Bob was doing PCP that night, which knowing Bob he probably was, it's not likely that he could even remember anything that happened, even if he could have done anything in that condition.

10. I was never contacted by any attorney or investigator about what I know about Bob or Scott Preston until October of 1986. The first time I met Bob Preston's attorney, Mr. Billy Nolas, was the night of October 20, 1986. That night he spent about 15 minutes asking me questions regarding what I knew about Bob Preston's drug addiction. I explained to him what I knew about Bob's use of drugs and agreed to testify to that information at a hearing held on October 21-23, 1986. I spoke again with Mr. Nolas after the hearing and shared with him the information

that is contained in this statement. At Mr. Nolas' request, I met with his investigator, Ms. Theresa Farley, and Mr. Tim Schroeder on November 21, 1986 and agreed to sign this affidavit. Had I been asked to testify to the judge and jury during Bob's trial or answer any questions at any time regarding what I know about Bob and Scott Preston, I would have cooperated with all that I know.

(PC 1280-83).

1. My name is Glenn Yazell and I am 26 years old. I first met Bob Preston when I was about 13 or 14 years old. We lived in adjacent neighborhoods in Altamonte Springs near Bear Lake Elementary School.

2. Me and my brother, John, knew Bob and his brother Scott from the neighborhood. In the mid-1970's we and the other teenagers in the area would hang out and party. Most of us would drink and do drugs for fun. Bob was always an easy-going guy and got along with everyone, but everybody hated Bob's brother, Scott.

3. Scott always acted very weird and people would always avoid him. He never really had any friends and everyone would always stay as far away from him as they could. He spent a lot of time in juvenile detention since wherever he went there was trouble. When he would come back home, he always seemed even more screwed up than before he left.

4. Everyone in the neighborhood was shocked that Bob Preston was accused and arrested for the murder of Earline Walker. No one ever believed that Bob was guilty - it just didn't fit. It did, however, sound like something that Scott was capable of and most everyone I know believes that Scott Preston is guilty of Earline Walker's death. Scott is just the kind of person who would stand silent while his brother was convicted of something he did.

5. In the Spring of 1978, shortly after the Walker murder, I hired Scott to clean up a yard of a customer for whom a [sic] drilled a well. Right after that, Scott started coming by my house when I wasn't at home and hanging around as if we were good friends. My wife, Carla, was very upset about this because Scott was acting so strange and she was very afraid of him. Scott kept bringing gifts to Carla that were things that belonged to Bob. At first I just told Carla to not worry about Scott, because in a way I felt sorry for him because he was so weird and he didn't have any friends.

6. One time, Scott came by my house when Carla was there alone and took a knife from the kitchen and hid it under the woodstove. He was talking real crazy and kept

> asking her if he could light the stove. She kept telling him he couldn't but he kept asking. Finally, a male friend of ours came by and Carla talked him into staying until Scott left because she was so afraid. Later when Carla told me this story, I told Scott if he came to my house again I would call the police. He never bothered us again.
>
> 7. I believe that Scott Preston is guilty of the murder that Bob Preston is convicted of because Scott specifically confessed this to my bother, John. Even before I knew about Scott's confession to John, I believed that Scott was responsible for Earline Walker's death. I have also spoken to many other people that know both Bob and Scott and everyone I spoke to shares this opinion. In fact, most people believe that Scott has been involved in other murders as well and are afraid to have any contact with him at all because of how sick he is.
>
> 8. I was never contacted by any attorney or investigator about what I know about Bob or Scott Preston until October of 1986. The first time I met Bob Preston's attorney, Mr. Billy Nolas, was on October 20, 1986. At that time he spent a short while asking me questions about Bob Preston's drug problems. I told him what I knew about Bob's addiction to drugs and agreed to testify to that information at a hearing held on October 21-23, 1986. I spoke with Mr. Nolas after the hearing and shared with him the information that is contained in this statement. At Mr. Nolas' request, I met with his investigator, Ms. Theresa Farley, on November 20, 1986 and agreed to sign this affidavit. If I had been asked to testify to the judge and jury during Bob's trial or answer any questions at any time regarding what I know about Bob and Scott Preston, I would have cooperated with all that I know.

(PC 1285-88).

Mr. Preston can now prove his innocence and his entitlement to post-conviction relief. The Rule 3.850 court, however, provided no ruling whatsoever on any of these issues, although Mr. Preston urged that court to hold an expedited hearing and, at least, to rule.

Even the State's brief concedes that there is no lower court ruling. (See Answer Brief of Appellee [hereinafter "Answer"], p. 13). The State thus necessarily concedes what is obvious: the lower court's order cannot be deemed "final," for it has rendered no ruling on material issues presented in the litigation of this action. See, e.g., Blake v. Kemp, 758 F.2d 523, 525 (11th Cir. 1985); see also id. at 539

(Tjoflat, J., dissenting). Policy, as well as time-honored standards attendant to an appellate court's review function, mandate that Mr. Preston's case be remanded for an initial ruling from the lower court. That is all that Mr. Preston is asking for at this stage.

Although conceding that the requisite lower court initial ruling has not been made, the State nevertheless goes on to castigate Mr. Preston's counsel and vehemently argue that this Court should take the unprecedented step of making an initial ruling. The ruling urged, predictably, is procedural default. But the lower court never said that consideration would be procedurally barred -- it said nothing. It neither exercised discretion, nor refused to exercise discretion. It neither applied a procedural bar, nor refused to apply a bar. It neither indicated that Mr. Preston's claims had merit, nor that they had no merit. At a minimum, this Court should temporarily relinquish jurisdiction to the lower court for the initial ruling which this appellate Court cannot provide.

The State wants it both ways. Its brief argues that this Court should not consider the merits of Mr. Preston's claims because there is no initial ruling from the Rule 3.850 court. It nevertheless then argues that this Court should initially rule and apply an unprecedented procedural bar. The inconsistency itself defeats the State's argument. Mr. Preston's initial brief discussed why his claims must be heard. He discusses some of these reasons again below. But even if Mr. Preston's motions are analyzed as an appeal to the lower court's discretion to permit consideration of the claims, an initial ruling from the lower court is still required -- the lower court did not exercise or refuse to exercise discretion. Under any standard, a proper lower court initial ruling and final order are required. Even the State's brief concedes this point, as it must.

The State, however, goes on to level various procedural default contentions against Mr. Preston's claim. But the State's brief fails to disclose that the State

itself never presented those (or any) procedural default contentions to the lower court. Mr. Preston presented his claims to the Rule 3.850 court as soon as the evidence supporting his claims was uncovered. Mr. Preston also presented various reasons demonstrating that the claims should be heard, that an expedited hearing should be conducted, and that, at least, the lower court should render some ruling. The State, on the other hand, never alleged below that Mr. Preston's claims should be procedurally barred; it never even hinted before the lower court that counsel's diligence was open to question (an assertion the State now vehemently parades); it never said before the lower court that it should not consider what Mr. Preston presented; it never even provided an explanation concerning its continued refusals to comply with Mr. Preston's Chapter 119 requests, or regarding the fact that discovery of the evidence at issue had been hampered because of the State's own withholding of information -- at trial and during the post-conviction process. The State remained silent before the lower court -- it thus deprived that court of the opportunity to initially pass on the various contentions which it now belatedly springs forth for the first time on appeal. This will not do. The appropriate time to lodge its allegations was before the lower court, and its failure to raise the allegations below deprived Mr. Preston of the opportunity to explain to that court why the State's contentions should be rejected, why due diligence was exercised, and why the claims are not procedurally barred. Mr. Preston was never permitted to present an appropriate responsive proffer, to file appropriate affidavits rebutting the State's contentions, or to request a hearing at which he could present the facts demonstrating why the State is wrong. Mr. Preston was given no opportunity to respond -- the State held back its allegations. The State thus "sandbagged" Mr. Preston, counsel, and the lower court. The complaints it now parades are brought too late; its withholding of its procedural contentions from the lower court bars its efforts to initially raise those contentions on appeal. The State waived any

procedural arguments by keeping them hidden below. The State's efforts to now belatedly level such arguments should be foreclosed. Cf. Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984); LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981).

The primary issue therefore involves the lower court's failure to render any ruling, and any analysis of the issue requires that the nature of Mr. Preston's claims not be ignored. What Mr. Preston asserted below -- supported by witnesses with first-hand knowledge who provided that knowledge under oath -- goes to the heart of this [or any] Court's primary duty to do justice. Simply put, Mr. Preston is innocent of the capital offense for which he has been sentenced to die; he would have proven his innocence at trial had the State not suppressed critical evidence and had his attorney properly investigated.1/ The evidence is compelling. It becomes even more compelling when placed in the context of the remarkably weak case presented by the State at trial. This case involved no direct evidence: no incriminating statements; no identification; no accomplice testimony.2/ Rather, the State presented a case based on bits and pieces of "crime lab" evidence. (See Issue III, infra; see also Initial Brief of Appellant, Issue III.) In this regard, Mr. Preston demonstrated at the Rule 3.850 hearing that the key "crime lab" evidence -- the testimony of Diana Bass -- was discreditable and could have been discredited had the State not withheld from the defense critical evidence demonstrating that its "expert", Bass, was no expert at all, and that her testimony should not have been

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1. These are, of course, powerful claims; but they are supported by substantial evidence. As we asserted below, Mr. Preston can prove what has been pled if only given a fair opportunity.

2. The jurors struggled with their verdict. They deliberated at length. They posed a number of questions to the court. At sentencing, their vote was 7-5.

relied upon. (See Issue III, infra; see also Initial Brief of Appellant, Issue III.)

The State nevertheless shrugs off Mr. Preston's claim of innocence and asserts that it should not be heard. Contrary to the State's assertions, Rule 3.850 proceedings are grounded in due process, see Holland v. State, 503 So. 2d 1250 (Fla. 1987), and the focus of due process is that justice be done. To that end, preventing miscarriages of justice has been recognized as a post-conviction tribunal's most essential duty. See generally, Smith v. Murray, 106 S.Ct. 2661, 2668 (1986); Murray v. Carrier, 106 S.Ct. 2639, 2650 (1986); Kuhlmann v. Wilson, 106 S.Ct. 2616, 2627 (1986); see also Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970). There can be no more egregious miscarriage of justice than the wrongful conviction and execution of an innocent man. All Mr. Preston seeks is an opportunity to be heard on these issues.

The State's brief goes to great lengths to castigate Mr. Preston's counsel. Although it never even presented the hint of such an argument below, the State here boldly asserts that "[t]his case is a case of delay. . . ." (Answer, p. 13) (emphasis in original). But the State fails to say anything about its own role in that "delay" -- it was, after all, the State that withheld the evidence at issue at trial; it was, after all, the State that withheld the evidence at issue during the post-conviction process. When, soon before the hearing was scheduled, a judicial decision authorized Mr. Preston to seek disclosure of the State's files, see Tribune Company v. Public Records, P.C.S.O., Miller/Jent, 493 So. 2d 480 (1986)(rehearing denied September 5, 1986), Mr. Preston's counsel relied on that decision and sought disclosure. The State to this day refuses to allow Mr. Preston the access to which the law entitles him. Id.

Undersigned counsel became involved in Mr. Preston's case six days before the hearing,3/ and then did all he could to expeditiously present Mr. Preston's case. As soon as the evidence at issue was uncovered, it was presented to the Court. Undersigned counsel was in no way attempting to delay or engage in piecemeal litigation. To the contrary, what was sought was an expeditious ruling from the court in this proceeding, so that "piecemeal" successive litigation at a later date could be avoided. Here, as in State v. Sireci, 510 So. 2d 1222, 1224 (Fla. 1987), "as soon as the factual basis become available," counsel presented the evidence at issue and requested a ruling. The lower court, however, did not rule, and the State now asks this Court to take the unprecedented step of rendering that initial ruling by improperly applying a procedural bar. Yet, the State itself was responsible for

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3. This Court is well aware of the institutional predicament which the Office of the Capital Collateral Representative faced during the relevant time period. Mr. Preston's original attorneys -- Sondra Goldenfarb and Stephen Malone -- left the office before Mr. Preston's hearing, when the St. Petersburg CCR branch office was forced to close due to budgetary requirements. Mark Olive, Esq., was then the only attorney with any capital experience on CCR's staff. In September 1986, undersigned counsel joined the office. CCR, then with only two experienced and/or qualified attorneys, attempted to represent Mr. Preston (and to prepare for the October hearing) while representing over one hundred other death-sentenced inmates. Ten death warrants were signed between August and October of 1986. The brutal circumstances under which Mr. Preston's case and other cases during that period of time had to be litigated is no secret; the State's challenge to counsel's diligence should not be accepted at face value. The true facts regarding the State's assertions can be refuted, and would be refuted, at a hearing. (As noted, the State failed to raise such contentions below, and therefore deprived counsel and Mr. Preston of the opportunity to proffer the compelling facts demonstrating that due diligence was exercised, that no procedural bar exists, and that the State itself was responsible for much of the "delay".) Should this Court have any questions about counsel's diligence, Mr. Preston respectfully urges that the Court direct a hearing on this issue. Such a hearing will dispel any concern; diligence was exercised in this case to the best of undersigned counsel's ability or that which can be expected of any attorney litigating a case under similar circumstances. (In this regard, a copy of the reply brief filed in the Eleventh Circuit United States Court of Appeals by CCR in another case involving similar State assertions is appended hereto. The brief discusses the circumstances under which CCR litigated cases during much of the relevant time period immediately prior to Mr. Preston's hearing.)

withholding much of the evidence at issue, first at trial, and now during the post-conviction process, as it withheld its procedural contentions from presentation before the lower court. The State should not now be heard to complain.

This case involves the classic example of "interference by [State] officials", Brown v. Allen, 344 U.S. 443, 486 (1953), quoted in Murray v. Carrier, supra, 106 S.Ct. at 2646, which precluded a litigant from asserting a claim earlier. (To date, Mr. Preston's legitimate Chapter 119 requests remain ignored; and the State still conceals its files.) This case also involves claims whose basis was unknown, and unknown for reasons beyond the litigant's control. See Murray v. Carrier, supra, 106 S.Ct at 2646. Under such circumstances, it would be wholly improper for this Court to accept the State's invitation that it apply a procedural bar, see Murray v. Carrier, supra; Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), even if this Court could properly render an initial ruling. The State continues to withhold its files, yet it asks this Court to punish Mr. Preston because counsel fortuitously uncovered the evidence at issue days after the hearing. Ironically, "finality" interests would have been best served had the State's representatives disclosed their files (as Chapter 119 requires), agreed that an expedited hearing on these issues was appropriate, or even joined Mr. Preston in requesting that the lower court rule. The State, however, simply stood silent until Mr. Preston was forced to appeal in order to seek a direction that the lower court render a ruling. Any "sandbagging" that took place in this case was engaged in by the State's representatives. It was, after all, the State that withheld its procedural default arguments from the lower court (thus foreclosing Mr. Preston's ability to rebut such claims, present a proffer, or urge a hearing thereon) only to boldly parade them on appeal.

We, like the State, have an interest in the finality of this litigation. After all, an individual whose innocence can be proven continues to sit on death row while the State vigorously opposes any hearing on his claims. This Court can ensure the

interests of both justice and finality: as in Groover v. State, 489 So. 2d 15, 18 (Fla. 1986), the Court may remand this case for the required initial ruling on these issues and can direct that the hearing be expedited. Given the nature of the claims at issue, and the other factors discussed herein and in Mr. Preston's initial brief, such action would be perfectly appropriate and would further the avoidance of piecemeal litigation. Most importantly, such action would further the ends of justice, for it would allow a death-sentenced inmate to be heard on what is, after all, the most significant of all claims.

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 HE HAD REPRESENTED MR. PRESTON IN CONNECTION WITH A PRIOR CONVICTION WHICH WAS USED TO AGGRAVATE THIS CAPITAL SENTENCE

The Rule 3.850 court ruled on the merits of this claim. (See PC 1308 [Order denying Rule 3.850 relief].) The court's order could not be plainer -- no procedural bar was applied, or even mentioned. Nor was the application of such a bar advocated, or even hinted at, by the State. The State litigated the merits of the claim below and declined to assert any procedural bar. Mr. Preston was therefore never permitted to proffer the reasons why the procedural arguments the State now belatedly advances are insufficient to bar merits review, and the lower court was never provided with an opportunity to rule on the contentions now belatedly advanced. Conceding before the lower court that the issue should be litigated on the merits, the State has waived its alleged procedural contentions. See Boykins v. Wainwright, supra, 737 F.2d at 1545; LaRoche v. Wainwright, supra, 599 F.2d at 724; Washington v. Watkins, supra, 655 F.2d at 1368; Grooms v. Wainwright, 610 F.2d 344, 347 (5th Cir.)(where lower court rules on merits and state fails to raise a procedural objection, state is foreclosed from raising procedural contention for first time on appeal), cert.

denied, 445 U.S. 953 (1980). The lower court, in fact, accepted, verbatim, the State's proposed order. (Compare PC 1308 [Rule 3.850 court's order], with PC 1302 [State's proposed order]. See also, Initial Brief of Appellant, Issue I). The State should not now be heard to complain; and should not now be permitted to assert contentions that it failed to even include in its proposed order.

The lower court, without objection, heard the parties litigate the merits, and then ruled on the merits. The merits of the claim are thus now before this Court. The merits demand relief.

Mr. Preston is not arguing here that he is entitled to relief on this issue "merely because Marblestone decided to become an assistant state attorney years after he had represented Preston" (Answer, p. 22); rather, the gravamen of Mr. Preston's claim is that Assistant State Attorney Marblestone "decided," and the State Attorney's Office "decided" to allow him to participate in Robert Preston's capital prosecution, despite the fact he had formerly represented Mr. Preston is a case which was relied upon and used in the instant proceeding to sentence Mr. Preston to death. Under such circumstances, the prosecuting agency is duty-bound to "screen" the attorney who previously represented a defendant from any participation, "direct or indirect," in the subsequent prosecution of that defendant. See State v. Fitzpatrick, 464 So.2d 1185, 1187 (Fla. 1985)(emphasis supplied)(expressly approving ABA Formal Op. 342, 62 A.B.A.J. 517 [1976]); See also, Code of Professional Responsibility, D.R. 5-105(d); Model Rules of Professional Conduct, Rule 4-1.11(c). This the State Attorney's Office did not do in Mr. Preston's case.

Before the lower court as well as before this Court the State concedes that Fitzpatrick, supra, presents the appropriate analysis for the resolution of this issue. (See Answer at 22.) The lower court also relied on Fitzpatrick (R. 1308), but misread what Fitzpatrick held. Under Fitzpatrick, the entire State Attorney's Office is precluded from proceeding in the prosecution of a defendant if the

individual attorney who previously represented that defendant 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 added). Under Fitzpatrick, under no circumstances can a prosecutor who previously represented the defendant involve himself in any way in the prosecution of his former client. Assistant State Attorney Marblestone did just that, and thus violated Mr. Preston's rights under Fitzpatrick and the Fifth, Sixth, Eighth, and Fourteenth Amendments. The only other pertinent question under Fitzpatrick is whether Mr. Preston's previous case was "related" to the capital charge. It was, as most clearly exemplified by the sentencing court's reliance on that previous conviction to sentence Mr. Preston to death, and by the State's arguments at sentencing relating to that previous offense.

The State would require Mr. Preston to establish "unequivocal undisputed testimony that . . . discussions of privileged communications or any other matters with reference to Preston were had between the attorney [Marblestone] and others in his office," (Answer, p.21). However, Fitzpatrick never imposed such an impossible test. Rather, Fitzpatrick's two-part test mandates that relief be granted if the attorney who previously represented the defendant participates "in any capacity," "directly or indirectly," in the subsequent prosecution of that defendant. Id. at 1187-88 (emphasis supplied). Fitzpatrick was violated in this case.

The difficulties in proving an actual disclosure of confidential information are in fact amply illustrated by the Rule 3.850 record in the instant case. Marblestone, the only witness who could have testified in regard to this matter, testified under oath that he never even appeared at the pretrial hearing at issue, that the clerk's notes of that hearing reflected a mistake made by the clerk, and that he never appeared "on this case on that day, or any other day, and represented the State of Florida." (PC 100-01). Marblestone's under-oath assertions were then conclusively

proven to be false when the previous court reporter read the minutes of that day's proceedings into the record (PC 124-26).

Moreover, other practical problems of proving an actual disclosure of prejudicial information are apparent: a defendant seeking to prove that confidential information was actually disclosed must necessarily disclose much of the confidential communications in the course of showing that an actual disclosure occurred, thus "destroy[ing] the very confidentiality he seeks to protect." See Fitzpatrick, 469 So. 2d at 1189 (Erlich, J., dissenting). Such reasons are precisely why, under Fitzpatrick, a showing of participation in the subsequent prosecution obviates the necessity of showing an actual disclosure, and thus avoids the various difficulties a defendant faces in making such a showing.

Mr. Preston presented conclusive evidence proving precisely what Fitzpatrick required him to prove. In fact, the record in this case speaks for itself: Assistant State Attorney Marblestone participated in the prosecution which led to Mr. Preston's conviction and sentence of death. He, inter alia, objected to pretrial motions filed by the defense, negotiated a waiver of speedy trial, and related specific facts regarding the State's case against Mr. Preston. (See PC 124-36.) Although [under oath] Marblestone denied any court appearance with regard to the murder prosecution of Mr. Preston, disavowed any knowledge of the case, and asserted that any indication to the contrary contained in court records was a "mistake" (see PC 100-102), the court reporter's reading of the minutes of his appearance and argument on behalf of the State belied his testimony (Compare PC 100-102, with PC 124-26).

The court reporter's testimony relating what actually took place in court demonstrated that Marblestone's involvement went far beyond what the State now contends (See Answer, p. 21 ["Marblestone's involvement was limited to nothing more than a regurgitation of what counsel handling the case but unable to appear, had

asked him to say."]) However, even if the State's assertions were accurate, Mr. Preston's entitlement to relief remains undisputable: whether or not Marblestone's argument was a "regurgitation", his appearance and argument at the pretrial hearing in this case was plainly "participation" in the prosecution. His participation was more than "improvident" (Answer, p. 24), it was prohibited under any applicable ethical standard, under constitutional guarantees, and under this Court's decision in Fitzpatrick.

Marblestone's participation in the prosecution continued into post-conviction proceedings. Marblestone testified at the hearing below that he discussed the allegations contained in Mr. Preston's Rule 3.850 motion with the Assistant State Attorney assigned to the case, and that he then investigated and gathered evidence in rebuttal of his former client's instant claim, which he then provided to the prosecutor who actually litigated the 3.850 motion. (See PC 96, 102-04, 114). It is of no moment that "no evidence ... was introduced at the evidentiary hearing by Marblestone that was of a privileged nature" (Answer, p. 23) -- Marblestone undeniably did participate in the Rule 3.850 litigation. See Fitzpatrick, supra. (In fact, at the Rule 3.850 hearing, the State sought to elicit Mr. Preston's privileged communications while Marblestone was on the stand and was only prevented from doing so when the court sustained counsel's objection.) Marblestone's continued participation in the prosecution infected the post-conviction proceedings. His participation violated Mr. Preston's due process and equal protection rights to a full and fair hearing, just as his participation in the initial proceedings rendered Mr. Preston's conviction and sentence of death violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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 trial court made no ruling regarding Mr. Preston's claim that the State's deliberate suppression of evidence relating to Diana Bass' incompetence and lack of expert qualifications violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Brady v. Maryland. Rather, the court ruled only that "Bass' testimony was not misleading or based upon improper technique" (PC 1307), without analyzing, or even mentioning, the State misconduct which is the basis of this claim. The court made no findings of fact, much less "succinct" ones (see Answer, p. 27), with regard to the State's deliberate withholding of evidence demonstrating that its "expert's" testimony was in fact incompetent, unqualified, and unreliable; that its "expert" was no expert at all, or that the State misled the jury and court when it presented Bass as an "expert".

Even those rulings which the court did make were erroneous, contrary to fact, and without record support. As discussed in Mr. Preston's initial brief, the evidence presented at the Rule 3.850 hearing demonstrated that Bass' lack of professional qualifications, skills, and expertise rendered any testimony she gave regarding hair analysis inherently misleading, and that she used improper techniques as a matter of course. Moreover, the expert testimony of James Halligan (who had served as director of FDLE's Tallahassee Crime Lab for a number of years, and who had established FDLE's training and supervision procedures) was that Ms. Bass' testimony at Mr. Preston's trial was misleading (see PC 207), that her techniques were consistently improper (PC 170-83), and that her techniques were consistently unreliable. This testimony was not only unrebutted by any of the other evidence adduced at the hearing, but was in fact corroborated by the testimony of Robert Kopec

(her supervisor at FDLE's Sanford Crime Lab) regarding her lack of competence and the unreliability of her efforts (See PC 485-93). Of course, none of this was disclosed at the time of trial.4/

Bass' substantive testimony concerning the results of her analysis was inherently misleading, as was her testimony regarding her qualifications as an expert. As Mr. Preston discussed in his initial brief, Bass was not qualified to provide expert testimony or opinion, but the evidence which demonstrated her lack of training, skills, and qualifications was withheld from the defense. Mr. Preston's trial attorney did not know nor had reason to know that her testimony was misleading, because the State deliberately suppressed evidence, and stood silent while its witness misled the jury and the court. Had this evidence been made available to trial counsel, the defense could have (and would have, see PC 458 [testimony of trial attorney]) demonstrated that Bass was not qualified to testify as an expert, and that any opinions she expressed were devoid of credibility.

Mr. Preston does not contend that the State has a "duty to actively assist the defense in investigating the case." (Answer, p. 27.) Rather, Mr. Preston relies on the bedrock constitutional imperative that the State must disclose evidence that is favorable to the accused and "material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963); see also United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 105 S.Ct. 3375 (1985); Arango v. State, 467 So. 2d 692 (Fla. 1985), vacated and remanded for reconsideration in light of Bagley, adhered to on remand pursuant to Bagley, 497 So. 2d 1161 (Fla. 1986). Mr. Preston

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4. The evaluation she performed in Mr. Preston's case, in fact, was the last she would perform at FDLE. Contrary to her trial testimony, she left FDLE soon after because of Mr. Kopec's evaluation. After so indicting her expertise, Mr. Kopec prohibited her from conducting further analyses. Although the FDLE would not rely on her expertise, Mr. Preston's jurors were asked to rely on her.

also relies on the fundamental constitutional mandate that the State not present false and misleading evidence. See Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); Bagley, supra; Agurs, supra. Those duties were violated here when the State failed to disclose the evidence of its expert's incompetence and total lack of expert qualifications, and when it allowed Bass to provide misleading testimony about her qualifications and her evaluation in this case. The State did not have to "independently conduct [a] tangential investigation into the personnel files of a witness" (Answer, p. 29) to find this evidence -- it was contained in their own [FDLE's] files.

Appellee makes much of the fact that "there was no specific request by the defense for personnel files of those expert witnesses to be called by the state." (Answer, p. 28.) The government's constitutional duty to disclose evidence favorable to the accused is unaffected by the specificity of the defendant's request -- the duty remains even if the defense makes no request. Bagley, supra, 105 U.S. at 3384. In any event, Mr. Preston's trial counsel made repeated requests for material, exculpatory evidence prior to trial. Defense counsel would have had no good faith basis for a request with the degree of specificity required by the State. Counsel was entitled to, and did, assume that the Florida Department of Law Enforcement's "experts" were in fact experts. The State represented them to be so, although in the case of Bass they possessed information which clearly demonstrated the contrary.

The State also argues that the prosecution had no duty to disclose the evidence at issue here because it could not be "logically expected that the prosecutor has any awareness of the individual personnel files of each of his prospective expert witnesses." (Answer, p. 28.) The prosecution, however, must be "logically expected" to be aware of the expert qualification [or lack thereof] of the law enforcement witnesses that it presents as "experts". The law, in fact, is crystal clear that the prosecution is legally chargeable with the knowledge possessed by its law enforcement

officers. See Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984)("knowledge of the police ... will be imputed to state prosecutors"); see also Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977); Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969); Arango v. State, supra, 467 So. 2d at 693.

While the State agrees that the prosecution is "imputed with knowledge possessed by the police as [its] investigative arm" (Answer, p. 28), the State would have the Court believe that the Florida Department of Law Enforcement is not a "police" agency, but rather is an "independent contractor" only "collaterally involved" with criminal prosecutions, and not "truly a part of the prosecutorial/law enforcement arm of the State." (Id. at p. 29). Under the State's view, the prosecution would be chargeable with the knowledge of a local meter maid, but not with the knowledge of the State's chief law enforcement agency, an agency which investigates virtually every major crime occurring in Florida, an agency directly involved in the prosecution of almost all capital cases, an agency with the primary responsibility of analyzing forensic evidence for the State in such cases, and an agency intimately involved in the prosecution of this case. The State's position is almost too patently fallacious to require a response. Suffice it to say that the Florida Department of Law Enforcement is the investigative arm of the State, that it played a major part in the investigation of the instant case, that it "work[ed] closely with the prosecut[ion]," Arango, 467 So. 2d at 693, in this case, and therefore that the prosecution here was chargeable with knowledge of any exculpatory information possessed by that agency. Arango, supra; Williams v. Griswald, supra.

The State also argues that the fact that Bass was no longer employed by FDLE at the time of Mr. Preston's trial somehow obviated FDLE's and the prosecution's awareness of the evidence which demonstrated her complete lack of expert qualifications, and thus relieved the State of its constitutional duty to disclose that evidence to the defense. (See Answer, p. 28.) The reasons for and the

circumstances surrounding Bass' departure from FDLE form a large part of Mr. Preston's claim -- the unrebutted evidence adduced at the Rule 3.850 hearing below showed that Bass left the agency, and the field of microanalysis, immediately after she was prohibited from further case work as the result of an evaluation which revealed her incompetence and her lack of training, skill, and expertise. (See PC 799-800, 139-207, 481-93). Mr. Preston's trial counsel attempted to learn from Bass the reasons for her departure from FDLE, but was again misled (Compare PC 451 and 1134, with PC 457-61). No one told him, the court, or the jury the truth. Surely the State cannot expect this Court or the Appellant to believe that the trial prosecutors were unaware of the circumstances underlying their expert's "retirement" from her field of expertise. The "hair analysis" conducted in Mr. Preston's case was, after all, the last one she was allowed to perform. FDLE prohibited her from conducting further evaluations immediately after this one, and she left FDLE soon after Mr. Kopec's indictment of her expertise. In any event, the prosecution was legally chargeable with such knowledge, and its failure to disclose the evidence at issue violated Mr. Preston's rights and rendered his capital trial and sentencing proceedings fundamentally unfair and unreliable. Brady, supra; Arango, supra.

The evidence here withheld falls squarely within the strictures of Brady v. Maryland and its progeny. Had trial counsel had this evidence, he could have demonstrated that Bass was not qualified to testify as an expert, and that in fact she was a lay witness advancing expert opinions regarding a highly complex, technical field. He could have demonstrated that her testimony was misleading, that her techniques were improper, and therefore that her "expert" opinions and conclusions were absolutely unworthy of belief. This, in fact, is what Mr. Preston proved at the evidentiary hearing. (See PC 170-83, 207, 481-93, 799-800).

The prosecution made Bass' testimony the feature of its case. According to the trial prosecutor, her testimony established that hairs removed from the clothing of

Mr. Preston were "in no way distinguishable from the victims" (R. 1791), and was therefore "direct and positive evidence" of Mr. Preston's guilt (R. 1815). The hair analysis evidence and Bass' testimony was so critical, according to the prosecutor, that her failure to make a positive comparison of either of the 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 two could have cleared or served to exculpate the Defendant.

(R. 1791)(emphasis added).

The state's emphasis on this evidence was understandable. If believed, Bass' analysis of the hairs was the only evidence placing Mr. Preston in direct contact with the victim. (Cf. Issue I, supra.) The State emphasized Bass' testimony because it was, as presented, the strongest evidence it had. There can be no doubt as to its materiality.5/

Bass' testimony was of such a critical nature that there is a more than reasonable probability that it's disclosure would have altered the outcome of the case, and Mr. Preston is therefore entitled to the relief he seeks. Brady, supra; Bagley, supra; Arango, supra. However, the withheld evidence cannot be considered in isolation: the materiality of the evidence at issue must be determined on the basis

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5. The critical nature of the evidence provided through Bass' testimony, and a fortiori the materiality of the deliberately withheld evidence which demonstrates that her testimony was incompetent and unqualified, becomes even more apparent when viewed in the light of other critically exculpatory evidence withheld by the State. As discussed in Issues I, IV, and V of Appellant's Initial Brief, and Issue I of the instant brief, the State failed to disclose evidence indicating that Mr. Preston's brother, Scott, had actually committed the crime. With the possible exception of Bass' testimony regarding the hair removed from Mr. Preston's belt buckle, all of the other bits and pieces of evidence presented by the State are wholly consistent with Scott Preston's guilt (Cf. Issue I, supra.) The "belt buckle" testimony, of course, is no longer viable. We now know that Bass was unqualified to act or testify as an expert. We now know that her testimony lacked credibility, and therefore proved nothing with regard to Mr. Preston's guilt.

of the cumulative effect of all the suppressed evidence (see Initial Brief of Appellant, Issues I, III, IV, and V) and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, 730 F.2d 1334, 1356 (10th Cir. 1984).

Even if this were solely a case of nondisclosure, Mr. Preston has met the Brady/Bagley materiality standard, and is therefore entitled to relief. However, this case goes beyond that. Bass and the trial prosecutors presented her testimony as that of a qualified expert. Clear evidence indicating that she was decidely neither qualified nor an expert was within the State's possession. The State cannot close its eyes to what its own files reflect, as it cannot present evidence known to be misleading. Consequently, the constitutional violation in Mr. Preston's case is of a more serious nature, and the materiality standard is correspondingly stricter. See Bagley, supra, 105 S.Ct. at 3382; Agurs, supra, 427 U.S. at 103-04; Giglio v. United States, 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

The State's use of evidence known to be false or misleading is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, supra, 427 U.S. at 103-04 and n.8. See also, Giglio, 150 U.S. at 153. Consequently, in cases involving knowing use of misleading evidence, the defendant's conviction must be set aside if there is any reasonable likelihood that the evidence affected the jury's verdict. United States v. Bagley, supra, 105 S.Ct. at 3382, quoting United States v. Agurs, 427 U.S. at 102. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. Bass' testimony was plainly misleading with regard to her qualifications, expertise, and the evaluation

she performed in this case. She provided false testimony even with regard to her reasons for leaving the FDLE. The testimony was known to be false. Mr. Preston is plainly entitled to relief.6/

In this case, evidence which would have demonstrated that the State's key witness was in fact wholly unqualified and incompetent to testify as an expert was withheld from the defense while the witness and the State presented her testimony as the conclusive opinion of an eminently qualified, highly skilled expert. Disclosure of the evidence would in all probability have had an effect on the jury's verdict at

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6. Moreover, the materiality standards established by Brady, Giglio, and Bagley, do not distinguish between the jury's guilt/innocence verdict and its sentencing verdict. Thus, the inquiry is whether disclosure of the withheld evidence would affect the outcome of either the guilt/innocence or the capital sentencing stages of a trial. See Smith (Dennis) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence only because withheld evidence related to punishment, but not guilt/innocence). The withheld evidence discussed herein affected both phases of his capital trial. This contention may well be "impossible to understand" for the Appellee (see Answer, p. 26), but Mr. Preston is confident that this Court will understand the argument.

There is no question but that the evidence at issue would have been admissible at sentencing. The most basic eighth amendment jurisprudence tells us that all evidence concerning the facts surrounding the capital offense is admissible at the penalty phase. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). However, even if not introduced at the sentencing phase, the evidence at issue regarding Diana Bass would still have had an effect on the penalty verdict.

As this and the federal courts have recognized, evidence presented at the guilt/innocence phase of a capital trial can and does have an effect on the outcome of the sentencing phase. See Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986)("We note that non-statutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceeding"). See also, Smith v. Wainwright, 741 F.2d 1248 (1984); see also 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"); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). The evidence withheld here would have, in all probability, affected the sentencing verdict voted by Mr. Preston's 7-5 jury. The Eighth Amendment's heightened reliability requirements apply to trial and sentencing and under those standards Mr. Preston is also entitled to relief.

guilt/innocence and sentencing, and its suppression therefore violated Mr. Preston's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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

Mr. Preston relies on the arguments presented in his initial brief, and in Issue I of the instant brief.

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

Mr. Preston relies on the arguments presented in his initial brief, and in Issue I of the instant brief.

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

Mr. Preston relies on the arguments presented in his initial brief.

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

As discussed in Mr. Preston's initial brief, this issue was appropriately brought in Rule 3.850 proceedings, and was therefore before the trial court on the merits. Mr. Preston complied with the procedures established by this Court's decision in Mann v. State, 482 So. 2d 1360 (Fla. 1986), by filing a separate Rule 3.850 motion in the appropriate court. The trial court denied this claim without the

benefit of a ruling on the constitutionality of the underlying decision. The trial court erred.

The State argues that even if the underlying conviction was found to be unconstitutional, "there is nevertheless no basis for reversal in this cause given the wealth of other aggravating circumstances ... and the trial court's ... finding

omitted). What the State ignores, however, is that the removal of the underlying conviction from the sentencing calculus would not only have resulted in a reduction of the total number of aggravating circumstances validly found by the trial judge from three to two, see Preston v. State, 444 So. 2d 939 (Fla. 1984), but also would have added a statutory mitigating circumstance to the calculus, i.e., that the defendant had no significant history of prior criminal activity. Fla. Stat. section 921.141(6)(2). (Only the "deadly missile" conviction prevented a finding that that mitigating factor applied). Obviously, the erroneous reliance on the unconstitutional prior conviction is not harmless -- a three aggravating circumstances, no mitigating circumstances balance, see Preston, 444 So. 2d 939, is very different from a two aggravating circumstances, one mitigating circumstance balance. See, e.g., Elledge v. State, 346 So. 2d 998 (Fla. 1977).

This was a close case -- the jury's sentencing verdict was by the narrowest possible margin (7-5), and it had returned several questions regarding the mechanics of imposing a life sentence during its deliberations. One vote was all that was needed for a valid recommendation of life, and the removal of one aggravating circumstance from the jury's consideration, as well as the addition of one statutory mitigating circumstance, would doubtlessly have changed the result. It simply cannot be said that reliance on the unconstitutional underlying conviction was harmless.

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

We recognize that this Court has rejected the view that Caldwell v. Mississippi, 472 U.S. 320, 1055 S.Ct. 2633 (1985) represents a "change in law" making such claims cognizable in post-conviction proceedings. See, e.g., Phillips v. Dugger, 515 So. 2d 227, 228 (Fla. 1987). However, for the reasons stated in Mr. Preston's initial brief, as well as those detailed in n.7, infra, we respectfully urge the Court to reconsider.

This claim is based on the Eighth Amendment mandates established by Caldwell. Various federal courts of appeal have recognized that Caldwell represents a significant change in law (see n.7, infra), and members of this Court have suggested that Caldwell claims should be heard in Florida post-conviction proceedings. See, e.g., Phillips, supra, 515 So. 2d at 228 (Barkett, J., specially concurring). Mr. Preston's claim should be heard7/ and relief should be granted.

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7. Caldwell did not exist at the time of Mr. Preston's trial, nor when Mr. Preston's appeal was presented to this Court. Nor did there exist any precedent applying Caldwell's standards to Florida's trifurcated capital sentencing system. The first such case was Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied with opinion sub. nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987).

Caldwell represents a "substantial change" in Eighth Amendment law, far more substantial in fact than Hitchcock v. Dugger, 107 s.Ct. 1821 (1987). This is so because where Hitchcock changed the standard of review which this Court had been applying to a class of constitutional claims, see Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987)(Hitchcock rejected "mere presentation" standard of review applied to Lockett v. Ohio issues); Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987)(same), the Caldwell decision established a class of federal constitutional claims which did not previously exist. Adams v. Dugger, 816 F.2d at 1499. As such, Caldwell falls squarely within the standards enuciated in Witt v. State, 387 So.2d 922 (Fla. 1980) and Downs v. Dugger. In this regard, it is significant that every judge of the

(footnote continued on following page)

Moreover, it is of no moment that Mr. Preston's trial counsel stated during argument at sentencing that the jury's recommendation would be "weighed heavily" by the trial judge. (See Answer, p. 48.) This isolated comment was by no means

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(footnote continued from preceding page)

Eleventh Circuit who has passed on a Caldwell claim has recognized the novelty of the constitutional doctrine which Caldwell established. See, e.g., Adams v. Wainwright, supra, 804 F.2d 1526; Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987); McCorquodale v. Kemp, No. 87-8724 (11th Cir., September 20, 1987), and Caldwell's novelty has also been recognized by other federal circuits. See Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987)(en banc).

Caldwell involves the Eighth Amendment requirements essential to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S.Ct. at 2645-46; see also, Phillips, supra, 515 F.2d at 228 (Barkett, J., specially concurring). The opinion established, for the first time, that comments which diminish a capital jury's sense of responsibility render the resulting death sentence unreliable and therefore constitutionally invalid. This Court, however, has relied on its own state law opinions to reject the view that Caldwell is a "novel" decision. See e.g., Copeland v. Wainwright, 505 so. 2d 425, 427 (Fla. 1987); Phillips v. Dugger, supra. Mr. Preston respectfully urges the Court to reconsider since,

> [t]he mere fact a practice may be condemned as a matter of state law, . . . does not indicate that the same practice constitutes an Eighth Amendment violation.

Adams v. Dugger, 816 F.2d at 1496 n.2 (emphasis supplied). This Court's state law cases construing the capital sentencing statute did not establish that as a matter of federal constitutional law, statements such as those at issue in Mr. Preston's case violated the Eighth Amendment. Caldwell is a substantial change in law because it established the Eighth Amendment principle.

The "tools" referred to by the State with which Mr. Preston could have raised a "Caldwell-like claim" on direct appeal, (see Answer, p. 50-51) were purely state-law decisions. The "tools" for raising the instant federal constitutional claim were simply not available to any litigant until Caldwell itself, and not truly available to Florida capital litigants until Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). The fact that one Florida capital defendant successfully sought a jury instruction consistent with state law in his 1984 trial (see Answer, p. 49) is of no moment -- the claim presented here is not that Mr. Preston's trial judge refused to accurately instruct the jury as to the applicable state law, but that he misinstructed and misinformed them in a way that violated the Eighth Amendment as interpreted in Caldwell. This claim was not available to Mr. Preston at the time of his direct appeal.

sufficient to undo the harm caused by the judge's instructions that he, not the jury, had the "sole" responsibility for the sentencing decision.

In this regard, it is noteworthy that the Caldwell court rejected the suggestion that even the prosecutor's own later statements "that the jury played an important role in the sentencing process" undid the harm caused by his earlier remark. Id., 105 S.Ct. at 2645 n.7. The Court explained that "even if the prosecutor's later comments did leave the jury with [the] view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous insistence that the jury's determination of the appropriateness of the sentence of death would be reviewed by the appellate court to assure its correctness." Id. That analysis applies with even stronger force to Mr. Preston's case. Here there was but a sole accurate reference to the jury's responsibility made by defense counsel. That passing reference was not sufficient to "retract" or "undermine" the misleading and inaccurate instructions of the trial judge. Moreover, the same defense counsel had earlier informed Mr. Preston's jury 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 added).

For the reasons discussed herein and in Mr. Preston's initial brief this claim should be determined on the merits. Because it cannot be shown that the comments at issue here had "no effect" on the jury's sentencing decision, Caldwell, 105 S.Ct. at 2646, the merits demand 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

The sentencing court used a previous, non-violent, juvenile misdemeanor adjudication to sentence Mr. Preston to death, and it used it as if it was a violent felony conviction. There can be no dispute that this was wrong, and violative of the Eighth Amendment. This is a classic example of a trial court's unconstitutional reliance on "misinformation of constitutional magnitude" to sentence a capital defendant to death. See Burgett v. Texas, 389 U.S. 109 (1967); Zant v. Stephens, 462 U.S. 862 (1983); United States v. Tucker, 404 U.S. 443 (1972). As such, this claim involves classic fundamental error -- no procedural bar applies in such contexts. Moreover, contrary to the State's brief's assertion, capital sentencing error violates the Eighth Amendment equally whether employed to establish aggravating circumstances or rebut mitigating factors. Cf. Proffit v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983).

The State further asserts that since Mr. Preston's juvenile misdemeanor conviction was discussed between the prosecutor and the court, and since the former stated that the prior adjudication did not involve a violent felony, the sentencing order's misplaced reliance on that adjudication was only a "typographical" error. (Answer, p. 53). The order itself (R. 2816) refutes the State's assertion. The prosecutor's general in-court statements regarding aggravating and mitigating circumstances simply do not rebut the conclusive evidence of how the trial court determined that a death sentence was appropriate in this case -- its sentencing order.

Finally, this error cannot be deemed harmless. Had the trial court not misplaced its reliance on the juvenile adjudication, Mr. Preston's record would have reflected only the "deadly missile" conviction -- an offense which occurred at about

the same time as the capital felony and of which Mr. Preston was convicted well after his indictment on the capital charges. The "no significant criminal history" mitigating circumstance could have been more than properly found under such circumstances. On direct appeal, this Court reversed the finding as to one of the four aggravating factors found. Obviously, as this Court's opinion on direct appeal makes clear, see Preston, 444 So. 2d 939, the presence of a mitigating circumstance would have made a difference. See generally, Elledge v. State, 346 So. 2d 998 (Fla. 1977). Simply put, a three aggravating circumstances, no mitigating circumstance case is very, very different than the two aggravating circumstances, one mitigating circumstance case which we would have had had the sentencing court not relied on misinformation to reject the "no significant criminal history" factor. Elledge, supra. The error cannot be deemed harmless.

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

It is black letter law that a trial court is precluded from directing a verdict for the State in a criminal trial by jury. Rose v. Clark, 106 S.Ct. 3101, 3106 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). Just as fundamental error occurs when a court directs a verdict in the State's favor at guilt-innocence, fundamental error occurs when a trial court does so at sentencing. In fact, the Eighth Amendment's heightened reliability requirements mandate even closer judicial scrutiny of such issues in the context of capital sentencing.

Moreover, contrary to the State's assertion that "there is no doubt that this jury would recommend death irrespective of this allegedly improper jury instruction," (Answer, p. 57), the facts of this case indicate just the opposite. The jury deliberated at great length at both the guilt-innocence and penalty phases. They posed a number of questions to the court. They struggled to reach a sentencing

verdict and voted for death by the slimmest of margins -- 7-5. Given these circumstances, the improper instruction at issue simply cannot be deemed harmless beyond a reasonable doubt.

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

Caldwell v. Mississippi did not exist at the time of Mr. Preston's trial. Neither had Harich v. State, 437 So. 2d 1082 (Fla. 1983)-- the state law basis of Mr. Preston's claim -- yet been decided. Mr. Preston simply lacked the "tools" on which to base a trial-level objection to the jury instructions here at issue. See generally Reed v. Ross, 468 U.S. 1, 16 (1984).

As stated earlier (see n.7, supra), this Court has declined to view Caldwell as a "sufficiently significant change in the law upon which to base a collateral attack," Phillips v. Dugger, 515 So. 2d at 228, when addressing Caldwell challenges based upon prosecutorial comments and judicial instructions which, according to the petitioners, tended to diminish the jury's sense of responsibility for its sentencing decision. However, this Court has never reached the issue of whether the companion fundamental constitutional principle announced by Caldwell-- that inaccurate and misleading instructions provided to a capital sentencing jury with regard to its role and function violate that Eighth amendment-- is such a change in the law. Mr. Preston urges that the Court reach that issue, and grant relief.

Contrary to the State's assertions, the trial court's erroneous jury vote instructions were by no means "harmless." The jury here voted for death by a vote of 7 to 5, the slimmest of possible margins. Cf. Harich, supra (9-3 jury recommendation of death rendered error harmless). The jurors' deliberations were lengthy, and, as

stated in previous sections of this brief, they posed to the court a number of questions indicating that they were struggling to decided whether to recommend life or death. The erroneous and misleading instructions may very well have affected this jury. Under no construction can it be said that the misleading, inaccurate, and inconsistent jury instructions here at issue had "no effect." Caldwell, 105 S.Ct. at 2646.

The State, however, asserts that Mr. Preston's claim is "mere speculation." (Answer, p. 60). But, the question is not whether the jurors told the court that they were deadlocked (only in rare circumstances will evidence of a deadlocked jury be obvious from the trial record); the question is whether it can be said that the erroneous instructions were harmless beyond a reasonable doubt, Harich, supra, or had "no effect." Caldwell, supra, 105 S.Ct. at 2646. Given the circumstances discussed herein and in Mr. Preston's initial brief, that simply cannot be said.

Accordingly, Mr. Preston should be granted the relief he seeks. Should the Court deem this claim improper for constitutional harmless error analysis but as one requiring specific responses from the jurors themselves, Mr. Preston urges the Court to relinquish jurisdiction and direct an expedited hearing on this issue.

ISSUE XII

MR. PRESTON WAS SUBJECTED TO TWO EXAMINATIONS BY STATE PSYCHIATRIST WITHOUT BEING ADVISED OF HIS RIGHT TO COUNSEL, AND STATEMENTS OBTAINED DURING THE COURSE OF THESE 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 lower court did not "purport" (Answer, p. 64) to reach the merits of Mr. Preston's claim. It did reach the merits. The State presented no procedural default argument to the lower court with regard to this issue. In fact, the lower court signed the State's proposed order. Mr. Preston presented the lower court with numerous reasons demonstrating that his claim should be entertained on the merits.

The State did not contest that issue, and never even as much as hinted that the lower court should apply a procedural bar. Rather, the State chose to litigate only the merits of Mr. Preston's claim.

It therefore seems ironic that the State now belatedly presents before this Court a procedural default argument. Just as a defendant's counsel is not entitled to withhold issues from trial court review, the State's representatives must not be allowed to withhold their contentions and raise them for the first time on appeal. The State should not be so easily allowed to deprive a trial court of its responsibility to render an initial ruling on the parties' assertions. Neither should the State be allowed to so easily deprive a defendant from rebutting a procedural default contention by presenting an appropriate proffer to the trial court. In this case, the State's obvious concession below that the claim was to be reviewed on the merits forecloses its belated attempt to raise a procedural default contention before this Court. The State cannot so easily "sandbag" the defendant and the courts. Here, the State chose to litigate only the merits before the lower court; it has waived its procedural default arguments. Cf. Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984); LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981). See also, Grooms v. Wainwright, 610 F.2d 344, 347 (5th Cir.)(where lower court decides merits of claim and state fails to raise a procedural objection, state is foreclosed from raising procedural contention for first time on appeal), cert. denied, 445 U.S. 953 (1980).

On the merits, the State again misses the point. Mr. Preston's trial counsel in no way whatsoever opened the door to the elicitation of the statements Mr. Preston made to the State's experts during the court-ordered psychiatric evaluations. Since counsel never opened the door, the admission of Mr. Preston's statements was wholly improper, and rendered his capital trial and sentencing proceedings fundamentally unfair and unreliable. In this regard there can be little dispute, for that has long

been the standard enforced by this Court in identical settings. See Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970) ("[T]he Court and the State should not in their inquiry [of court-appointed experts] 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; however, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense."); Jones v. State, 289 So. 2d 725 (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 told him about [the offense]."); McMunn v. State, 264 So. 2d 868, 870 (Fla. 1st DCA 1972) ("An inquiry directed to court-appointed psychiatrists by the State must be limited to sanity or insanity...." 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."); see also Smith v. State, 314 So. 2d 226, 229 (Fla. 4th DCA 1975); State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Federal constitutional standards correspond to those applied by this Court. See, e.g., Estelle v. Smith, 451 U.S. 454 (1981); Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Parkin. supra, 238 So. 2d at 820 (citing privilege against incrimination); Jones, supra, 289 So. 2d at 278 (citing Fifth Amendment).

The Appellee's brief explains that the State's experts were properly called at trial since Mr. Preston's counsel placed his client's mental state at issue. (Answer, p. 67). That explanation is irrelevant-- counsel did not open the door, Parkin, supra, to introduction of any of the damaging statements which these experts elicited during their evaluations. The State's elicitation of those statements from its

expert witnesses at trial is the constitutional error. The lower court nevertheless denied relief on the merits. On the merits, Mr. Preston urges this Court to apply its long-established standards, Parkin; Jones, supra, and grant Mr. Preston relief.

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

Mr. Preston relies on the arguments presented in his initial brief. He notes that this claim is before the Court on the merits. See Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987).

CONCLUSION

Because the Circuit Court erred, its order should be reversed. Because factual issues were never fully resolved, and material issues nevewr initially ruled upon by the lower court, 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,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

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

By: Billy H. Nolas
Counsel for Appellant,
Robert Anthony Preston

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 Sean Daly, Assistant Attorney General, Department of Legal Affairs, Beck's Building, 4th Floor, 125 North Ridgewood Drive, Daytona Beach, FL 32014, this 19th day of January, 1988.

Attorney