IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 71402

BENNIE DEMPS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

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

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

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

Counsel for Appellant

CLAIM I

MR. DEMPS' "SENTENCING JURY" WAS MISTAKENLY TOLD THAT THE RESPONSIBILITY FOR SENTENCING RESTED SOLELY WITH THE JUDGE, THEREBY DILUTING THEIR REQUIRED AWESOME SENSE OF RESPONSIBILITY, AND PRODUCING AN UNRELIABLE SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.1/

The gravamen of Mr. Demps' claim is that the prosecutor and the judge substantially misled and misinformed the jury as to its proper role and function at capital sentencing. Under Florida's capital sentencing statute, the jury has the primary responsibility for sentencing. Although the jury's sentencing verdict is sometimes referred to as "advisory" or as a "recommendation," the jury's role at the sentencing phase of a capital trial is critical. See Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State,

---

1. This Caldwell argument is taken virtually verbatim from the appellant's en banc brief in Mann v. Dugger, No. 86-3182, by permission of counsel for Mr. Mann, Talbot D'Alemberte.

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); Dubois v. State, ___ So. 2d ___ (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, No. 68,341 (Fla. September 3, 1987). Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. In fact, the judge's role 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. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no

reasonable person could differ." Tedder, 322 So.2d at 910.

Both the prosecutor and judge led Mr. Demps' jury to believe that the judge was the sentencer, and that he was free to impose whatever sentence he wished, regardless of the jury's decision. At no point were the jurors correctly instructed as to Florida law--they were never told that their sentencing decision was entitled to great weight, to extreme deference, or that in fact judge overrides of a jury's recommendation are seldom affirmed by the Florida Supreme Court.

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., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's decision would be automatically reviewable by the Mississippi Supreme Court. However, because the prosecutor failed to also point out that the jury's

decision would be viewed with a presumption of correctness, the Caldwell Court held that the jury was erroneously led to believe that the ultimate responsibility for the death sentence lay elsewhere. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument 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,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S.Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The constitutional vice of the 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, and 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. In Mr. Demps' case, the evil condemned in Caldwell is even more apparent.

As in Caldwell the prosecutor's remarks in Mr. Demps' case "were quite focused, unambiguous, and strong." 105 S. Ct. at 2645. But the prosecutor's comments here went a step further -- they were much more systematic than those in Caldwell. Moreover, the prosecutor's efforts to diminish the jury's sense of responsibility in Mr. Demps' case were given the imprimatur of the court through its instructions. Cf. Caldwell, 105 S. Ct. at 2645 ("The trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them..."); McCorquodale v. Kemp, supra, slip op. at 7. Here, in fact, the trial judge himself presented the jury with inaccurate information -- the error is thus even more egregious than that in Caldwell:

> [B]ecause . . . 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 have no effect and to have minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d 1526, 1531 (11th Cir. 1986).

Caldwell teaches that, given comments such as those

provided by the judge and prosecutor to Mr. Demps' capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden here. In Mr. Demps' case, substantial mitigation was presented. Mr. Demps' case thus falls "within the area of deference to the jury's recommended sentence which makes the need for reliability in that recommended sentence of critical importance." Adams, 804 F.2d at 1533. Put another way, had the jurors not been misinformed, and had they recommended life, that recommendation could not have been overridden, for a "reasonable basis" for such a life recommendation existed in this case. See, e.g., Ferry v. State, supra. Mr. Demps' sentence of death therefore "does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S. Ct. at 2646.

Following the decision in Caldwell, this Circuit addressed the case of a Florida jury which received instructions which may have diminished its sense of responsibility. In November, 1986, Chief Judge Roney and Judges Fay and Johnson decided Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), and held that Caldwell v. Mississippi applied to Florida capital cases for, in

Florida,

> [T]he jury's recommendation...is entitled to great weight. McCampbell v. State, 421 So.2nd 1072, 1075 (Fla. 1982) (per curiam), and may be rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (per curiam). This limitation on the judge's exercise of the jury override provides a "crucial protection" for the defendant. Dobbert v. Florida, 432 U.S. 282, 295 (1977).

Adams, 804 F.2d at 1529 (emphasis supplied).

The Adams panel examined the facts and compared them to Caldwell. In Caldwell the comments were made by a prosecutor in closing argument, and endorsed by the judge. Adams involved statements made by a judge in jury selection. E.g., Adams, 804 F.2d at 1528 ("The ultimate responsibility . . . is not on your shoulders."). Adams held that the judge's statements violated Caldwell. Adams, 804 F.2d at 1529.

The Adams statements have direct parallels in Demps. Both the Adams and Demps juries were told that: the jury verdict was just a recommendation; that the judge was not bound by their recommendation; and that the jurors' role was merely advisory and simply an "opinion"; no curative instructions were given. These parallels between Adams--the settled law of the Circuit--and Demps

are so striking that the argument could well be ended here.

After Adams, this Circuit's next Caldwell case was Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), which is before the Eleventh Circuit for en banc briefing and argument. In Harich, the panel (Fay, Johnson and Clark) held that a statement by the prosecutor and certain statements by the trial judge did not mislead the jury. During voir dire, the prosecutor stated that in the sentencing phase the "court pronounces whatever sentence it sees fit". The trial court then made statements at guilt/innocence to the effect that sentencing was the judge's job. E.g., Harich, 813 F.2d at 1099 ("the penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict...").

The Harich panel concluded that the statements at issue did not create the "intolerable danger" that an advisory jury was allowed to minimize its proper role and that the "seriousness of the jury's advisory role was adequately communicated. ..." Harich, 813 F.2d at 1101. The next decision in this circuit to follow Caldwell in this setting was Mann v. Dugger, 817 F.2d 1471 (11th cir. 1987). In a case with many of the same problems as

Harich, relief was granted. Both Mann and Harich are before the full court.

Because no procedural or successor bars apply to this claim in this Circuit, Adams, supra, and because obviously there is a reasonable likelihood of success respecting the issue, a stay is proper.

CLAIM II

THE STATE WITHHELD CRITICAL EXCULPATORY EVIDENCE REGARDING (1) LARRY HATHAWAY'S COMPLICITY IN THE CRIME, (2) THE TRUE DEAL THE STATE HAD WITH THIS STAR WITNESS, AND (3) MR. HATHAWAY'S MENTAL ILLNESS, AND PROPENSITY TO LIE, IN VIOLATION OF MR. DEMPS' SIXTH, EIGHTH AND FOURTEENTH AMDENDMENT RIGHTS.

This claim involves intentional misconduct by the State. The State withheld evidence of incredible impeachment value regarding star witness Larry Hathaway--that he was crazy, that the State knew it, that he was a liar (especially about prison stabbings); that the State knew it, that according to his statements to the police he was a look-out in this killing, and that the State promised him help on parole in return for his testimony.

The State's only response is that this has been litigated. It has not. The State has consistently denied any parole deal, and did in post-conviction in 1983. No allegation of a parole with Hathaway has ever

been made, the State has denied about any such deal whenever asked, and Hathaway has been allowed to deny it too. Further, the State knew and withheld Hathaway's insanity, and his statements to police which were exculpatory.

A post-conviction hearing was held regarding pressure the State brought to bear on William Squires. The State claims the claim now raised--that Hathaway was a purchased, insane, witness--was "raised in Demps' first petition, fully litigated in a massive evidentiary hearing, appealed, raised in federal court, and appealed again to the federal Eleventh Circuit." See Motion to Dismiss Rule 3.850 Motion , p. 3. This is innocent.

The claim was not raised earlier. It could not be because the truth was hidden, despite repeated requests for the information by now Judge Carroll, the defense attorney in this case. He would testify that he asked for this very information and was told it did not exist. Current counsel obtained the information only after invoking the Florida Public Records Act.

Exculpatory evidence should not be allowed to be hidden, and then, where it is found, the State should not be allowed to say that it was found too late. No rule, Rule 3.850 or any other rule, should be used as a shield

to protect State misconduct. That is what the State urges.

Prosecutors may neither suppress material evidence, nor allow witnesses to lie or shade the truth, nor present misleading evidence, and certainly may never argue to the jury facts or inferences from facts known to be false. The prosecutor's function is to seek justice, not to obtain convictions. See ABA Standards for Criminal Justice, "The Prosecutor Function", Standards 3-1.1 to 3-1.4. Thus, the prosecutor must disclose information that is helpful to the defense, whether that information relates to guilt or innocence, and regardless of whether defense counsel requests the specific information. United States v. Bagley, 105 S. Ct. 3375 (1985).

The evidence deliberately withheld and the perjured testimony condoned by the State was not known to defense or the trial court. It was not known in the first Rule 3.850, or federal proceeding. It had not been revealed.

The State's withholding of exculpatory evidence violated the sixth, eighth and fourteenth amendments. The State's concealment of exculpatory evidence deprived Mr. Demps' of a fair trial and violated due process of law. Brady v. Maryland, 373 U.S. 83 (1963). When

withheld evidence goes to the credibility and veracity, i.e., when it impeaches the testimony of a prosecution witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. See generally Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974). Of course, counsel cannot be effective when deceived, so hiding exculpatory information violates the sixth amendment right to effective assistance of counsel as well. Cf. United States v. Cronic, 104 S. Ct. 2039 (1984). The fundamental unreliability of a capital conviction and sentence of death gained as a result of such prosecutorial misconduct also violates the eighth amendment.

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

(U.S. S. Ct. February 24, 1987).

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

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

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

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

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

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

Counsel for Mr. Demps made repeated requests for exculpatory, material information pretrial. As would be

proven, he did so continuously during the first post-conviction proceeding. It was not provided. Exculpatory and material evidence is evidence favorable to the defense which may create any reasonable likelihood that the the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence is one and the same.

The method of assessing materiality is well-established. Analysis begins with the Supreme Court's reminder in Agurs that the failure of the prosecution to provide the defense with specifically requested evidence "is seldom if ever excusable." United States v. Agurs, 427 U.S. at 106. Any doubts on the materiality issue accordingly must be resolved "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980); accord United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Anderson v. South Carolina, 542 F. Supp. 725, 732 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983); United States v.

Feeney, 501 F. Supp. 1324, 1334 (D. Colo. 1980); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977). "[T]his rule is especially appropriate in a death penalty case." Chaney v. Brown, supra, 730 F.2d at 1344.

Second, materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-35, 736, 737 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure

sec. 557.2, at 359 (2d ed. 1982).

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

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant. Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981). This is so, because, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or a reasonable doubt as to his guilt, or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is for a jury, and not th[e] Court to determine guilt or innocence," Blanton v. Blackburn, 494 F. Supp. 895,

901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981), materiality is established and reversal required once the reviewing court concludes that the suppressed evidence "might" or "could" have affected the outcome on the issue of guilt . . . [or] punishment," United States v. Agurs, supra, 427 U.S. at 105, 106, and that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." Bagley, supra, 105 S. Ct. at 3383.

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

In Brady and Agurs, the prosecutor

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

Bagley, supra.

This is what was withheld. Two types of testimony convicted Mr. Demps: (a) Larry Hathaway's "eyewitness" snitch testimony, (b) correctional officer's testimony that the victim identified Mr. Demps, in a dying declaration. That evidence should have been insufficient to convince any rational trier of fact of Mr. Demps' guilt beyond a reasonable doubt. Had the State revealed what it actually knew about and how it obtained Mr. Hathaway's testimony, there is a reasonable probability that the result in this case would have been different. The information in support of this claim has just been obtained from the State by undersigned counsel. The claim will be amended to demonstrate the total

incredibility of the dying declaration as soon as possible.

Hathaway testified at trial (and in pretrial depositions) that he had been promised nothing but protection in return for his testimony (R. 730, 748, 749, 759; March 6, 1978, Deposition, pp. 104, 137). About the actual offense, he testified:

> Q Where was the first opportunity you had to see the defendant, Harry Mungin?
>
> A In front of his cell.
>
> Q All right. What cell was that?
>
> A He lived in the first cell on the north side third floor.
>
> Q Tell the jury what you observed of him?
>
> A I come out of my cell to go downstairs to the second floor and as I approached Inmate Mungin's cell he stepped out and I stopped and he asked me if there was anybody else on the floor besides me.
>
> Q At that time was there anybody else on the floor?
>
> A No, sir, except for two inmates who lived across from me. They were inside their cell, and other than that I didn't know of anybody else up there.
>
> Q How long had the wing call gone out for the evening meal before the time you're now testifying to?
>
> A Probably three or four minutes.
>
> Q And was the defendant, Harry Mungin, at

that time by himself or with others?

A He was by himself.

Q What did he say to you?

A He asked me if there was anybody else on the floor besides me that I knew of and I told him no. He told me to go downstairs and stay downstairs.

Q Did he tell you why?

A Yes, he said he was fixing to get rid of a snitch.

Q All right. What did you do?

A I went downstairs.

(R. 718-19). He testified that he then returned to the area, he saw Mungin in Sturgis' cell, and that Jackson was striking the victim while Mr. Demps was holding the victim (R. 227).

Hathaway's testimony was incredible and highly impeachable for a number of reasons known to the State, but concealed from defense counsel:

a. <u>According to earlier statements, Hathaway was an accomplice</u>.

On March 4, 1978, Inspector Beardsley provided a written narrative Addendum Report regarding his investigation of the crime. <u>See</u> App. B. This Report was provided to Elwell, the State attorney. It was not provided to defense counsel.

The Report gave the following account of what

Hathaway had told Beardsley concerning the initial Mungin contact:

> That he was standing in front of his cell door on the third tier of W wing around 4:30 in the afternoon on the 6th of September, 1976, when he was approached by inmate Harry Mungin. Mungin asked him if there was anyone on the third floor besides him. Hathaway states that he replied to Mungin that he didn't know and was told by Mungin to check and if there was no one that was visible, he was to walk down the stairs. He says he told Mungin, "Sure," and then he looked around and at that time Mungin looked at him and said, "We're fixing to kill a snitch," Hathaway will say that he then went down the stairs.
> . . .

App. B. This reveals that Hathaway was an accomplice -- a look out -- asked to, and agreeing to, check and give an "all clear" signal, for murder. He did so. His testimony was that he simply told Mungin what he purportedly already knew -- no one was around (R. 91). The report reveals "he didn't know," so he looked around, and then gave the signal -- "he was to walk down the stairs." Defense counsel was not provided this information, which implicated Hathaway, and differed from his trial testimony. Further, and as relates to inconsistencies between pretrial statements and testimony, according to the Report, Hathaway told Beardsley that Mungin was not later just in the door of Sturgis' cell, but was "holding on to Sturgis." His

testimony was that Mungin was in the door.

b. Hathaway was promised help on parole

When Hathaway testified at trial, he expected that Elwell and Beardsley would try to help him on parole afterwards. He believed it because Elwell and Beardsley had told him so. This will be demonstrated through Hathaway's testimony at an evidentiary hearing. He recently admitted it when he was confronted with his May 17, 1978, letter to Elwell. App. A.

The allegations contained in this petition are the facts upon which relief is requested. However, certain documents do support the allegations, and are submitted in the accompanying appendix. First, the May 17, 1978, letter, right after trial, reminded Elwell of his promises to Hathaway: "[Y]ou said if I told the truth and the trial turned out alright you'd try and help me." Id. This was never revealed: the only help promised was supposedly protection, but Hathaway reveals in his letter an expectation for more, because he had been promised it. He received it. Help from Beardsley and Elwell began upon Mr. Demps' conviction, and culminated six months later in a written "request for special parole consideration":

To reiterate my previous request for special

> parole consideration for inmate Hathaway, I am asking you to present his very special case to the Parole Commission in my behalf.
>
> . . . .
>
> At this time I am now putting these facts in writing.
>
> . . . .
>
> I would appreciate your bringing all this to the attention of the Board. If it would be possible that Hathaway could be paroled he could be removed to a county jail in Nevada until such time as a parole would be effective.
>
> I would add that the Assistant State Attorney for the 8th Judicial Circuit, Mr. Tom Elwell, certainly will echo the remarks I have made in this memo and has assured me that he will give any help he can to parole consideration for inmate Hathaway.

App. C, Memo for Beardsley to Parole Commission. These were all facts that henceforth [sic] had not been presented in writing" as Louie L. Wainwright, Secretary, wrote to the Parole Commission:

> September 12, 1978
>
> Mr. Maurice G. Crockett, Chairman
> Florida Parole and Probation Commission
> 1309 Winewood Boulevard
> Tallahassee, Florida 32301
>
> Re: Larry Hathaway, #040479
>
> Dear Chairman Crockett:
>
> Mr. Bill Beardsley, Prison Inspector, has requested in his letter of August 31, 1978, "special parole consideration for inmate

Hathaway". Mr. Beardsley goes into facts that henceforth had not been presented in writing. He has also acquired a progress report from the Northern Nevada Correctional Center where Inmate Hathaway is presently housed. This report also goes into additional depths detailing the special nature of his confinement.

It would be most appreciated by Mr. Beardsley and the Department if the Commission would review Inmate Hathaway's file with consideration being given for possible parole action.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

App. D. Beardsley continued to assist, App. E, and as post-conviction proceedings (and the need for more testimony) neared, Mr. Hathaway was promised a "small camp" assignment in West Florida. App. F. Prior defense counsel John Carroll wished to depose Hathaway, but the State was squeamish:

DATE: December 3, 1982

FROM: Joyce C. Bruce

TO: Mr. Charles H. Lawson
Tallahassee

RE: HATHAWAY

At your request I met with Dave Bachman, Beardsley, and Russell Smith on December 2nd.

The outcome of the discussion was that Bill Beardsley would discuss Hathaway's situation with Phil Welch, have Phil review entire

file, make a classification determination, at which time a better idea would had of what type facility Hathaway could be placed into in Florida. Mr. Beardsley would then write to Hathaway regarding the type facility he would be placed into and obtain a response from him regarding whether or not it is still his desire to return to Florida.

. . . .

If subject is returned to Florida, Beardsley said it would be best to have the deposition delayed until his return since he felt the need to talk to him personally, and possibly have him meet and talk with Tom Elwell before the deposition is taken by Mr. Carroll to be sure his story is the same.

App. G. As time for Mr. Hathaway's testimony in post-conviction proceedings grew still nearer, new "help" came from Beardsley and Elwell:

DATE: March 21, 1983

FROM: Bill Beardsley, Inspector

TO: Department of Corrections Admission and Release Authority
Attn: Liz White

RE: Larry Hathaway #040479

Attached are two letters I have received pertaining to the parole plan of Larry Hathaway. Request they be placed in his file so they might come to the attention of the Parole Examiner.

In 1978, I placed a letter in Hathaway's file recommending parole considerations based on his assistance to our Department and the State Attorney. Request those facts again be presented to the Parole Examiner.

App. H. Defense counsel was not aware of the promises. The jury was not made aware of Mr. Hathaway's expectations, which would be revealed at an evidentiary hearing. Mr. Demps did not know any of this information until two days ago. Prior counsel did not unreasonably fail to discover this information -- it has been hidden, and prior counsel exercised due diligence.

c. Hathaway was mentally ill, and was a liar, who had lied to Beardsley.

Hathaway is a crazed murderer himself, and was known to be a liar, by the State. Beardsley himself could never "be sure his [Hathaway's] story is the same." Hathaway had been a witness/suspect regarding a different stabbing in his cell, and Beardsley had investigated. His description of Hathaway's snitching a year before Mr. Demps' case is telling:

> As you will remember our only conversation concerning the stabbing of inmate Herndon resulted in your fabrication of the true events which have now been determined through lengthy investigation.

App. I. Defense attorney was not informed of Hathaway's fabrication track record. In fact, Hathaway was allowed to lie to defense counsel in depositions:

Q. So there was no prosecution as a result of the Gary Herndon incident?

A. None that I know of.

Q. Did you ever give any statement to anybody about what you knew about that?

A. No, sir.

March 6, 1978, deposition, p. 139. Appendix I shows otherwise. Such lies, or altered realities, were common for Hathaway.

Prison records not released until last week reveal Mr. Hathaway's chronic mental illness, instability, and character for dissembling. This person who "needed protection" described himself much differently in 1974. As a prison psychiatric report reveals, this man is nuts:

> This is a 28 year old, white, blond, male individual, who was seen today at DeSoto Correctional Institution where he is serving a 99 year sentence for murder. He states that he killed, not only a 23 year old girl whose body was found in a ditch, but also a 25 year old man who was with her at the time, and whose body has never been found. He said that at the time, he was pushing drugs and he was very involved in a deal that was going on with these 2 particular individuals, who turned out to be undercovers. Inasmuch as they did not produce the money, he "eliminated" them. In reviewing his record, it is noted that he denied the offense at the time that he was arrested and gave a completely different history. During the interview today, he said that he has committed murder before and that he had been arrested twice for the same thing, but there was not enough evidence, and consequently he was released, and that he had been under suspicion 7 times total. He says that on 2 occasions, he got paid $2500.00 for killing, which he did and the other times, he just did in for "no reason". --"It just

occurred." He states that in 1966, he committed murder and did not know that he had done it, that he was just in the kitchen of a house and he stabbed this man to death and just stood there and his brother shook him up, slapped him, and he didn't even move. The same thing happened in 1971. He indicated that he did not care and that whoever is in his path, he would eliminate without second thoughts, without guilt or remorse. However, he contradicts himself by then saying that he is now concerned about what he is going to do because he has been unable to sleep and remains awake all the time thinking and thinking, his mind constantly working, has become completely paranoid, not wanting to be around people, being scared of everybody, and this is exactly the way that he has felt in the past when he had committed murder.

Mr. Hathaway indicates that he has had problems with the law on many previous occasions, starting when he was 13 years of age when he had an argument in a night club and shot an individual 4 times, but was not incarcerated because he was a juvenile. In reviewing his FBI record, it is noted that his long career of crime started in 1963 when he was 17 years of age.

. . . .

He said that he has had 4 head injuries, the first time when he was 13 years of age when he was involved in a car accident and was knocked unconscious. The second time was when he was 15 years of age in a riot in jail when he was hit by other inmates and he passed out. The third time was at age 21 when he was hit with a baseball bat and was hospitalized for observation of brain concussion. The last time was 2 months ago when he was hit 3 or 4 times with a club, scuffling with another inmate. He denies any history of convulsive episodes, headaches, dizziness. He talks about those "trances" but his reliability is questionable.

> Mental status examination reveals a 28 year old, white male individual, who appears in no acute distress. He is extremely manipulative. He wants to be transferred to Lake Butler so that he could be "helped". He contradicts himself by saying that he did not care about killing and doesn't care about doing the same if somebody bothers him, and later in the next breath by stating that he is now begging for professional help so that he would not kill again. He also contradicts himself by stating that the so-called trances happened with no warning but later stating that he right now feels exactly the same way (meaning restless, unable to sleep, etc., etc.) as in the past when he had committed murder for no reason or provocation. His speech was relevant and coherent. There is no disorganization of thought processes. No delusional material can be elicited. He denies hallucinations. He is considered to be unreliable.
>
> Diagnostic Impression: Personality Disorder, Anti-social

App. J. Anti-social personality has as its paramount characteristic a singularly relevant impeachment tidbit -- persistent lying. See Diagnostic and Statistical Manual of Mental Disorders, III p. 370. When he first entered FSP, he was diagnosed schizophrenic. App. K. Since then, he has been repeatedly diagnosed as mentally ill.

Respondent has known for years that Hathaway was inherently unreliable. The following are all prison mental health reports about him:

a) 11/20/74 - "[T]his is a very unstable

individual and needs observation over a long period of time to care." App. K.

b) 10/10/75 - "This is a young man who apparently has no real insight,; is in serious need, in my opinion, of psychiatric and psychological assistance. . . . A dangerous individual, one who certainly must remain incarcerated. ..." App. L.

c) 9/17/76 - This is a week after this witness purportedly saw the killing. Examiner repeats that there is information "as to his tales he gave to the psychologist about killing people and things of that sort." App. M.

d) 1/16/78 -- This is a couple of months before Hathaway's trial testimony. Beardsley states "this man still has some medical problems and is currently on medication. ..." App. N.

Defense counsel was not provided this information before trial. Lying, mental illness, spinning yarns -- all exculpatory. The State was happy to have Hathaway testify to lies. Here is a good one:

Q. Have you ever been convicted of a crime?

A. Yes, sir, I have.

Q. How many times?

A. Three times.

(R. 754). Maybe three times a year would be true. Hathaway's record, known to the State at the time of trial:

App. O. Three convictions?

When it came time for Hathaway to testify in post-conviction proceedings in this Court in 1983, he was once again being diagnosed as mentally unstable. As noted above, Beardsley and Elwell arranged to speak with Hathaway before his 1983 deposition to ensure his "story was the same." Before returning to testify, Hathaway "was involved with a narcotics smuggling operation," App. P. No matter. Contact between Hathaway, Elwell and Beardsley was arranged. App. Q.

On February 8, 1983, Hathaway was deposed. On December 14, 1983, he testified in post-conviction. On March 30, 1983, he was out of his mind:

> On March 30, 1983, at approximately 11:00 AM, Capt. Harrell called me, B. Weeks, to his office. Sgt. Hearn told me and Capt. Harrell that Inmate HATHAWAY, Larry, W/M, DC 040479, was acting very strange. Capt. Harrell told me to go talk with inmate Hathaway. I had inmate Hathaway brought to the all purpose room. I sat on one side of the desk and inmate Hathaway sat on the other side. I asked inmate Hathaway what was wrong with him. He started talking very low where I couldn't hear him. I told him to speak up so I could hear him. He then started talking in Spanish or something. I told him I didn't know what he was talking about. I had my

arms lying on the desk and he reached across the desk and grabbed me by both wrists and stated, "you know what I mean" and made a very sneering face. I twist my hands around and grabbed him by both wrists and held him. I told him to cool it, that I was trying to help him.

App. R. The State let this man testify in post-conviction. Mr. Kirkland gives more detail:

> On Wednesday, March 30, 1983, I was at Okaloosa Correctional Institution interviewing an inmate when Lt. B. Weeks requested that I assist him him observing an inmates behavior. The Lieutenant and and the inmate were in a room next to the Confinement area. When I entered the room, Lt. Weeks introduced the inmate name as Larry Hathaway, number unknown. Inmate HATHAWAY looked at me and told Lt. Weeks he knew who I was and began talking in a language unknown to me. Inmate HATHAWAY appeared disoriented as to time and date and made some remarks about inflicting physical damage to his body. In my opinion, inmate HATHAWAY needed to be examine by a doctor as soon as possible, and I asked Lt. Weeks to step out (continued on 2nd page)
>
> I caught inmate HATHAWAY by his arms with both of my hands and pushed him away from me.
>
> I let go of him and continued with the conversation. He continued to sit and talk with me. I realized he was high on some type of drug or he had lost his mind. Mr. Carl W. Kirkland was at the prison and I had him talk with inmate Hathaway. Mr. Kirkland came to the same conclusion as I did. Mr. Kirkland advised us to transfer inmate Hathaway to R.M.C. as soon as possible. Inmate Hathaway was transferred to R.M.C. that day.

App. S. Two weeks before his testimony in post-conviction before this Court, it is reported that "ZCI

STAFF; CLAIMS HE'S CRAZY." App. T. This was the year Elwell and Beardsley had to be sure Hathaway had the "same story"; this is the year Beardsley again recommended parole for Hathaway.

Hathaway is today diagnosed as psychotic, schizophrenic, paranoid (chronic in remission), and antisocial personality. He requires psychotropic medication. App. U. This is who sent Mr. Demps to death row. The State has known how crazy his "snitch" was, but has not revealed it.

There is a reasonable probability that had the State revealed the above information, the result in this case would have been different. It simply violates due process of law, and reliability in sentencing requirements of the eighth amendment for Mr. Hathaway to say anything in this case.

CLAIM III

MR. DEMPS HAS BEEN DENIED NOTICE AND THE OPPORTUNITY TO REBUT PURPORTED FACTS THAT WERE UTILIZED TO IMPOSE AND/OR TO AFFIRM IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS--THE BASIS UPON WHICH THE PENALTY WAS AFFIRMED IS UNRELIABLE.

The presentence investigation provided to the judge in this case contained no information which could have

justified ignoring the life recommendation of a properly instructed Florida jury. Magill; Riley, supra. Without warning to Mr. Demps, without providing him any opportunity to rebut mistakes in the report and in its own opinion, the Florida Supreme Court used the PSI to find that Lockett error before the jury was harmless. This imaginative dodging of eighth amendment law creates a tangled web of other constitutional problems, that are outlined in the petition. The claim as it exists in the petition is reprinted here largely verbatim.

In Demps v. Dugger, supra, the Florida Supreme Court determined that error under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), had occurred in this case. The Court decided that the error was "harmless," however, because of matters contained in a presentence investigation report which the trial court considered. No rehearing was allowed. Hitchcock is a change in law, as is applying a harmless error analysis to an acknowledged eighth amendment violation. Inasmuch as the Court essentially "imposed" sentence by purportedly looking at the record and finding that only a death sentence could be proper in this case, this is Mr. Demps' first opportunity "to rebut evidence and argument used against him . . . on which his death sentence may, in part, have

rested." Skipper v. South Carolina, 106 S. Ct. 1669, 1671-72 (1986)(Burger, C.J., Powell and Rehnquist, J., concurring). Consequently, no "abuse" or "default" applies.

At the time of Mr. Demps' sentencing it was understood that a Florida trial court would give great deference to a jury recommendation. Last Friday, the Florida Supreme Court ruled that had Mr. Demps' jury recommended life in a Lockett-pure proceeding, the trial court "would have properly imposed death." Notwithstanding the obvious shortcomings of such a speculative analysis, fraught with "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605, see Claim I, supra, the bases for the Court's harmless error result are inaccurate, unconstitutional, and unrebuttable.

Before sentencing, but after the tainted jury recommendation, the trial court stated it "will be directing a pre-sentence report, but I will take care of advising the parole and probation office as to the nature of the report. You, of course, each of you, will be furnished any such report prepared and submitted by the Court" (R. 1103). At the next Court appearance, the

Court asked simply "do you have any cause to show why the sentence of the law should not be pronounced upon you or anything to offer in mitigation of sentence?" Sentencing, p. 3. Before sentence was imposed, the PSI was not mentioned. No opportunity was provided to rebut its contents. There is no record support that Mr. Demps even saw it.

Of course, neither counsel nor Mr. Demps could have known why rebuttal was necessary -- to avoid a later harmless error analysis of a Hitchcock/Lockett error. Had Mr. Demps known that the PSI, and argument by five members of the Florida Supreme Court concerning it, would be used against him to defeat plain constitutional error, he would have rebutted. As will be demonstrated at an evidentiary hearing, the prejudicial contents of the PSI were rebuttable. He would further show that trial counsel was insufficient for not rebutting.

The factors used to permit a death sentence in Demps v. Dugger were wrong, irrelevant, rebuttable, and unconstitutional.

a. Discharge from the Marine Corps

The jury was informed that Mr. Demps' separation from the Marine Corps was: "nature of discharge, honorable" (R. 1063). The later PSI, which the judge but

not the jury saw, stated Mr. Demps received an "undesirable discharge" (R. 216). The Florida Supreme Court last Friday wrote that the PSI said the discharge was "dishonorable." Slip op. at p. 2. This mischaracterization of the discharge was utilized by the Court as support for the proposition that "the presentence investigation report, considered by the court, countered much of the nonstatutory mitigating evidence presented to the jury." Id. To rebut both the Florida Supreme Court and the PSI, Mr. Demps offers his certificate of discharge, which plainly and clearly states: "General Discharge Under Honorable Conditions." App. V.

b. Prison record of disciplinary problems; slip op. at p. 2.

How this could refute nonstatutory mitigating evidence introduced before the jury is curious. Assuming the truth of the Court's finding, its relevance is nil -- no statutory aggravating circumstance is established, and no mitigating circumstance is rebutted by, "prison problems." Mr. Demps could not have rebutted the dispositions of the prison "charges," but he wishes at this point to conduct a hearing on each and every one of the charges, to show that the underlying facts leading to

the dispositions were false. Since he did not rely before the jury on having no significant history of prior criminal activity, the prison disciplinary actions were irrelevant. To the extent the dispositions did not occur under procedures that provided due process of law, utilizing the dispositions to sentence him to death violates the eighth and fourteenth amendments.

c. No evidence he was under the influence of drugs at the time of the murder, slip op. at p. 2.

Failure to be intoxicated at the time of an offense is not an aggravating circumstance. It should not be used against him. It does not rebut any proffered mitigation either. The Florida Supreme Court seems to still be tied to statutory mitigation. Mr. Demps did not present evidence of intoxication at the time of the offense. He introduced "evidence that upon his return from Vietnam, he was an alcoholic and drug dependent," slip op., p. 6 (Kogan, J., dissenting), to ameliorate the 1971 offenses, and to show background mitigation.

d. "Loathsome distinction of . . . escaping the gallows" because of Furman; slip op. at pp. 2-3.

It is unconstitutional to enhance punishment based upon a defendant's exercise of his or her constitutional rights. The constitution forbade any punishment but life

for the 1971 offenses. Punishing Mr. Demps for Furman is the epitome of what Furman condemned -- lightning-like death sentences, arbitrary in the extreme, arising from harmless error analysis that has as its cornerstone the previous vindication of a condemned's rights.

e. The 1971 offense -- automatic death sentence

This is the sole reason for the death sentence in this case. Co-defendant Jackson, who did the stabbing, received a death recommendation. He had a prison record of stabbing people. The trial judge overrode his death recommendation. The only distinction between him and Mr. Demps (other than Mr. Demps' lesser culpability) was Mr. Demps' prior conviction, which was why he was in prison. The Florida Supreme Court held in Demps v. Dugger, in effect, that a prison killing by someone already convicted of murder brings an automatic death penalty. This violates the eighth and fourteenth amendments:

> [T]he Nevada statute at issue here applies to the particular situation of a life-term inmate who has been convicted of murder, and we have reserved judgment on the constitutionality of such a statute. We have declined to determine whether a mandatory statute applied to life-term inmates could withstand constitutional scrutiny, noting that perhaps the "extrem[e] narrow[ness]" of such a statute, see Woodson v. North Carolina, 428 U.S., at 287, n.7 (plurality opinion), or a particular deterrence concern, see Gregg v. Georgia, 428 U.S., at 186

(joint opinion); Lockett v. Ohio, 438 U.S., at 604, n.11 (plurality opinion), could render individualized sentencing unnecessary. See also Roberts (Stanislaus) v. Louisiana, 428 U.S., at 334, n.9 (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S., at 637, n.5. After consideration of this case, which places the issue squarely before us, we conclude that a departure from the individualized capital-sentencing doctrine is not justified and cannot be reconciled with the demands of the Eighth and Fourteenth Amendments.

A

The Nevada mandatory capital-sentencing statute under which Shuman was sentenced to death precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death. Redefining the offense as capital murder and specifying that it is a murder committed by a life-term inmate revealed only two facts about respondent--(1) that he had been convicted of murder while in prison, and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole. These two elements had to be established at Shuman's trial to support a verdict of guilty of capital murder. After the jury rendered that verdict of guilty, all that remained for the trial judge to do was to enter a judgment of conviction and impose the death sentence. The death sentence was a foregone conclusion.

These two elements of capital murder do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case.

Sumner v. Shuman, ___ S. Ct. ___ (1987). The only aggravating circumstances in this case, were (a) that Mr. Demps was convicted in 1971 of two murders that occurred

at the same moment, for which (b) he was serving life without parole. The Florida Supreme Court stated: "The trial court weighed these previous convictions as an aggravating factor along with the factor that Demps committed the crime while under sentence of imprisonment." Slip op., p. 3. There was no other aggravation. The Court's opinion did not discuss the nature of the previous crimes, just their existence. The Court's analysis violates Furman, Shuman, Lockett and Hitchcock.

f. The trial court was not presented with the true facts of the prior convictions.

A sentencer cannot rely upon the unsworn, inaccurate, and inflammatory descriptions of prior offenses in order to impose a death sentence. Certainly unsworn and unverified statements in a PSI about a prior offense cannot cure a Lockett impure jury recommendation proceeding. Since the Florida Supreme Court's opinion in Demps v. Dugger did not address the "facts" of the prior offense, perhaps the facts are irrelevant. "Facts" are, however, outlined in the PSI, App. W, and they are recited in the judge's sentencing order: "The evidence showed that Defendant Demps locked three innocent persons in the trunk of one of the victim's automobiles and at close range repeatedly fired a rifle through the trunk

into the bodies of the trapped victims killing two and wounding the third one, the heinous details of which are set forth in the presentence investigation considered by the Court in this case" (R. 232). These "facts" and factfindings are incorrect. Without trying here to present the "correct" facts, it is sufficient to state the following. The PSI in this case selectively lifted from the post-sentence investigation, App. X, in the 1971 case, the "facts" of the 1971 offense. The lifting was prejudicially selective. The 1971 case involved a co-defendant, Hardie. According to the post-sentence investigation, which suffered from its own selective incorporation of trial testimony, co-defendant Hardie, a sixteen-year-old, "went beserk" and he "opened up with a 7.62mm Assault Rifle AK, which they had stolen and then Demps started shooting also." Id. The PSI in this case, when lifting these facts, completely omitted any reference to the shooting being ignited by the co-defendant going beserk. In fact, at trial in 1971, co-defendant Hardie testified that Mr. Demps was not even present at the time of the killing, and did not participate. App. Y. The jury was instructed that Mr. Demps could be convicted of aiding and abetting, and thus first-degree murder, even if he was not present.

App. Z. There is no way of knowing the true facts of the 1971 offense from the record, but a PSI recitation of the purported facts, and a trial and/or appellate court's reliance on the PSI to sentence or find constitutional error to be harmless is untenable, incredibly risky, and violative of the eighth and fourteenth amendments.

Mr. Demps was sentenced to death, and his sentence was affirmed, based upon factors that were false, irrelevant, unconstitutional, and which he could not rebut, because he was given no opportunity. This violated his sixth, eighth, and fourteenth amendment rights. He has exercised absolute due diligence in presenting this claim.

CLAIM IV

TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE AT GUILT/INNOCENCE FOR FAILING TO IMPEACH HATHAWAY, THE STATE'S MOST IMPORTANT WITNESS, AND WAS PREJUDICIALLY INEFFECTIVE AT SENTENCING IN FAILING TO PRESENT COMPELLING EVIDENCE IN MITIGATION CONCERNING MR. DEMPS' BACKGROUND, AND OPPRESSIVE PRISON CONDITIONS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Demps has offered to prove that through no tactic or strategy his defense attorney failed to present mitigating evidence of his background, and about prison environment, when such evidence was available and

mitigating. Inasmuch as the Florida Supreme Court has now stated that on this record only death was appropriate, a better record was necessary. It could have been produced, as the petition reveals, with little effort.

The State calls the offered mitigating evidence "flotsam," and says petitioner has been lying in weight to spring it. Prior counsel represented Mr. Demps in post-conviction because no other counsel was available -- Mr. Demps had him or no one. Counsel had a basic conflict--he could not assess his own effectiveness and advise his client in a proper manner concerning it. Had he advised Mr. Demps, Mr. Demps would have either been left counselless, or left without a remedy for his right to vindicate his right to effective assistance of counsel. Such rock and hard place choices cannot be the predicate for procedural or successor bars.

As soon as new counsel took the case, this claim was brought. It is timely.

Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). When confronted "with both the intricacies of the law and the

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

Investigation is the sine qua non of effective assistance of counsel. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). And while courts should not question informed and tactical choices made by counsel, "when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel." United States v. DeCoster, 487 F.2d 1197 (1973).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 104 S. Ct. at 2065. Without the aid of an evidentiary hearing, this Court is not able to determine whether Mr. Demps' attorney made a tactical decision to do nothing. Yet, while hindsight may produce distorting effects, it is apparent that the witnesses who now offer compelling mitigation were available at trial.

Of course, the duty of counsel was to investigate mental condition as well. Trial counsel knew that Mr. White suffered from epilepsy and ulcers, and knew that he had a history of drug abuse. When trial counsel unreasonably fails to properly investigate mental circumstances relevant to sentencing, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), ineffective assistance of counsel is demonstrated. "Where the facts known and available, or with minimal diligence accessible, to defense counsel raise a reasonable doubt as to defendant's mental condition, counsel has an affirmative obligation to make further inquiry." Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978)(430 F. Supp. 107,111, district court opinion ruled upon by circuit court.).

CONCLUSION

WHEREFORE, Mr. Demps respectfully requests that this Court stay his execution and grant relief.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant Capital Collateral Representative

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

COUNSEL FOR APPELLANT

By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by (U.S. MAIL)(HAND DELIVERY) to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Courtyard #29, 111 South Magnolia Drive, Tallahassee, FL 32302, this 3rd day of November, 1987.

_____
Attorney