IN THE SUPREME COURT OF THE STATE OF FLORIDA

NO. _____

RONALD WOODS,

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
Capital Collateral Representative

JANE G. ROCAMORA
Staff Attorney

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

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

STATEMENT OF THE CASE

This is an appeal of the denial of Ronnie Woods' motion for post-conviction relief. On April 24, 1986, Mr. Woods' conviction and death sentence were affirmed by a majority of this Court. Woods v. State, 490 So.2d 24 (Fla. 1986) (Justice Shaw dissenting). The United States Supreme Court denied Mr. Woods' petition for a writ of certiorari on November 10, 1986. Woods v. Florida, 107 S.Ct. 446 (1986) (Justices Brennan and Marshall dissenting, Justice Blackman dissenting separately). Under Rule 3.850, Florida Rules of Criminal Procedure, Ronnie Woods had until November 10, 1988, to seek state post-conviction relief.

However, on October 5, 1987, the Governor denied Ronnie Woods application for executive clemency and signed a death warrant. By operation of that warrant, and this Court's special rule governing capital cases, Fla.R.Crim.P. 3.851, Ronnie Woods was suddenly, and without any warning, required to file his motion for post-conviction relief on November 4, 1987 (see P.C. 1-43)1/, more than a full year before Fla.R.Crim.P. 3.850

---

1. The now de facto decertified record on appeal will be designated "R. ___". The post-conviction record will be designated "P.C. ___". Due to exigencies of time, the normal format for a brief is abandoned (i.e., table of citations, summary of argument), see Rule 9.210(b), but a table of contents has been prepared, supra, for the Court's convenience.

required him to do so. Because he is indigent (see P.C. 48-52), Ronnie Woods must be represented by the Office of Capital Collateral Representative (CCR).

A. Lower Court Treatment Of Appellant's Emergency Motion To Vacate Judgment And Sentence

On November 4, 1987, Ronnie Woods filed in the trial court, inter alia, his Emergency Motion to Vacate Judgment and Sentence With Special Request for Leave to Amend, Motion for Stay of Execution, and Request for Continuance of Evidentiary Hearing" (P.C. 1-43) (hereinafter "Motion") and his Application for a Stay of Execution (P.C. 53-54). That Motion contained the following claims for relief:

1) that the eighth amendment prohibits, as cruel and unusual punishment, the imposition of the death penalty on one who was eighteen years old, with a mental age of twelve, at most, at the time of the offense (see P.C. 20-24);

2) that Ronnie Woods' sixth, eighth and fourteenth amendment rights were violated when the Court refused to continue the proceedings so that counsel could conduct a reasonable penalty-phase investigation and/or when counsel unreasonably failed to discover and present critical, mitigating evidence, and that the error also deprived Mr. Woods of a competently performed mental health evaluation (see P.C. 24-34);

3) that the atmosphere in which Ronnie Woods' trial occurred was so pervasively prejudicial that his right to a fair and impartial trial under the eighth and fourteenth amendments was violated (see P.C. 34), and that counsel unreasonably failed to fully reveal the extent of that prejudicial atmosphere;

4) that Ronnie Woods' jury was instructed that his mental health problems, if found, were to be considered as aggravating, rather than as mitigating, circumstances, which is a violation of the sixth, eighth and fourteenth amendments. See P.C. 40-41.

Almost two weeks later, on November 16, 1987, the State filed its Answer and Motion For Summary Dismissal. See P.C. 305-313 (hereinafter "Answer").2/ On November 17, 1987, the trial

---

2. By post-mark of November 10, 1987, the State served (and presumably filed) on undersigned counsel its Objection To Request For Leave To Amend, although that pleading does not appear in the post-conviction record on appeal. But see, Directions to the Clerk, P.C. 354-355. Many additional and important matters from the post-conviction proceedings do not appear in this record, despite the fact that counsel for Ronnie Woods requested that the entire record be prepared, and despite the fact that the clerk informed this Court by letter of December 3, 1987, that "the complete Record on 3.850" was being provided. See letter from Ms. Sue Hobey, Deputy Clerk, Office of Clerk of Courts, to Honorable Sid White.

Footnotes 2-5, infra, reveal other matters that were not included in the record on appeal from denial of post-conviction relief. All these omitted matters are addressed in Ronnie Woods' Motion to Correct and Supplement the Post-Conviction Record on Appeal, filed this day in this Court, pursuant to Rule 9.200(f)(1), Florida Rules of Appellate Procedure.

court, Judge Stephan P. Mickle presiding, heard oral argument. Counsel for Ronnie Woods informed the Court that, because of time limitations, the emergency Motion was not complete, that further investigation and research was necessary, and that it would be imperative that counsel file an amendment. P.C. 7-20.3/ Counsel for Ronnie Woods also argued that a stay was proper, and that an evidentiary hearing was necessary. The State argued that no evidentiary hearing was necessary, but that if one was, the State needed ten (10) days to prepare. The Court indicated that all matters would be taken under advisement.

Three days later, on November 20, 1987, the State requested four subpoenas for persons, including the original trial court court reporter, to attend a December 1, 1987, evidentiary hearing in this case, which, as of November 20, 1987, had not even been scheduled. Apparently the State had information not available to Ronnie Woods -- that an evidentiary hearing was going to occur. The State knew because the State was in the process of writing an Order granting a hearing, P.C. 334 at fn.1, but a hearing limited

---

3. Counsel for Ronnie Woods, upon denial of all matters in post-conviction, requested that a transcript of the November 17, 1987, oral argument be prepared and included in the post-conviction record on appeal. P.C. 358. It was not. See footnote 1, supra, and Motion to Correct and Supplement the Post-Conviction Record on Appeal, filed this day.

to the only claim that concerned the State -- Claim IV -- that the jury was instructed incorrectly.

Four days after the State issued its subpoenas, the trial court entered the State's Order Granting State's Motion for Summary Dismissal, In Part, And Ordering Evidentiary Hearing, In Part. P.C. 315. That Order set the evidentiary hearing the State apparently wanted on Claim IV, on a date which the State had presciently anticipated, and for which subpoenas had already been issued. Additionally, the Order denied relief on the other three claims. Ronnie Woods had not yet attempted to amend the emergency motion to vacate judgment and sentence, and no amendment was pending, but the State's prepared order nevertheless purportedly denied permission to amend: "Because the evidentiary hearing date is scheduled for December 1, 1987, and is expected to be completed that same day. Petitioner's Motion for Stay of Execution is hereby Denied, as well as Petitioner's Request for Leave to Amend." P.C. 316-17. Apparently, the result of the December 1, 1987, hearing was a foregone conclusion -- a stay was denied because the hearing would be completed before execution and, ostensibly, Ronnie Woods would lose immediately after the hearing.

There was no apparent reason for the evidentiary hearing that was granted on Claim IV. Ronnie Woods had pled that the jury instruction read to the jury was incorrect:

> The aggravating circumstances that you may consider are limited to any of the following, that are established by evidence, as it relates to Ronald Woods:
>
> First - the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

(R. 1667). It violates the eighth amendment to treat as aggravating that which it mitigating. Zant v. Stephens, 103 S.Ct. 2733 (1983). The State's only response to the claim was that the issue could or should have been raised on direct appeal. P.C. 312. As it turned out, the State wrote the order granting a hearing because the State wished to try to prove that the certified record on appeal was inaccurate. No pleading had asserted any such thing and Ronnie Woods could not have imagined that that was the State's plan, much less that the post-conviction court would allow furtherance of such a plan.

Ronnie Woods subsequently filed a Motion To Vacate November 23, 1987, Order Granting State's Motion For Summary Dismissal In Part, And Ordering Evidentiary Hearing In Part. In this Motion, Ronnie Woods stated he did not wish a hearing on Claim IV, P.C. 2, and, speculating on why the State might want one, he demonstrated that one was improper:

> The trial judge in this case was required by the Florida Death Penalty Statute to certify the entire record, Fla. Stat. sec. 921.141(4), so as to allow proper appellate review. The jury instructions were part of that certified record, were transcribed, and

that transcript is "prima facie a correct statement of such . . . proceedings." Fla. Stat. sec. 29.06 (1985).

Purported errors in the record on appeal are matters that now may be addressed, if at all, only by the Florida Supreme Court. Mr. Woods can only assume (since no answer has been filed) that the State now wishes to challenge the accuracy of the very transcript utilized to affirm Mr. Woods' sentence. Such a challenge is governed by the Florida rules of procedure which do not allow this Court, in this posture, to correct the record, or go behind it at all. The only provision for correcting error is Rule 9.200(f)(1), Florida Rules of Appellate Procedure, which provides:

> If there is an error . . . in the record, the parties by stipulation, the lower tribunal before the record is transmitted, or the [appellate] court may correct the record.

Id. (emphasis added). Thus, if an error is claimed, only the Florida Supreme Court can correct it.

P.C. 333-34. The pleading also averred that, without knowing the purpose of the hearing, counsel could not prepare:

Rule 3.850, Florida Rules of Criminal Procedure, provides a carefully delineated procedure for trial court handling of motions to vacate judgment and sentence. First, if the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. If a claim is not so dismissed, then "the court shall order the State Attorney to file an answer. . . ." Id.

An answer is required, inter alia, to allow a petitioner to know the State's position before an evidentiary hearing is held. After the answer is filed, the Court

> decides whether to conduct an evidentiary hearing. Id.
>
> No true answer has been filed by the State. No issues of fact exist. The transcript shows constitutional error, and the State has not denied it. Consequently, there is no need for an evidentiary hearing on this claim.
>
> Before Mr. Woods can meaningfully participate in, and obtain a full and fair hearing upon any fact resolution regarding this claim, if a hearing is to be held, he must know what the State contends. No "answer" was filed, so he cannot prepare for any such hearing.
>
> If an evidentiary hearing is to be held, a stay of execution should issue, so as to allow counsel for Mr. Woods to determine what the State's true position is regarding this claim and to allow proper preparation.

R. 334-36.

The Court denied the motion to vacate the order of November 23, 1987, intending to conduct a limited evidentiary hearing. Before it was conducted, counsel challenged the Court's power and/or jurisdiction to change the record on appeal:

> [Counsel] Then somewhat inexplicably, to me at least, the Court ordered an evidentiary hearing, the contours of which I'm not entirely certain. If what the State intends to do -- and they haven't enlightened us, at least not me in that regard through their pleadings. If what they intend to do is say that the record on appeal is incorrect, then it is our position that this Court does not at this juncture have jurisdiction to entertain proof on such a matter.
>
> The procedure regarding the compilation, certification and transmission of criminal

trial records in all criminal cases is very explicit, precise and fully contained in the rules, Rules of Criminal Procedure and Rules of Appellate Procedure. In a capital case, they're even more explicit in that, under the capital sentencing statute, the trial Court has to certify the entire record at a certain period of time after its preparation.

If any party to the proceedings wishes to say that the record is in error -- and the State has not pled that, has not given notice that that's what they wish to do. There's just been an evidentiary hearing set and, again, I don't know what that's about. But the State, if the State wishes to challenge the accuracy or claim there's an error in the record, there's one and only one way for them to do that at this juncture, and that's under Rule 9.200, Rules of Appellate Procedure.

Under f(1), if there is an error in the record, the lower tribunal, this Court, before the record is transmitted, which happened long ago, or the Court, that is, the Appellate Court, may correct the record. The pleadings that are before Your Honor state pursuant to a prima facie correct record under the law of the State of Florida that an eighth amendment violation occurred. The State said merely, "Too bad. You should have raised it earlier." The granting of an evidentiary hearing is perplexing in that posture and illegal in light of the rules of procedure, which state that, if the evidentiary hearing is to determine that there was an error in the record, it is not to be conducted here.

This Court, another judge presiding, certifed this record. The Florida Supreme Court, the federal courts, and all future courts rely upon that very voluminous, complex and heretofore thought well-put together record in order to determine whether constitutional error occurred or did not occur. If the State wishes to challenge the accuracy and reliability of that capital

sentencing proceeding and trial, there's a procedure for them to do it, and it's not before this Court. So, I would ask that the Court recognize that it has no jurisdiction to conduct an evidentiary hearing if what the State wants to do is challenge the record or go behind that record that's been properly certified.

P.C. 365-67. Counsel reiterated that there was no way to prepare for an evidentiary hearing without knowing what it was about:

> Now, maybe the State has -- or the Court has something else in mind in granting the evidentiary hearing and, if so, I need to be informed of what it is on this claim because I'm in the dark as to what the Court wants to hear about and, being in the dark, I can hardly be prepared to conduct a full and fair evidentiary hearing about something which I do not know.
>
> . . . .
>
> Are we now ready to proceed as it relates to the evidentiary hearing the Court set back on the 23rd of November?
>
> MR. TOBIN: State is ready.
>
> MR. OLIVE: The defense is not ready. I have no idea what the hearing's about, Your Honor.
>
> THE COURT: Very well. You may proceed, Mr. Tobin.

P.C. 367; 376-77. The State was then allowed to decertify the record on appeal by purportedly demonstrating that a tape recording from trial showed the certified record on appeal to be in error. Relief on Claim IV was subsequently denied on the merits.

B. Lower Court Action Upon Appellant's Amended Emergency Motion To Vacate Judgment Of Sentence

On December 1, 1987, Ronnie Woods filed his Amended Emergency Motion To Vacate Judgment And Sentence. P.C. 318-332. Claims V-IX were contained in the Amended Emergency Motion. The substance of these claims will be discussed in the argument section of this brief, infra. Here, it is sufficient to note that counsel wished, and sought, to prove due diligence in raising Claims V-IX, but the Court did not allow it:

> [Counsel]: Rule 3.851 does not bar this amendment. This is not a "later petition," within the meaning of the rule. The "first" petition has not been dismissed, execution is scheduled many days away, and the considerations leading to the adoption of Rule 3.851 are not applicable. Regardless, as required by the Rule, if it applies under these circumstances, it is specifically alleged that the facts upon which the following claims are predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day (30-day) period. Mr. Woods requests a hearing at which he would prove that counsel acted with utmost due diligence, but was unable to discover and present these claims earlier. Section III in the original motion demonstrates in general why counsel's obligations have prevented earlier presentation of the claims. Specifically, however, Mr. Woods alleges and will prove that his counsel has been involved in around the clock emergency litigation for other of the 270-plus inmates on death row in Florida, and that, despite due diligence, the Office of the Capital Collateral Representative was unable until now to bring these claims to the Court's attention.

P.C. 318-19. Before the limited evidentiary hearing began, counsel stated that Ronnie Woods could and would prove due diligence:

> [Counsel]: The State can respond to these claims quite readily and easily, and the only question is whether these claims could have been raised earlier -- well, the only question, number one, is whether Rule 3.851 applies to amendments, which it doesn't. Rule 3.851 says a petition that's filed after the thirty days can only be acted upon on the merits if due diligence has been shown.
>
> This is not a new petition. It's an amended petition because this Court in its order did not deny the earlier petition. It's still pending. Several claims were denied. One was not. So, we are simply amending that one. So, the rule doesn't apply.
>
> Even if it does apply, if the State is inclined to deny the claims procedurally rather than on the merits, then I would request an evidentiary hearing to prove to the Court that due diligence has been exercised, and I would proffer to the Court that counsel for CCR work around the clock on an emergency basis on all of their cases, and it is catch as catch can unfortunately for Mr. Woods, who gets to hear me argue before him that five claims that have merit might get denied in this court because I didn't work fast enough for him because I was working for a colleague of his next-door.
>
> That's not something that I like to say. It's the truth and he shouldn't be penalized for it, and I would bring our entire office staff here, put them in that chair, and bring the prosecutors from the State of Florida, put them in that chair from the AG's office, and provide to the Court proof that it was

> impossible for me exercising -- anyone in my office exercising extreme due diligence to get this petition to the Court any earlier than I have.
>
> This still is a meager pleading. This is not the way I want to represent anyone, and no one exercising due diligence in a capital case would want to represent somebody in this fashion. I presented fourteen claims to the Court and I don't think I've gotten to the meat of this case yet. It's a very complex case. I have not properly investigated it, but that's not the question. The question is whether I've exercised due diligence. I believe that we can prove it and, if the Court questions it, we wish the opportunity to prove due diligence has been exercised.

P.C. 374-76 (emphasis added).

The State stated that its position on Claims V-IX was the same as it had been before.4/ The court took the amended petition under advisement. P.C. 376. In an Order entered the day after the limited evidentiary hearing, the court denied Claims V-VII solely

---

4. The post-conviction record on appeal does not contain a transcript of the earlier November 17, 1987, hearing, or the State's Objection To Request For Leave To Amend, and so it is not possible for this Court to determine what the State meant when the State argued "the State's response to this would be the same as its written response that it filed. . . ." P.C. 376. See fn.1, supra; see also Motion To Correct And Supplement The Post-Conviction Record On Appeal.

on the basis of Rule 3.851. Mr. Woods then filed Motion For Rehearing, Motion To Require Court Reporter To Deliver To This Court And/Or Preserve Tapes (Audio And Stenographic) Of All Pre-Trial, Trial, And Capital Sentencing Proceedings Herein, And Motion To Stay Execution Pending Determination Of The Correctness And Completeness Of The Record. R. 345-49. Ronnie Woods stated:

> Because of counsel's other commitments and workload, counsel was, despite due diligence, unable to discover all errors, write them into claims for relief, have them typed, edited and proofed, and produce them for filing before this Court within the thirty day period required by Rule 3.851. Before this Court dismissed the petition, Mr. Woods amended it, weeks before execution, to include claims V-IX, which are, concededly, largely record bound claims.
>
> The State did not allege any prejudice from the motion being amended over two weeks before the warrant week expires. The State did not allege counsel had not been diligent. There was no allegation that the policy considerations underlying Rule 3.851 prevented hearing the claims. This Court simply decided, despite counsel's explicit statements that he could and would prove otherwise if given the opportunity, that there was "no reason these claims could not have been raised within the time limits. . . ." Order, p. 1. There were reasons, counsel offered to prove them, no opportunity to prove them was given, and the contrary finding has no record support.
>
> Counsel would prove, if given the chance:
>
> 1. That no attorney at CCR completely reviewed the record in this case before last weekend, because of other professional commitments;

2. Counsel exercised due diligence, within the context of counsel's workload. Counsel did not delay preparing in any willful manner, did not choose to delay, did not neglect the case, and did not plan to wait. Counsel did the work in this case when other work was completed, and when time allowed;

3. Mr. Woods did not choose to delay the presentation of Claims V-IX, did not know the claims existed, and did not acquiesce in counsel's failure to present the claims earlier. At every possible moment, Mr. Woods has urged counsel, indeed exhorted counsel, to operate as quickly, efficiently, and competently as possible, to act as an advocate, and to represent him in a reasonably competent and effective manner;

4. That cause exists for Mr. Woods' purported default -- he could not himself present Claims V-IX, he did not wish for counsel to delay their presentation, and counsel's failure to present the claims, if the result of lack of due diligence, provides cause to excuse the default.

The Florida Supreme Court has scheduled oral argument for December 9, 1987. There remains a week before that argument. The State can still respond to the merits of Claims V-IX, but has refused to seize the opportunity to do so. This Court may address the claims, but has chosen not to. Petitioner invites the State to take its time, think about the claims, be diligent in its efforts, and answer Claims V-IX. Petitioner is willing to patiently wait for such an answer, and for a ruling, after the answer. The only partner who has been prejudiced by the amended claims is Mr. Woods, who is not at fault. If the court is right, then counsel was too lazy (indifferent, stupid) to raise the claims in time, the State need not work <u>any</u> to respond

to them, and the court will not look at the claims, despite weeks remaining.

P.C. 346-49. The motion was summarily denied. P.C. 350.

C. Amendment Challenging The Entire Record On Appeal

Once the State was allowed to de facto decertify the record on appeal by having the court reporter testify that it was erroneous, petitioner filed an amended motion to vacate judgment and sentence, based upon the incorrectness and incompleteness of the entire record upon direct appeal.5/ As the post-conviction record reveals, the court immediately denied relief on this claim:

> Q There could be similar mistakes in this transcript elsewhere, couldn't there?
>
> MR. TOBIN: Objection. Again speculative and argumentative.
>
> MR. OLIVE: State challenged the transcript, Your Honor.
>
> THE COURT: Objection sustained. Let's move on, Counsel.

---

5. This motion does not appear in the post-conviction record on appeal, despite the fact that it was filed in open court, the trial judge considered it, and it was denied on the merits in open court. See footnote 1, supra. See also Motion To Correct And Supplement The Post-Conviction Record On Appeal.

MR. OLIVE: Well, Judge, at this time, I want to file an amended thirty-eight fifty that challenges the transcript since the State has chosen to...

The Defendant in a criminal case, especially a capital case, has the absolute right to --

THE COURT: Mr. Olive, just a moment. We're going to take a brief recess and we'll reconvene in about ten minutes.

(Thereupon, a brief recess was taken.)

THE COURT: Were you through with cross examination?

MR. OLIVE: No, Your Honor. At this point, I'd like to, since my cross examination is being restricted, take a moment and file this amended motion to vacate judgment and sentence, and I would move that the Court appoint experts for me, or the court reporter to give all of his tapes, all of his stenography tapes, all of his cassette tapes and the tape he dictated into, provide them to me, let me provide them to an expert.

What the State, if you believe their proof, has succeeded in doing is indicating to this Court that the record's unreliable. This motion that has just been filed says and the case law supports that, if it is unreliable, that in and of itself is a due process and eighth amendment and sixth amendment violation. The State wants to have its cake and eat it, too, say, "It's unreliable over here on this point where you win, Mr. Olive, but don't go into any other areas."

I think I have the right -- and it just now arose. So, there's no thirty-eight fifty-one problem. Since the State says it's unreliable, I believe, if that's correct, I should have the opportunity to look at the entire record. The entire record has at this point been called into question and I think I should have the opportunity to prepare. I think the Court should issue a stay.

The transcript in a capital case is the most important document imaginable. Every single Court after this Court has to rely on it and its accuracy, and the State has come to this Court and said this transcript's unreliable. For sake of argument, I agree.

Now, that violates the sixth, eighth and fourteenth amendments. Let me prove it. And, in order to do that, we need this witness to go for me, as he did for the State, and get all of his stuff together and bring it to me because I think we have the opportunity now that the State's opened it up to demonstrate that yes, you're right; it is inaccurate, and that violates the eighth amendment.

. . . .

THE COURT: The Defendant's amended motion to vacate judgment and sentence which was handed to the Court approximately ten minutes ago is hereby denied.

. . . .

MR. OLIVE: All right, sir. I also made a motion for an expert and to have all of the tapes and stenographic paper and the tape that this witness produced from those two items and gave to the other court reporter produced so I could

provide them to an expert. Has the Court denied that request?

THE COURT: Yes, sir.

P.C. 399-405 (emphasis added). Counsel was not allowed to ask witnesses questions about other portions of the transcript, because the court instructed counsel to "limit your inquiry to areas covered by the State on direct. That relates to that portion of the case that was called into question as it relates to the jury instructions read to the jury." P.C. 405. The Court was adamant:

> THE COURT: I'm saying is the area limited to the jury instructions?
>
> MR. OLIVE: Yes.
>
> THE COURT: I'll allow questions around that area. If you get beyond that, it will be another day and another hearing and another matter that you may want to explore, Mr. Olive.

P.C. 415-16; see also O.C. 419, 420.

Counsel attempted to obtain all the tapes that the court reporter had from trial, but was frustrated:

> MR. OLIVE: Will you instruct this witness then to provide to me all of his tapes and stenographic tapes?
>
> MR. TOBIN: I'm going to object to that because, if he provides those to him, there's a possibility that a member of his office may in some way damage them and, if they call into play in the future, then we would no longer have those.

THE COURT: I think the proper procedure, Mr. Olive, would be for you to file a motion to the Court for me to order these matters produced and give this witness sufficient notice and we'll set a date and time when the State can be there, et cetera.

MR. OLIVE: I'll be happy to do that.

THE COURT: If you do that, then I'll certainly consider it.

MR. OLIVE: I will file such a motion, Your Honor.

P.C. 406 (emphasis added). Counsel did file such a motion, and it was summarily denied. The Motion included the following:

II. PETITIONER REQUESTS THAT THIS COURT TAKE THOSE STEPS NECESSARY TO ENABLE PETITIONER EFFECTIVELY TO CHALLENGE THE RECORD

The State instructed the trial court reporter to find one tape and to listen to five transcribed lines in that tape. After much searching, he purportedly did so. The State instructed the reporter to bring the tape to the State attorney. The court reporter did. As would be proved, the State then played the five transcribed lines of the tape to witnesses, before and out of court.

In court, Petitioner asked the court to order the court reporter to get all the trial tapes and all official stenographic notes and to deliver them to counsel for Mr. Woods. The State objected. The objection was sustained. The State did not trust defense counsel not to alter the already decertified tapes. This court agreed, even after hearing testimony from the court reporter that he had already destroyed the actual tape(s) from which the certified record on appeal was typed.

> Thus, Petitioner asks that this Court take it upon itself, as required by Florida laws and the sixth, eighth, and fourteenth amendments, to ensure that the record is correct. Specifically, Petitioner requests that this Court:
>
> 1. Order the trial court reporter to gather all tapes (audio, stenographic, or other) of the pre-trial, trial, and sentencing proceedings herein, and deliver them to this Court at a hearing to be immediately scheduled;
>
> 2. Order that an expert provided for Petitioner, in the presence of the State, be permitted to examine all such tapes, listen to and/or record and duplicate them, and compare the tapes to the now decertified record;
>
> 3. Order that the trial court reporter make himself and his tapes available for deposition, and that the deposition be immediately scheduled by the Court;
>
> 4. Order that the scheduled execution be stayed, that a hearing be conducted regarding the inaccuracy of the record, and that counsel be provided sufficient time and resources to examine the tapes and prepare for the hearing.

P.C. 343-44. The Court denied the motion that it had invited.

P.C. 350. This appeal followed.

ARGUMENT

I

CONFIDENCE IN THE RELIABILITY OF THE RECORD ON APPEAL WAS UNDERMINED BY THE STATE'S AND THE TRIAL COURT'S ACTIONS IN POST-CONVICTION, AND RONNIE WOODS' SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED

This is a capital case. The lower court determined that the certified record on appeal was inaccurate in one very critical respect -- the capital sentencing jury instructions reviewed by this Court on direct appeal were not the actual instructions read to the jury. The record on appeal was thereby de facto decertified by the state and the post-conviction court's action. Counsel for Mr. Woods immediately challenged the entire transcript via an amended motion for post-conviction relief, which the court summarily denied. Counsel attempted to prove that the rest of the record was equally inaccurate, and that the trial court reporter was routinely unreliable, and Ronnie Woods sought the trial court's assistance in delivering to that court all tapes (stenographic and audio) of pre-trial, trial, and sentencing proceedings. The post-conviction court refused to hear or look into other evidence that the record before this Court on direct appeal was inaccurate and unreliable. This Court should stay Mr. Woods' execution and remand this case to the trial court for a full, fair, and comprehensive inquiry into the

accuracy of the entire record on appeal. See Delap v. State, 350 So.2d 462 (Fla. 1977); Johnson v. State, 442 So.2d 193 (Fla. 1983).

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant, and the appellate court. If an indigent appellant is denied a complete and accurate transcript and record, his or her rights to effective assistance of counsel on appeal, equal protection of the law, and due process, guaranteed by the sixth and fourteenth amendments, are violated. See Evitts v. Lucey, 105 S.Ct. 830 (1985); Griffin v. Illinois, 351 U.S. 12 (1956); Hardy v. United States, 375 U.S. 277 (1964); Entsmineger v. Iowa, 386 U.S. 748 (1967). Thus, if this were a petty shoplifting case, a remand to the trial court for determination of the accurateness of the record, or retrial, would be necessary. A fortiorari, a reliable record is necessary in a death penalty case.

Eighth amendment considerations counsel for even greater precautions in a capital case. The Constitution, and the Florida death penalty statute, require this Court to review the record to determine if the judge and jury acted with procedural rectitude. Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

"Reversible error--can turn on a phrase." Johnson v. State, 442 So. 2d 193, 198 (Fla. 1983)(Shaw, J. dissenting). Consequently, the trial judge is required to certify the record on appeal in capital cases, F.S. sec. 921.141(4), Art. V, Section 3(b)(1), Fla. Const. and, when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap, supra; Johnson, supra. That did not occur here.

Perhaps confidence in the reliability of the entire record can be restored if the lower court were to "hold an evidentiary hearing on the accuracy of the transcript." Johnson, 442 So. 2d at 195. On the other hand, perhaps after a full and fair inquiry, this Court may have "no alternative but to remand for a new trial of the cause." Delap, 350 So.2d at 463. What will occur after a full and fair hearing is not at issue. The State decided to challenge the accuracy of the record, the lower court has decided that the record on appeal is unreliable, and Ronnie Woods' motion challenging the reliability of the transcript as a whole was summarily denied. A hearing on that claim is required, and a stay should issue so as to allow that hearing to be conducted.

II

THIS COURT SHOULD STAY RONNIE WOODS' EXECUTION BECAUSE THE POST-CONVICTION RECORD ON APPEAL IS INCOMPLETE

The written claim upon which Argument I, supra, is predicated was not made a part of the post-conviction record, although the December 1, 1987, transcript plainly reveals that the claim was filed and was summarily denied on the merits by the trial court in open court. Furthermore, the earlier November 17, 1987, transcript of proceedings was not included in the post-conviction appeal record. The State's written objection to Ronnie Woods' request for permission to amend his Rule 3.850 motion is likewise not in the record. See Motion To Correct And Supplement The Record, filed with this brief. Appellate review is not meaningful without a properly certified record being before this Court, even if that review is from denial of post-conviction relief.

Other important matters are not included in the record before this court. The judge presiding over post-conviction was not the judge who tried this case. His knowledge of the case is, or should be, strictly a function of his review of the entire record. In such a situation, the requirement that "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to

the order" is especially important. Rule 3.850. The post-conviction judge attached nothing to his orders denying any of the claims and, in fact, the order was prepared by the State. Cf. Patterson v. Florida, 12 F.L.W. 528 (Fla. October 15, 1987)(requiring judge fact findings in capital sentencing proceedings).

The delineated procedure under Rule 3.850 is strictly enforced, and this case should be remanded and the trial court required to provide those portions of the files and records that conclusively demonstrate that Ronnie Woods is entitled to no relief.

III

MR. WOODS' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO CONTINUE THE PROCEEDINGS SO THAT COUNSEL COULD CONDUCT A REASONABLE PENALTY-PHASE INVESTIGATION, AND/OR WHEN COUNSEL UNREASONABLY FILED TO DISCOVER AND PRESENT CRITICAL MITIGATING EVIDENCE. THE ERROR ALSO DEPRIVED MR. WOODS OF A COMPETENT MENTAL HEALTH EVALUATION, IN VIOLATION OF THE FOURTEENTH AMENDMENT (CLAIM II)

Ronnie Woods, at age eight, was committed to a mental institution, where he was heavily sedated with psychotropic medication, isolated in a seclusion room, frequently with physical restraining devises. Eight years old. This history, as supplemented with other information readily available and

contained in the Emergency Motion but not discovered at the time of trial, has led the actual defense trial psychologist who testified at sentencing, now to conclude that which he was without sufficient information to form an opinion about at trial: at the time of the offense, statutory and non-statutory mitigating factors existed. This conclusion is also supported by the opinion of another, but independent, expert psychologist.

Ronnie Woods pled in his emergency motion that this demonstrated a violation of his sixth, eighth, and fourteenth amendment rights. The post-conviction judge did not attach those portions of the files and records that conclusively illustrated that Ronnie Woods was not entitled to relief on this claim. That is because the record does not, and cannot, so demonstrate. The order prepared by the State rejected this claim with the following language:

> 2. Petitioner's Claim II, that his Sixth, Eighth, and Fourteenth Amendment rights were violated when the trial Court refused his motion for a continuance, is hereby DENIED, and the State's Motion for Summary Dismissal of this claim is hereby GRANTED on the grounds that this matter was raised on direct appeal and has already been adversely decided against Petitioner by the Florida Supreme Court.
>
> see Woods v. State, 490 So2d 24 (Fla. 1986), Reh den July 18, 1986, Cert Din 107 S.Ct. 446 (US 1986); Fla. R.Crim.P. 3.850.
>
> To the extent Petitioner attempts in this claim to obtain review in the guise of

> ineffective assistance of counsel, such is clearly improper. See Sirece v. State, 469 So2d 119 (Fla.1985). Even as to the merits of this claim, this issue is controlled by Witt v. Washington, 465 So2d 510 (Fla.1985). Counsel is not ineffective for failing to obtain the volume of evidence he would have liked or the exact expert he wished.
>
> see Martin v. State, 455 So2d 370 (Fla.1984), Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985).

P.C. 315-16. This ruling is erroneous as a matter of law. Ronnie Woods is specifically not raising anything that was raised upon direct appeal, and an evidentiary hearing should be held regarding the sworn allegations.

If Mr. Woods' counsel had adequately investigated Mr. Woods' background, and/or had been accorded sufficient time to do so,6/

---

6. On September 12, 1983, Mr. Woods' counsel told the trial court that "the defense has not been able to prepare a sentencing phase for the trial ..." (R. 768). Counsel had throughout the proceeding sought more time to prepare for all phases of trial, but the requests were denied. Counsel strenuously argued that in light of the severe discovery problems with the case, the court should reschedule the trial date. Additionally, trial counsel informed the court that an expert was unavailable and he was in the process of finding another (See R. 806-809). The state did not object to the request (See e.g., 771, 808-809), and the court recognized, explicitly, the "extraordinary" nature of the case (R. 809). Nonetheless, the court refused to grant the motion (R. 819A). Trial counsel, with too few resources and too little time, "prepared" for penalty phase, but inadequately and ineffectively. The result was that Mr. Woods' attorneys never sought or found readily accessible critical information necessary to establish the existence of mitigating circumstances.

they would have found many constitutionally important records about Mr. Woods' background. Most important are his Hillsborough County School Records and Evaluations, and the Hillsborough County Hospital Records and Psychological Screening Report (see App. A). These records, and other now produced background information, were vitally important if a meaningful and individualized sentencing determination was to occur, especially with regard to mental health mitigating circumstances. Given the close 7-5 jury vote for death, this information could have made a difference.

A psychologist did testify on Mr. Woods' behalf at sentencing, but that expert, Harry Krop, Ph.D., was not provided the necessary background information that competent mental health experts require for a proper diagnosis. He admitted as much, in his testimony.

Proper background information has recently been easily discovered and provided to Dr. Krop and to another mental health expert, Dr. Harold H. Smith. Dr. Smith reviewed the materials, evaluated Mr. Woods, and provided his opinion regarding mitigating circumstances. Most notably, Dr. Smith found in the background information the very sort of evidence that is necessary to establish mental health statutory mitigating circumstances at sentencing, and to rebut aggravation. Dr. Krop had specifically testified at sentencing that he could not

address these factors, and the reason was simply that the records had not been uncovered. Dr. Smith's report is reproduced, so as to contrast what could and should have been produced, with what was:

> I evaluated Mr. Ronald Woods in Florida State Prison at Starke, Florida on October 31, 1987 in regard to mitigating factors relating to a charge of first degree murder of which he was convicted and sentenced to death. I examined him by means of interviews and psychological testing of intelligence, memory and neuropsychological factors.
>
> I have reviewed excerpts of the testimony given by psychologist, Harry Krop, Ph.D at Mr. Woods's trial as well as a subsequent report by him dated August 12, 1987 which was submitted for a clemency hearing. I have had the opportunity to review additional documents which were not available to Dr. Krop, most importantly, including:
>
> a) Psychological Screening Report, Angell Granville, Psychologist, 8-22-80;
>
> b) Hillsborough County School Records and Evaluations, 1972, et seq.;
>
> c) Hillsborough County Hospital Records.
>
> The records identified above reflect that as young as age 8, Mr. Woods was placed in a psychiatric hospital for treatment of what was possibly the manifestation of cerebral dysfunction.
>
> As a child, Mr. Woods displayed many of the manifestations of cerebral dysfunction such as visual perceptual difficulties, learning disabilities, hyperactivity, distractability, impulsivity, and excitability. As a result of these constitutional characteristics, Mr. Woods, according to the hospital records,

demonstrated a low tolerance to frustration and little self control. Because of this discontrol, authorities had to isolate him in a seclusion room, frequently with physical restraining devices.

Mr. Woods was also administered various medications while hospitalized, including Ritalin, Librium, Thorazine and Mellaril. His treating psychiatrist, during this time, noted that some of his behavior was of the type observed in psychotic children. Young Mr. Woods complained of headaches and dizziness, although gross neurological examination was negative. During this hospitalization he was observed to make what appears to have been a suicidal gesture. After discharge from the hospital, he received care at a guidance center.

His behavior at school continued to be inappropriate and unacceptable. A psychological evaluation conducted in 1972 noted his extremely disruptive and explosive behavior. Notable in that evaluation was evidence of poor concentration, low frustration tolerance and poor social awareness and judgment. The Hillsborough County public schools also noted in 1972 that Mr. Woods did not understand what was said to him and recommended that he be referred to the learning disability program. Young Mr. Woods continued to be extremely disruptive and explosive and in 1973, he was even exempted from school because of his inability to control behavior. The following year, he was enrolled at Bay Child for residential treatment. Thereafter, it was reported that he lived for approximately one year with an emotionally and physically abusive father. There are no records pertaining to him during that period.

Various interventions did not seem to significantly affect his functioning, and Mr. Woods soon came under the supervision of the Division of Youth Services and received continued residential treatment at the

Seffner Home. Later, he attended the Lake Magdalane Juvenile Home. Mr. Woods continued to have little control over his actions, medication was prescribed, and counselors recommended his continued residential treatment.

The Psychological Screening Report conducted in 1980 for Florida State Prison shows that his profile was similar to those persons who "experienced feelings of unreality, bizarre or confused thinking and conduct . . . and poor impulse control and some awareness of his asocial orientation but without the ability to control himself. It was recommended that he be placed in an institution which had psychiatric and psychological services and cautioned against suicidal or manipulative behavior. . . and that he should be under close supervision."

CONCLUSIONS

I am of the opinion that Mr. Woods, since childhood, has displayed evidence of cerebral dysfunction, as noted, in the various psychological test results which I have reviewed. Earlier psychological evaluations show low average intellect with evidence of lack of controls which are generally associated with frontal lobe dysfunction. My examination using the Wechsler Adult Intelligence Scale-Revised also shows poor social awareness and poor judgment which has been documented since age eight in hospital treatment records, school records, and prior psychological evaluations.

Further, I am of the opinion that at the time of the offense Mr. Woods was functioning under extreme mental and emotional disturbance which was considered to be a continuance of his long-standing mental and emotional difficulties and which are seen to be linked to cerebral dysfunction. I believe that he also had significantly impaired capacity to conform his behavior to the requirements of law. Since childhood, he has

> had difficulties conforming his behavior to the requirements of the standards established for schools, hospitals and within his own home, and I believe that the same constitutional factors existed at the time of the offense. I respectfully request the court to consider this evidence as extremely relevant to his sentencing determination.

App. B.

In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court recognized that the due process clause entitled an indigent defendant to a professionally competent court-funded evaluation of his mental status at the time of the offense. Mr. Woods mental status at the time of the offense had been evaluated prior to trial by a psychologist, but one who never had access to records that identified a history of cerebral dysfunction. As in Mr. Mason's case, these records had not been "uncovered by defense counsel" during trial proceedings, and were proffered for the first time in Rule 3.850 proceedings. Id. at 736. Recognizing that the evaluations of Mr. Mason's mental status would be "flawed" if the physicians had "neglect[ed] a history" such as this, Id. at 736-37, the Court remanded Mr. Mason's case for an evidentiary hearing "in order to resolve the question, raised by the evidence proffered, of whether Mr. Mason's due process rights have been protected through valid evaluations of his competence." Id. at 735. Accordingly, the Court recognized that the due process right to court-funded psychiatric evaluation

includes the right to a professionally accurate and complete evaluation.

The Florida Supreme Court's conclusions in this respect are supported by independent analysis of this question in light of federal due process principles. As the Supreme Court has explained, interests that are protected by the Due Process Clause may arise from two sources -- the Due Process Clause itself or state law. Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Mechum v. Fano, 427 U.S. 215, 223-27 (1976). Both of these sources recognize and require protection of the defendant's interest in having a valid evaluation of his or her mental status.

The due process clause itself requires protection of this interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 1094-97 (1985). As the Court explained in Ake, the provision of competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," Id. at 1093, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them." Id. at 1096.

During Mr. Woods' penalty proceedings, Dr. Krop testified that his psychological testing of Mr. Woods showed him to be mentally retarded, with an I.Q. of 69 (See R. 1526-1557). The state attorney's cross-examination of Dr. Krop left the

mitigating testimony as little more than this -- Ronnie Woods has an I.Q. of 69. The trial court in its sentencing order paid no attention to non-statutory mitigating circumstances, and found the absence of statutory ones (other than age). With evidence of statutory mitigating circumstances in hand, there is a reasonable probability that the result of Mr. Woods 7-5 sentencing jury would have been different.

Such evidence was available, but it was unreasonably not produced, through no tactic or strategy. Dr. Krop has, in fact, been recontacted, and he has examined the materials that were necessary before, but which he did not receive, either because of the trial court's haste or defense counsel's ineffectiveness, or both. Dr. Krop notes especially the remarkable documented history of psychotic behavior in Ronnie Woods, dating back to age six or seven, and the documented medicating of Mr. Woods as a child, medication that is normally reserved for seriously mentally ill persons. Dr. Krop concludes, and would have testified at sentencing had he had the correct information, that Ronnie Woods suffers from paranoid disorder, mental retardation, and cerebral dysfunction, he has all of his life, that he easily fades in and out of psychosis, and that, under stress and/or duress, he readily and non-volitionally could enter a psychotic state. This new information resulted in Dr. Krop deciding in his expert opinion that important statutory mitigating circumstances

were present, contrary to his trial testimony:

> I am writing to report my findings regarding the above-named 23-year-old black male, who I first evaluated in 1983, evaluated again April 3, 1987, and about whom I have recently reviewed extensive medical and psychiatric information concerning him that was unavailable to me at the time of my testimony in Mr. Woods' trial in 1983. The record of that trial accurately reflects the information available to me at that time.
>
> APRIL 3, 1987, EVALUATION
>
> Mr. Woods was referred to assist in providing a psychological profile for an upcoming clemency hearing. Accordingly, the Defendant participated in a clinical interview of approximately two hours duration which included a review of his behavior that led up to the offenses along with the gathering of a psychosocial history and a mental status examination. Mr. Woods was also administered a neuropsychological test battery which included the Weschler Adult Intelligence Scale-Revised (WAIS-R), Wide Range Achievement Test, Wechsler Memory Scale, Bender Gestalt, Aphasia Screening Test, and other screening tests. I also had the opportunity to review a prior psychiatric evaluation by Dr. Harvey Langee, the presentence investigation, a number of letters and statements written by individuals familiar with Mr. Woods, transcripts from the trial, and medical records.
>
> Mr. Woods was seen in an office provided at FSP. He presents as a tall, thin individual who was generally cooperative with this examiner during this evaluation process. However, he complained that he was frustrated due to his not being allowed privileges. Mr. Woods offers that he is blind in his right eye, suggesting that he has had difficulty since being incarcerated. There are no other obvious physical defects as motor coordination, posture and gait are within

normal limits. He displayed minimal anxiety throughout the evaluation and exhibited generally depressed affect. He describes a number of neurovegetative indicants of a clinical depression, including poor sleep and occasional suicidal ideations. He denies any history of aberrant perceptual phenomena such as auditory or visual hallucinations, but his thinking and speech reflected paranoid ideations. In this regard, it is clear that Mr. Woods has always felt to be discriminated against suggesting that others have always tended to see him as different because of his race and/or "slowness." He elaborates that he was treated like a "slave" by UCI and was extremely upset at or around the time of the incident. He states that he was observed to be crying by his fellow inmates after "I was jumped on by the officers for nothing." He states that he was asked to join the Dixie Playboys "to do something about that crazy stuff."

Formal Mental Status Examination reveals that Mr. Woods is oriented in all three spheres but he was unable to discuss current events in an informed manner. Similarly, his speech was clear but generally impoverished and his thinking was extremely concrete. All cognitive processes are impaired as his memory for remote events is consistent with his retarded intellect.

Results of psychological testing indicate that Mr. Woods is functioning in the Mild range of Mental Retardation (FSIQ = 69), or the lowest two percent of the population. Inspection of the individual subtests reveals significant impairment in all cognitive areas with the exception of his ability to recall digits after a short period of time. The most significant deficit in Mr. Woods' cognitive development is his judgment as he earned only a two (with ten being the average score) on the Comprehensive subtest. Although he appeared to exert maximum effort on all tasks, his performance on the comprehension subtest reflects extremely poor

common sense and a significant deficit in his ability to reason and think of consequences in social situations. Abstract thinking and perceptual-motor ability are other lowered cognitive functions. His responses to the Bender-Gestalt suggest relatively good ability to reproduce various visual stimuli as his drawings do not reflect a significant deficit in perceptual-motor ability. Logical memory as assessed on the Wechsler Memory Scale is also within normal limits. Mr. Woods' reading skills have also improved since he was last tested by this examiner four years ago.

NEW AND RELEVANT BACKGROUND

Mr. Woods was convicted of First Degree Murder and three counts of Attempted First Degree Murder related to an incident in which he allegedly killed a correctional officer and injured others. The incidents occurred in the Union Correctional Institution on May 5, 1983. Consequently, Mr. Woods was sentenced to Death by the Honorable R. A. Green on October 14, 1983. Mr. Woods indicates that he has been placed on Q wing at Florida State Prison since the sentence was given. At the time of the murder, Mr. Woods was serving time for Arson and according to the PSI, he has an extensive juvenile and adult criminal history dating back to October, 1971.

As Mr. Woods is a poor historian, much of the background information was obtained from records or members of the Defendant's family. Mr. Woods derives from an unstable family background, the fourth oldest of nine children born to his parents. The father, who left the family when Mr. Woods was only about four years old, physically abused his son and provided no real emotional support. His mother raised the nine children essentially by herself with the help of finances from AFDC. Significant in Mr. Woods' background is the sudden death of his eleven-year-old sister, Linda, who apparently

died from a heart attack while the Defendant rubbed her arm to comfort her. According to Mr. Woods' mother, this tragedy had a significantly traumatic effect on the Defendant as he was quite close to her. She offers that after her daughter's death, she often found Mr. Woods to be talking to himself at night and talking to his deceased sister. Mrs. Woods also describes a retarded developmental history for Mr. Woods and reports that her son suffered with a seizure disorder when he was younger. He has an eighth grade education and it is not clear whether he participated in regular or special classes. He has no special vocational skills and never was referred to Vocational Rehabilitation. Records indicate that Mr. Woods was treated at the Hillsborough County Hospital when he was a juvenile, but until I was provided these records by Ms. Rocamora, I had never seen the records.

The records are significant in that they reveal that as young as age 8, Mr. Woods was receiving in-house psychiatric treatment for what appears to be brain-damage or mental illness. He was, even in that environment, intensely unstable, to the point of requiring restraints and seclusion. This is quite an unusual finding in someone so young. He was administered psychotropic drugs for his mental illness, drugs commonly prescribed for the treatment of psychosis.

After discharge from this facility, Mr. Woods' inappropriate impulsive behavior continued. His school adjustment was abysmal, as he was barred from school, and was labeled learning disabled.

SUMMARY AND CONCLUSIONS

The most significant result of the evaluation is that it would render my 1983 testimony at Mr. Woods' trial much different. It is apparent that Mr. Woods suffers from paranoid disorder, his brain is either not intact or he suffers chemical imbalances, and

these factors, in combination with my earlier findings of mental retardation, combine to provide an overall mental health picture far different than the one I diagnosed. I am familiar with the Florida death penalty statute, and its list of mitigating circumstances. It is my opinion that the mental health circumstances exist in this case.

The following summary points out some of the bases for my current diagnosis. This is a 23-year-old single black male who was evaluated to determine his emotional status at or around the time of the offense and to assess his current personality functioning. Mr. Woods has been convicted of First Degree Murder and is currently serving a sentence of Death at Florida State Prison. Mr. Woods was evaluated by this examiner in April, 1987, as well as in 1983. Although Mr. Woods has demonstrated some improvement in basic academic skills, his overall intellectual functioning remains in the Mild range of Mental Retardation with his most significant deficit being seen in the area of judgment. He also shows limited insight and is viewed as a person who was both intellectually and emotionally deprived during childhood. He was a victim of physical abuse by his father and according to his self report, he was sexually abused by an adult neighbor when he was nine years old. Mr. Woods was also emotionally affected by the sudden and tragic death of his sister with whom he was quite close.

Despite Mr. Woods' extensive criminal history which dates back to when he was quite young, his personality testing characterizes him as an individual who prefers to avoid conflicts and confrontation when he can. He is seen as a person who suffers from a Paranoid Disorder characterized by persistent persecutory delusions. This disorder is featured by mild psychotic episodes, which may come and go, and which are prominent during stress. Because of his lowered

intellectual abilities, Mr. Woods did not have the capacity to cope adequately with the many failures generally associated with mental retardation. He lacks the capacity for leadership ability and thus generally is a position where he follows others and is easily influenced regardless of the appropriateness of the actions involved.

Based on this evaluation and the information available to me, it is this examiner's opinion that Mr. Woods was extremely susceptible to manipulation by his fellow inmates. Given this individual's lowered intellectual abilities coupled with his emotional immaturity, Mr. Woods was actually functioning at a mental age of about twelve years old at the time of the incident. In view of this individual's Paranoid Disorder, mental retardation, apparent cerebral dysfunction, and impaired judgment, it is this examiners's opinion that Mr. Woods, if guilty, acted under extreme duress and was substantially dominated by his more intelligent and emotionally mature peers, and his acts resulted from duress. Mr. Woods was also suffering from a distorted perception that he was being discriminated against and thus was quite disturbed emotionally because of the treatment that he thought was being specifically directed at him. Given his overall mental instability, his ability and capacity to conform his behavior to the requirements of law was substantially impaired. Many other mitigating circumstances arise from the hospital records I reviewed, as outlined earlier in this report.

Thank you for the opportunity to evaluate this individual. Please feel free to contact me if I can provide any additional information regarding this inmate.

App. C.

An evidentiary hearing is necessary to resolve this claim.

Mason. Even if this Court believes that Ronnie Woods will ultimately lose this claim, the files and records do not conclusively establish that, and, under Rule 3.850, an evidentiary hearing is necessary.

IV

MR. WOODS' DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT -- EXECUTION OF AN EIGHTEEN YEAR OLD OFFENDER, WHO HAS THE MENTAL AGE OF A TWELVE YEAR OLD, IS CRUEL AND UNUSUAL PUNISHMENT (CLAIM I)

Ronnie Woods was twelve years old at the time of the offense. His I.Q. had been measured by the State to be 60; the defense psychologist testified at sentencing that Ronnie Woods' I.Q. was as high as 69. Ronnie Woods functioned mentally at the level of a twelve year old child, or younger, at the time of the offense. His execution would offend the evolving standards of decency in a civilized society, would serve no legitimate penological goal, and would violate the eighth and fourteenth amendments.

The trial court denied this claim on its merits, without allowing an evidentiary hearing. If provided an evidentiary hearing, Ronnie Woods would demonstrate that, because of their incapacities, the mentally retarded are uniquely unfit for the imposition of the sentence of death. Homicides committed by the mentally retarded are prototypically the result of their limited

ability to understand the external world, their limited repertoire of responsive and coping behaviors, their inability appropriately to sequence behavior, and their inability to mediate and restrain aggression. As would be proven, mentally retarded offenders are thus the very opposite of the kind of offender whose "highly culpable mental state" permits imposition of the death penalty. Tison v. Arizona, 95 L.Ed.2d 127, 144 (1987). Since no legitimate penological purpose is served by the condemnation of the mentally retarded, the "basic concept of human dignity at the core of the [Eighth] Amendment," Gregg v. Georgia, 428 U.S. 153, 182 (1976), forbids the condemnation and execution of the mentally retarded.

Evidence would be introduced to prove that aggressive, homicidal behavior by a mentally retarded person is the product of the unique incapacities produced by mental retardation. Frank J. Menolascino, M.D., and John J. McGee, Ph.D., experts in the field of mental retardation, describe the reasons why retardation makes one vulnerable to engaging in aggressive behavior in three significant ways:

> First, the retarded person does not fully or accurately understand the complex outside world. Because of this, what might be regarded as trivial incidents for a nonretarded person -- e.g., verbal threats, gestural indications of violence, and simple daily frustrations -- likely become major stressors for the retarded person. Second, when confronted with such stressors, it is

> clear that [the retarded person] over-reacts to these external stimuli in the form of aggression. This occurs because he has an extremely limited range of adaptive and responsive behaviors, and because he does not know the appropriate sequencing of behaviors. For example, if someone threatens the retarded person, he is likely to respond with an abrupt outpouring of aggression, rather than engage in a sequence of behaviors that would first clarify the seriousness of the threat, then seek to defuse or avoid it, and only after all of these responses had failed, respond to the threat with self-protective aggression. With his limited range of responsive behaviors and his inability to sequence even these behaviors, the retarded person is left to impulsive "trial-and-error" types of behavior in response to external stressors. Third, once the retarded person becomes aggressive, his aggression will generally run its course without restraint. Without much ability to mediate his behaviors, he is likely to be far more aggressive in a particular situation than the situation would seem to call for. His responses will appear out of proportion to the provocation and will continue far longer than appears necessary. The retarded person is simply unable to reign in his aggression once it has been triggered.

These aspects of the mentally retarded person's deficits are particularly important, for "follow-up studies of retarded adults have consistently indicated that failure in the community and vocational settings is not due to lack of vocational skills (physical cognition), but rather to deficits in interpersonal relations . . . ." Simeonsson, Monson, & Blacker, "Social Understanding in Mental Retardation," in Brooks, Sperbert, & McCauley (eds.), Learning and Cognition in the Mentally Retarded

390-91 (1984)(emphasis supplied). "The nature of interpersonal competence involves the ability to recognize the existence of perspectives, intentions, and feelings in another person, to infer accurately what those are, and to differentiate them from one's own in purposive behavior." Id. at 391. It is the retarded person's deficits in interpersonal competence that creates the vulnerability of engaging in aggressive behavior.

The sentence of death is constitutionally permissible only if it serves a legitimate penological purpose. Only two such purposes are potentially served by the death penalty, however: retribution and deterrence. Gregg v. Georgia, 428 U.S. at 183. Condemnation of the retarded serves neither purpose.

Retribution is served only if the condemned is sufficiently culpable to be sentenced to death, for the principle of retribution is that society needs to "impose upon criminal offenders the punishment they 'deserve' . . . ." 428 U.S. at 183 (emphasis supplied). Thus, whether the imposition of death furthers the goal of retribution "very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). To be sufficiently culpable to warrant the death sentence, one convicted of murder must be personally responsible for the murder. Id. at 800-801. And one is personally responsible only if the murder is the equivalent of an act of "intentional wrongdoing," id. at 800 -- an intentional act

undertaken by one who knows or should know that it is morally wrong. "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." Tison v. Arizona, 95 L.Ed.2d at 143.

The homicidal behavior of the mentally retarded person is just the opposite of such conduct. It is, prototypically, an act of self-protection, triggered by a misunderstood event in the external world, which is immune to mediation and restraint once triggered. It is thus the antithesis of the volitional, fully informed choice to kill, made by one who is aware that the killing is neither justified nor excusable. The urge to inflict the most severe punishment on the most culpable offenders -- the need for retribution -- cannot be satisfied by the condemnation of the retarded.

Similarly, deterrence is served only if the killer is one who has chosen to kill despite the known wrongfulness of the killing. While "carefully contemplated murders" may be deterred by the execution of murderers who commit similar crimes, murderers who "act in passion" cannot be similarly deterred. Gregg v. Georgia, 428 U.S. at 185-186. Plainly, the murders committed by the retarded are like those committed "in passion" and can be no more deterred than such murders.

Finally, the execution of the mentally retarded must be

rejected, for the retarded, unlike any other group of people in this society, are pushed into inappropriate behaviors that sometimes lead to homicide by the very failure of society to provide the support necessary to reduce their vulnerability to such behavior. As Dr. Menolascino and Dr. McGee have explained,

> [W]ith loving and patient support and with positive role modeling, they can learn appropriate coping mechanisms. It is obvious, however, that Herbert has never had the support necessary to learn to cope with external stressors; nor, indeed, as a black child growing up in extreme poverty in a deeply segregated society, prior to the enactment of federal legislation mandating the provision of appropriate education and support for mentally retarded persons, is it likely that he would have. A person with Herbert's limited range of adaptive behaviors and intellectual functioning, linked to and exacerbated by a chaotic home life and a highly inadequate education and social support system, had no opportunity to develop the coping skills that easily and naturally come to nonretarded persons in the course of normal growth and development.

Thus, the mentally retarded cannot be blamed -- at least not to the extent of taking their lives -- for their homicidal behavior. Unlike nonretarded people, they cannot, on their own, learn the skills necessary to avoid such behaviors. Their homicides are, in a very direct sense, a reflection of the failure of a civilized society to meet its obligations. To condemn such persons -- whose vulnerability to homicidal behavior is not of their own making and whose vulnerability could be redressed by psychosocial supports if they were made available --

is to reject human decency at the most fundamental level, and violates the eighth and fourteenth amendments.

In this case, it was not just mental retardation, but also age that warranted an evidentiary hearing and a stay of execution -- execution of minors offends this society's evolving standards of decency.

As noted, in Gregg, Justice Stewart found that the death penalty was undoubtedly a "significant" deterrent to murder. Deterrence, therefore, may be a legitimate basis under the eighth amendment to legally impose death. However valid that belief may be as it concerns adults, it becomes totally irrelevant when applied to young people. Youth, who characteristically have impaired abilities to judge or consider the consequences of their behavior, can never benefit or be deterred by the "spectre" of a death penalty:

> Adolescents tend to "live for today" with little thought of the future consequences of their actions. See, e.g., Kastenbaum, "Time and Death in Adolescence," in The Meaning of Death 99 (H. Feifel ed. 1959). "'[A]dolescents may have less capacity to control their conduct and to think in long range terms than adults.'" Eddings, 455 U.S. at 115 n. 11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)). Adolescents are in a developmental stage when defiance of danger and death is often not controlled by a sense of mortality. The young are attracted to--not deterred from--flirtations with death because of an immature

> feeling of omnipotence. Fredlund, Children and Death from the School Setting Viewpoint, 47 J. School Health 533 (1977); Miller, "Adolescent Suicide: Etiology and Treatment," in 9 Adolescent Psychiatry 327 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981). One of the problems with juvenile behavior is not that the juveniles are cold, calculating and careful in these judgments; it is that they have no judgment at all, Parham v. J.R., 442 U.S. 584, 603 (1979), at least in the sense of considering the consequence of their behavior and deciding to proceed nevertheless. Irwin & Millstein, Biopsychological Correlates of Risk-Taking Behaviors during Adolescence, 7 J. of Adolescent Health Care 82S (Nov. 1986 Supp.). This absence of judgment derives from the adolescents' limited experience and lack of ability to calculate future consequences.

Brief of the Petitioner, Thompson v. Oklahoma, 107 S.Ct. 446 (1987) cert. granted.

These kinds of characteristics are precisely those characteristics which apply to Mr. Woods' at the time of the offense. His brain was, quite simply, dysfunctioning, because of his mental retardation, and his behavior was that of a youth.

The meaning of the eighth amendment's prohibition of cruel and unusual punishment must be drawn "from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86 (1958). Imposition of the death penalty on Mr. Woods is as cruel and unusual to him as it would be to a twelve year old. It serves no legitimate penological purpose. His execution would therefore constitute a violation of the

eighth amendment.

This Court should stay Mr. Woods' execution at least until such time as the Supreme Court decides the Thompson case. Then, this claim should be addressed under the Thompson parameters.

V

MR. WOODS' RIGHTS TO A FAIR AND IMPARTIAL TRIAL WERE VIOLATED BY THE ATMOSPHERE AT TRIAL WHICH WAS SO PERVASIVELY PREJUDICIAL THAT MR. WOODS WAS DENIED DUE PROCESS OF LAW, AND TRIAL COUNSEL INEFFECTIVELY PRESENTED AND/OR PRESERVED THE ISSUE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

As this Court knows, at least one-half of the spectators at trial in this capital case were uniformed correctional officers. Defense counsel at trial asked the State to correct the situation (R. 1317-18), but, after that failed, counsel asked the court to exclude the officers. The court refused.

What was not known on appeal was that the trial atmosphere was much more polluted than is revealed by the mere presence of uniformed officers. Trial counsel, through no tactic or strategy, unreasonably failed to present to the trial court the pervasive and racially volatile mean-spiritness that enveloped those trial proceedings. The uniforms in court were bad enough, but, in the context of all that was happening, the courtroom was simply the most record-visible manifestation of nastiness.

a) The Courthouse

1. The transcript provides references to the trial court's attempts to keep Mr. Woods' jurors from the overbearing presence of the uniformed officers. Those attempts however merely illustrate the unacceptable risk of the jurors' having been affected by their presence. The starkest example of the trial judge's efforts came on the eve of jury deliberations during closing arguments at the innocence-guilt proceedings:

> THE COURT: Mr. Replogle, wait just a minute.
>
> MR. REPLOGLE: Yes, sir.
>
> THE COURT: Ladies and gentlemen of the jury, we are going to take about a 20-minute break at this point. Let me ask you to make yourselves comfortable in the jury room.
>
> I will have another announcement in just a moment. Please remain in place.
>
> You may go to the jury room.
>
> (Thereupon, the jury retired to the jury room and the following further proceedings were had outside of the presence of the jury:)
>
> THE COURT: Counsel, approach the Bench.
>
> MR. VIPPERMAN: Yes, sir.
>
> MR. BERNSTEIN: Yes, Your Honor.
>
> MR. TOBIN: Yes, sir.
>
> MR. REPLOGLE: Yes, sir.
>
> THE COURT: Everyone in the courtroom remain in place.

(Discussion at the Bench.)

THE COURT: Mr. Bailiff.

THE BAILIFF: Yes, sir.

THE COURT: Please listen carefully, and ladies and gentlemen in the audience.

It will be the ruling of this Court, and direction to the audience in the court, that, during the recesses, until further ordered, during the process and progress of this trial, you are to leave the second floor, leave the landing, and come no further than the first floor.

Prior to Court resuming, you will be notified. Please come back in and be in place before the Court resumes.

Excluded from this order will be the personnel of the State Attorney's office, members of the media, those people involved in security of the defendants, and the attorneys and the court officials.

Everyone else should go down to the first floor at this time.

When we resume the hearing, the trial, before we resume, you will be told by the bailiff and you will be allowed to come back and sit down.

The order concerning demonstrations and movement during the arguments remains in effect.

Please leave the courtroom and the second floor at this time.

(R. 1375-1376). At an evidentiary hearing, Mr. Woods would demonstrate that because of the unique size and layout of the courthouse, the harm that the judge sought to eliminate by

issuing the directions above had in all probability already occurred. Mr. Woods' trial was therefore defective under the fourteenth amendment. See Holbrook v. Flynn, 106 s.Ct. 1340 (1986).

2. In 1983, correction officers were prohibited by law from carrying guns. However, during the trial in Lake Butler, correction officers "secured the parameters" of the small courthouse with rifles and/or shotguns. When court was in session, these rife-toting officers relaxed their watch, and mingled with their friends and spectators on the steps of the courthouse and on its first floor.

3. Both Mr. Woods' sister, Cynthia Little and his aunt Juanita Richardson, actually observed officers with guns in the courthouse, as would be proven.

4. Moreover, it is virtually certain that the jurors - arriving in the morning, leaving in the evening, being escorted through the grounds at lunch time - were clearly exposed to the highly charged and unduly provocative atmosphere created by the presence of the guns.

b. Anti-Black Animus

1. Ms. Woods and her daughter Cynthia attended court every day, after Monday, September 23, 1983. They and other family members were the only blacks in the courtroom, except for the defendants and one alternate juror, until Mr.

Woods' co-defendant's mother and step-father arrived.

2. At an evidentiary hearing they would describe the fear they felt each and every day they went to the courtroom. They would describe the hostile and vicious glares directed at them and the racial epithets intended for their ears.

3. Ms. Woods and Cynthia telephoned Juanita Richardson, Ms. Woods' sister, on Thursday night of the trial. Vipperman and/or Bernstein, Mr. Woods' trial counsel, had told them that they needed more people with them, before the end of the trial, for their own safety. Ms. Richardson came and brought some family members with her.

4. Cynthia Little recalls telling her mother during the week of trial that a white man she saw in court in Lake Butler was also staying in a room near theirs at a motel in Gainesville. She told her mother that many times when they entered or left their room, this man would stand in the hallway and watch them as they left. Sometime during that week, Ms. Little remembers talking in the motel hallway with someone and noticing that this man came out of his room solely to listen to their conversation. When they left so did he.

5. Juanita Richardson, who lived in Jacksonville at the time, had never experienced such racial hatred as she did when she attended Mr. Woods' trial.

6. Ms. Richardson, while at the courthouse one

day, remembers clearly that she asked someone where she and her family could eat lunch during a recess. That person, whom Ms. Richardson did not know, told her that the judge and attorneys ate at the restaurant "across the street," but that she could eat across the railroad tracks "where the black people eat." So, she and her family did.

c. The Correctional Officers

1) The trial judge noted during the proceedings that eighty-to-ninety people were viewing the trial, half of whom were correctional officers in uniform. This fact was noted by this Court in its opinion on direct appeal.

2) What was not known by the Court is the fact that the Department of Corrections officers' uniforms or any clothing "furnished by the Department [of Corrections] is not be be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work." Department of Corrections Rule 33-4.07 (See App. C). The officers by attending court in their uniforms in violation of their own regulations were acting intentionally, consciously, and maliciously to intimidate and influence the factfinders. Their uniforms were equivalent to the posters in State v. Gens, 107 S.C. 448, 93 S.E. 139 (1917); the large, bright yellow buttons in State v. Franklin, 327 S.E. 2d 449 (W. Va. 1985); and the presence of the uniformed police in U.S. v. Rios Ruiz, 579 F.2d

670 (1st cir. 1978) See (R. 1377). The members of this community knew that uniforms were not to be worn for this purpose.

d. The Community

Before the trial, a petition, which nobody would allow Vipperman or Bernstein to see, circulated in the community. The petition contained hostile statements directed to the defendants in this case. The petition was signed by more that 5,000 people. Several venire persons admitted to either knowing or hearing about the petition.

As would be shown at an evidentiary hearing, the atmosphere at trial was so intently prejudicial that a fair trial was not had, in violation of the sixth, eighth, and fourteenth amendments.

VI

THE JURY WAS INSTRUCTED THAT IT HAD TO CONSIDER MR. WOODS' MENTAL PROBLEMS, IF FOUND, AS AGGRAVATING RATHER THAN MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS (CLAIM IV)

The trial court allowed the State to attempt to prove that the certified transcript was in error regarding this claim. The court had no jurisdiction to go behind the certified record, and its actions are consequently null and void. In any event, the State's proof did not show the transcript was wrong, and the

trial court conducted a less than full and fair hearing on the question. Consequently, a stay of execution should be granted, this Court should take such steps as are necessary to determine the accuracy of the transcript, and Ronnie Woods should be granted relief.

A. As The Certified Record On Appeal Reveals, Fundamental Eighth Amendment Error Destroyed The Reliability Of Mr. Woods' Capital Sentencing Proceeding

Mr. Woods had a twelve year old mentality at the time of the offense and trial. He was eighteen years old and had a 69 I.Q. This dominant mental shortcoming, and its attendant ramifications, was important mitigation. A lay juror could readily have found that this inherent disability in combination with the facts of the offense, was, or created, an extreme mental or emotional disturbance, which is a statutory mitigating circumstance. Fla.Stat. sec. 921.141(6)(b).

Amazingly, and in flagrant violation of the statute and the constitution, the jury was instructed to consider this as aggravating rather than mitigating. In the sentencing jury instructions, the trial judge instructed the jurors:

> The aggravating circumstances that you may consider are limited to any of the following, that are established by evidence, as it relates to Ronald Woods:
>
> First - the crime for which the defendant is to be sentenced was committed

> while he was under the influence of extreme mental or emotional disturbance.

(R. 1667).

It violates the eighth amendment to treat as aggravating that which is mitigating. Zant v. Stephens, 103 S.Ct. 2733 (1983). A statute may not "attach[] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process ... or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. If the aggravating circumstance at issue in this case had been invalid for reasons such as those, due process of law would require that the jury decision to impose death be set aside." Id., 103 S.Ct. at 2747.

The 7-5 jury recommendation was quite fragile. One more vote for life and, in all probability, life would have been imposed, under the Florida statutory scheme. This error cannot be said to have had no effect on the vote. This is fundamental eighth amendment error that deprived Mr. Woods of his right to meaningful and individualized capital sentencing, in violation of the eighteenth and fourteenth amendments. Trial counsel unreasonably and prejudicially, through no tactic or strategy, failed to object to this error. Resentencing is required.

B. The State's Proof Did Not Rebut The Prima Facie Record

The certified record is, as the witnesses testified in post-conviction, the document that reflects what occurred at trial. The State challenged that record, and the trial court, without jurisdiction, allowed the challenge. Since that court had no jurisdiction to correct the record, and since, in fact, that court did not correct the record, Mr. Woods should be summarily granted relief.

In any event, the State's evidence showed only that the court reporter brought a tape to post-conviction court, the tape had the trial judge's voice on it, and that at one point on that tape the judge stated that the first aggravating circumstance was that the crime was committed while the defendant was under sentence of imprisonment. The court reporter also said his stenographic notes, which were not brought into court because of directions given him by the state attorney, reflected this statement by the judge. He could not recall where those notes were. The witness did not testify that "the Court gave the proper jury instruction as required by the Florida Standard Jury Instructions," Order, p. 2, and the lower Court erred by finding that the witness testified in that manner.

The proof did not show that the transcript was wrong. The tape introduced was unmarked. It was found in a box with tapes

from other trials. The court reporter had tapes from thousands of trials, scattered about unmarked, in boxes at at least three different locations. He testified that in fact he did not know where his stenographic notes were. The tape bore no independent and reliable indicia that it came from this trial, or that the brief bit played in court corresponded to what was read to the jury at the questioned page in the heretofore certified record.

The tape was not played, except for the five lines the State challenged. As noted, there was no evidence that the lines played occurred at the point challenged in the transcript. As far as the proof shows, the lines on the audio tape could have been said off the record, before trial, two weeks ago, or at someone else's trial. Context was not proven. The court reporter does not remember what was said at trial, and the non-authenticated tape, not even the official stenographic notes, is the only basis upon which the court came to any conclusion.

The tape should not have been admitted. There was no predicate laid. After it was admitted, it did not show what the State wished to show. The State has failed to demonstrate that the certified record is in error, and relief should be granted.

C. No Full And Fair Hearing Was Afforded On The Question Of The Authenticity Of The Tape

The court reporter's credibility was the most important question at the limited evidentiary hearing. He testified it was

his mistake, not the judge's. The post-conviction court would not allow questions of and about the court reporter that would shed light on his credibility, and on whether he would lie about the record. Evidence of other troubles attorneys had had with the reporter was excluded. The court reporter's problems preparing the record on appeal herein were not elucidated, because of respondent's objections. No leeway was provided Ronnie Woods to go beyond the question of whether the short part of the tape which played according to the witness, the judge speaking at the Woods' trial. This restriction rendered the hearing less than full and fair.

D. The Trial Court Had No Jurisdiction To Challenge The Record

Only this Court may correct the record on appeal in a capital case at this juncture.

VII

RONNIE WOODS SHOULD BE AFFORDED THE OPPORTUNITY TO DEMONSTRATE THAT, WITH REGARD TO CLAIMS V-IX, THE FACTS WERE UNKNOWN TO THE MOVANT AND COULD NOT HAVE BEEN ASCERTAINED BY THE EXERCISE OF DUE DILIGENCE PRIOR TO THE END OF THE THIRTY (30) DAY PERIOD OF RULE 3.851

Nine days before his scheduled execution, fifteen days before the expiration of the death warrant, eight days before argument in this Court, and fully one year before he had to file a post-conviction motion under the time limitation provision of Rule 3.850, Ronnie Woods submitted five claims for relief to the trial court in a verified amendment to his motion to vacate judgment and sentence. Respondent asserted no prejudice from this action. Post-conviction counsel told the court he would prove that the facts could not have been discovered earlier despite the fact that ultra-due diligence had been exercised. The court responded by simply summarily denying relief on all the claims, applying Rule 3.851 in a mechanical, simplistic, and arbitrary manner.

There was (and is) plenty of time for merits treatment of the claims. They raise real, legitimate and constitutional concerns about the conviction and death sentence, but the mechanistic application of Rule 3.851 has barred them, without consideration of the <u>reasons</u> for this Court's experimentation

with that Rule. The Court has candidly conceded there are problems with the Rule, and has extended the file for submission of comments and suggestions regarding it. The purpose of the rule -- to provide courts with more time to consider capital post-conviction claims -- is not met here. Everyone has plenty of time, but no one has bothered with merits treatment because it is, apparently, unnecessary.

There is no independent and adequate state reason for this avoidance of merits resolution of federal constitutional challenges. If allowed to operate in this manner, the rule arbitrarily cuts off state review of challenges based upon violations of federal constitutional rights. It will not prevent later federal review of the claims. An evidentiary hearing is necessary to establish the presence or absence of due diligence.

VIII

IT WAS IMPROPER FOR THE STATE TO URGE, AND FOR THE COURT TO CONSIDER, THE VICTIM'S CLOSE PERSONAL AND PROFESSIONAL RELATIONSHIP WITH THE PROSECUTION AND THE COURT, AS A BASIS FOR IMPOSITION OF DEATH, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. (CLAIM V)

Half the spectators at trial and sentencing in the small prison county were uniformed correctional officers. A motion to change venue was denied. A request to clear the officers from the courtroom was denied. That issue was raised upon direct

appeal, and, while calling it a close question, this court affirmed.

Since the time of the direct appeal in this case, the United States Supreme Court decided Booth v. Maryland, 107 S. Ct. 2529 (1987). In Booth, the factfinder was allowed to consider the impact of the victim's death on the community within which he lived. The Court reversed the death sentence, finding such evidence and information to be irrelevant and prejudicial, and that such information rendered the death decision unreliable.

Booth is a change in law, and its application in post-conviction proceedings under Witt v. State, 387 So. 2d 922 (Fla. 1980) is proper. The jury viewing of the uniformed officers in the courtroom provided perhaps the most vivid victim impact statement imagineable. New law requires reversal.

However, the impact before the judge was even more constitutionally prohibited. The trial judge presided in a court that regularly conducted trials concerning prisons, prisoners and guards. Unrevealed in the transcript until judge sentencing was that the victim in this case had frequently been before the trial court, and in the very courtroom, as a guard and as a witness (presumably), and that the victim held a special place in the prosecutor's, and the court's, consideration. In short, the prosecutor and the court were the very people "impacted" by the

victim's death, and they urged and considered the impact on them, as a basis for death:

> There is nothing to be gained by restating the factors of this offense or the great loss felt because of this offense. There is nothing to be gained by trying the system or observing the obvious.

Sentencing, p. 19 (judge).

> As this Court knows, normally in a first degree murder case the State Attorney, especially the one handling the case, does not know the victim. We only find out about the victim second hand after he is dead. This case is somewhat different. Sergeant Dennard was one of our transport officers and has been to this courtroom many times. I knew Sergeant Dennard. That does make a difference.

Sentencing, p. 9 (prosecutor).

> Your Honor, I heard the testimony and in closing argument made reference to the fact that he had a mother isn't really a mitigating circumstance. Mr. Bernstein said then it was and talked about it and mentioned it just a moment ago, but there is another man in this case who grew up without a father. He was raised by his mother and four sisters who did not have a lot of money, but he chose not to steal. He chose not to commit crimes and that was John Steven Dennard. He had all the disadvantages that Mr. Woods faced, but he chose not to go to a life of crime. I still maintain that is not a mitigating circumstance.

Id., pp 13-14 (prosecutor)(these "facts" about the victim were not in evidence). Trial counsel unreasonably failed to object to these nonrecord, irrelevant and prejudicial comments.

This trial was conducted before an audience of persons impacted by the victim's death, in a small community, most of the members of which were impacted, it was prosecuted by a person close to the victim, and it was presided over by a court that was directly impacted. As the prosecutor urged: "That does make a difference." The difference it made in this case was that it rendered the proceedings fundamentally unfair and introduced a degree of unreliability into the proceedings that violated the sixth, eighth and fourteenth amendments.

IX

MR. WOODS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE PROSECUTOR'S REPEATED REFERENCE TO MR. WOODS' DECISION NOT TO PRESENT EVIDENCE, AND TRIAL COUNSEL'S FAILURE TO OBJECT WAS NOT A MATTER OF TACTIC OR STRATEGY, BUT WAS AN UNREASONABLE AND PREJUDICIAL OMISSION. (CLAIM VI)

A defendant may not be penalized for not testifying, may not be penalized for not presenting proof, and may not be required to shoulder any burden of proof. A prosecutor, in closing argument to the jury or otherwise, may not comment on a defendant's exercise of these rights. The prosecutor violated those basic tenets of constitutional law, and counsel did not object.

The prosecutor repeatedly told the jury that Mr. Woods could have tried to present a defense but did not:

I think this case is a good example of the American system of justice where I would submit people are so obviously guilty, who are given all the rights and protection, what you have observed as being those fine attorneys, all of the due process, that was so viciously and cold-bloodedly denied Steven Dennard.

(R. 1352).

Now, let's go to the identity of each defendant as a participant. Mr. Bean is identified by Mr. Taylor, who says that he was part with Mr. Woods of that conversation on A Floor.

Now, Mr. Vipperman tells you that Mr. Walker is lying and it suddenly surprised him and he would have brought in Mr. Brown.

Where is the witnesses that contradict Mr. Taylor about A Floor?

These defendants are with their buddies. They are all, you know, beating their chests, getting their egos up to go out and attack some officers.

Is the State going to be able to produce those people?

No.

But we did produce somebody that overheard them and, if that didn't occur, where is their buddies to say that it didn't happen.

Certainly, the State has the burden of proof, and we did, we produced uncontradicted testimony that that took place.

(R. 1365-67)(emphasis added).

> Now, let's look at Mr. Woods and, here we have even more, we have Mr. Taylor on the A Floor, again uncontradicted.

(R. 1370)(emphasis added).

> Ms. Gilbert, who testifies that she has had daily contact, she is a clerk at the Main housing Unit where they live. She recognized him. I asked her did she have daily contact. There isn't any contradiction to that.
>
> Mr. Vipperman has the right to try to contradict it but that goes in, that is uncontradicted. She seen him regularly.
>
> So, as to the issue of his own client's guilt or innocence, he tells you that there was no way to know.
>
> Now, at the end of his argument, when he suddenly has no alibi for where his clients were, although Mr. Battle says they weren't there, we hear no other witnesses as to where they were, except for the officers who tell you where they really are.

(R. 1431). Mr. Vipperman had presented no evidence. Trial counsel unreasonably failed to object to these improper prosecutorial comments, through no tactic or strategy, and Mr. Woods' rights under the sixth and fourteenth amendments were violated by this unreasonable and prejudicial omission.

These comments violated Mr. Woods' fifth, sixth, eighth and fourteenth amendment rights.

X

THE TRIAL COURT IMPROPERLY RELIED UPON JUVENILE OFFENSES AND PRISON DISCIPLINARY REPORTS IN AGGRAVATION OF PUNISHMENT, IN IMPOSING A SENTENCE OF DEATH, AND MR. WOODS HAD NO MEANINGFUL OPPORTUNITY TO EXPLAIN HOW THESE FACTORS WERE ACTUALLY MITIGATING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A presentence investigation (PSI) was prepared for the trial court's consideration, after the jury recommendation. That PSI contained Ronnie Woods' juvenile record (he was only 18), and his difficulties in prison. The trial court asked if the PSI was materially inaccurate and counsel said "no".

The trial court then imposed death. The court did not, in the presence of counsel or Ronnie Woods, rely upon juvenile arrests or prison disciplinary reports when pronouncing death (R. 17, Sentencing). However, in the judge's sentencing order, the judge wrote:

> The Defendant has presented a discipline problem during his incarceration. The Investigation further shows that he has engaged in criminal conduct since a very early age.

(R. 654). No opportunity was provided for Mr. woods to present argument regarding why these findings were (a) irrelevant and improper, and (b) if relevant, mitigating, not aggravating.

The trial court considered only statutory aggravating and mitigating circumstances. The court found two aggravating and

one mitigating statutory factor. The jury vote was 7-5. Mr. Woods' co-defendant received life. It cannot be said that the trial court's consideration of this prejudicial and unreliable information had no effect on the sentence, and, consequently, Mr. Woods' eighth amendment rights were violated.

If provided the opportunity, Mr. Woods would demonstrate that his record as a juvenile was solely attributable to his mental disability, his inability to control his actions due to brain damage and mental retardation, his deprived socio-economic upbringing, abuse and neglect, and the failings of the support systems that should have protected him. This information was not developed and presented before, but can be now. See Claim II; argument III, supra. His prison infractions demonstrate prison life, the prison environment, and the daily animosity between guards and inmates, and between inmates and inmates. The prison infractions also reflect how, because of Mr. Woods' innate mental condition, he frequently was led by others, he had difficulty adjusting, and he had brain-damaged reactions to his environment. This is mitigating, it was considered as aggravating, and now is the first opportunity Ronnie Woods has had to address it. The trial court's reliance upon this information violated Mr. Woods' sixth, eighth and fourteenth amendment rights.

XI

THE PROSECUTOR AND TRIAL JUDGE UNDER FLORIDA'S BIFURCATED TRIAL PROCEDURE MISINFORMED THE JURY AND IMPERMISSIBLY DIMINISHED THE JURORS' UNDERSTANDING OF THE IMPORTANCE OF THEIR ROLE AND RESPONSIBILITY IN THE SENTENCING PHASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CLAIM VIII)

The trial court repeatedly misinformed and misinstructed Mr. Woods' jury as to its true responsibility in the capital sentencing process under Florida law. These comments derogated the jury's sentencing role, contrary to the law, and diminished their "awesome sense of responsibility," in violation of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

In Florida, the jury's sentencing recommendation is entitled to great weight in the judge's sentencing decision. A judge may override a jury recommendation of life imprisonment only if "the facts suggesting a sentence of death [are] so clear that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Mr. Woods' trial judge improperly and inaccurately characterized the role, responsibility, and critical function of the jury with regard to sentence, in violation of the sixth, eighth and fourteenth amendments.

In his opening statement to the members of the venire, the judge improperly and unconstitutionally diminished the importance of the responsibility that Mr. Woods' jurors would have during the penalty phase of his trial. They were told that their verdict merely constituted a "recommendation" to the "court":

> In the first proceedings, the jury will determine the guilt or the innocence of the charge of murder. If, and only if, the jury finds a verdict of guilty of murder in the first degree, a second phase will commence and the jury then will be asked to recommend to the Court what the penalty should be for the offense of murder in the first degree.

(R. 871)(emphasis added). At no time did the judge even mention to those who ultimately decided that Ronald Woods should die that they were, in fact, his sentencers.

Moreover, though the judge directed his improper comments to only some members of the venire panel, all panel members were actually listening to the judge's directions and subsequent venire members were even reminded of all instructions which preceded their own individual questioning. See, e.g., R. 1000, 3009-10, 3028-29.

After Mr. Woods' jury was chosen, and even before he was found guilty, the judge reminded the jury of his improper views of their sentencing responsibility:

> I will now inform you of the maximum and minimum possible penalties in this case. The penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict. The possible

> results of this case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the defendants in accordance with these instructions.

(R. 1458-1460)(emphasis added).

After the jurors found Mr. Woods guilty, the judge reminded them of the next phase of the trial. In doing so, he again unconstitutionally instructed them concerning their sentencing responsibility:

> THE COURT: Ladies and gentlemen of the jury, by your verdict, the next phase of these proceedings will be that part of the proceedings in which the jury recommends to the Court the penalty the Court should impose for the offense of first degree murder in the case of Mr. Bean and Mr. Woods.

(R. 1480).

Once the penalty trial began, the judge announced, again, contrary to the Constitution and the Caldwell decision, that Ronald Woods' jury should accept no responsibility for deciding that he should die:

> Ladies and gentlemen of the jury, you have found the defendants guilty of the crimes of murder in the first degree. The punishment for this crime will be death or life imprisonment without possibility of parole for 25 years. The final decision, as to what punishment shall be imposed, rests solely with the Judge of this Court.

(R. 1519)(emphasis added).

Finally, just before the jury retired to consider Ronnie Woods' fate, the judge, one last time, instructed the jury that the responsibility for Ronald's life rested with him, not them:

> As you have been told, the final decision, as to what punishment shall be imposed, is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1665)(emphasis added).

Ronald Woods' jury was thus compelled, by the judge, to regard its role under Florida's capital sentencing scheme as merely perfunctory and to regard the responsibility for sentencing as belonging to a greater authority. Because the jury was led to believe that it had little or no effect on sentencing, when in fact their function at capital sentencing is critical, and because this created a reduced sense of responsibility, incompatible with Florida sentencing procedure and with the eighth amendment, the recommendation of Mr. Woods' jury is constitutionally unreliable, and a new sentencing hearing is required.

The claim is cognizable now for several reasons. First, Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), prohibits incorrect comments and instructions which cannot be said to have

had no effect on sentencing, and which could diminish the sentencers' sense of moral responsibility for its decision. The jury is "sentencer" in Florida because the recommendation is entitled to great weight. Caldwell is new and controlling law which is cognizable in 3.850 proceedings. Second, it was an unreasonable omission by defense counsel to have allowed the jury to be so misinformed, an omission not possibly attributable to reasonable tactic or strategy. The error is prejudicial, especially in light of the other misinformation on which the jury was instructed, and violates Mr. Woods' right to effective assistance of counsel under the sixth, eighth and fourteenth amendments. Finally, misinforming and thereby misleading a jury about the ultimate penalty, and their effect on its imposition, is fundamental error under the eighth and fourteenth amendments because reliability in capital sentencing is thereby foreclosed, allowing death sentences that strike like lightning, and which are arbitrarily, discriminatorily and capriciously imposed. The repeated comments were wrong and most certainly it cannot be said that they "had no effect on the sentencing decision." Caldwell. Therefore, a new sentencing is required.

XII

MR. WOODS WAS PREJUDICED WHEN TRIAL COUNSEL UNREASONABLY FAILED TO ARGUE IN SUPPORT OF THE MOTION FOR SEVERANCE THAT MR. WOODS' CO-DEFENDANT'S LAWYER WAS HIS EX-LAWYER IN THIS PROCEEDING, AND THAT THIS CONFLICT OF INTEREST DENIED DUE PROCESS OF LAW, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THAT THAT CONFLICT, IN AND OF ITSELF, PRESENTED A SIXTH, EIGHTH AND FOURTEENTH AMENDMENT VIOLATION. (CLAIM 14)

Mr. Replogle was appointed to represent both defendants in the trial court on June 9, 1983. He interviewed both defendants, counseled both defendants, filed pleadings on behalf of both defendants, and, it is to be hoped, zealously represented both defendants. He then filed a motion to withdraw from both clients' cases (R. 45-59).

Mr. Replogle was allowed to withdraw from Mr. Woods' case, but remained counsel for Mr. Bean (R. 50-51, 62-63). At trial, he argued that his ex-client Woods was more culpable and more deserving of death than Mr. Bean. Mr. Vipperman, who was appointed to represent Mr. Woods after Replogle withdrew, knew this was going to happen, but unreasonably failed to argue his client's attorney-client privilege with Replogle as a basis for severance.

As Mr. Vipperman informed the trial court:

> Mr. Replogle has affirmed to me, personally, that he sees the only defense for

> his client is to inculpate my client as much as possible.

(R. 797). Mr. Vipperman also told the court:

> [M]y co-defendant is going to be more or less prosecuting me in this case in that I am going to be treated -- or my client is going to be treated as being a great deal more culpable than the co-defendant.

(R. 799).

Replogle did as promised, cross-examining witnesses so as to maximize Mr. Woods' involvement and minimize Mr. Bean's (R. 958, 984, 1066-99, 1178-1204), arguing to judge and jury that his former client in this very case, Mr. Woods, was the prime actor, see, e.g., R. 1283, and, as much as possible, condemning Mr. Woods while extracting Mr. Bean from the offense.

Replogle's actions of hurting a former client in order to assist the current one, when <u>both</u> were involved, purportedly, in the same transaction, reflects a classic conflict of interest. The court <u>knew</u> that Replogle had represented both clients, and, it is to be hoped, the judge would not expect Mr. Replogle to adopt a defense inconsistent with the truth. The court could only assume that the theory argued by Replogle was consistent with what he had learned from Woods. Consequently, Mr. Woods was convicted and sentenced in a proceeding in which his own (former) attorney in the same action was blaming him at every turn. This violates the sixth amendment right to have counsel who will

zealously represent your interest, even after termination of the attorney-client relationship.

The conflict, glaringly present during the innocence/guilt phase, continued at the penalty phase. Replogle, seeking to distinguish his present client (co-defendant Bean) and his former one, Ronald Woods, and having worked with the state attorney as both Woods' and Bean's attorney, revealed a pretrial secret and convinced the jury that even the prosecutor truly believed that only Ronald Woods deserved death:

> [The Prosecutor] has told you that the crime that Mr. Bean is guilty of deserves the death penalty. What he didn't tell you, and what I promised that I wouldn't tell you but I am going to tell you, is that, a short while ago, before the trial, the State Attorney indicated that he would accept a plea for Mr. Bean for second degree murder, if Mr. Bean would give a statement and implicate the persons who put him up to it, motivated it, armed him, sent him out to do it.

(R. 1667)(emphasis added).

The conflict thus violated Mr. Woods' right to a fair and reliable capital sentencing proceeding as well as his right to a fair and reliable trial under the sixth, eighth and fourteenth amendments.

Mr. Vipperman unreasonably did not present the attorney-client privilege and professional ethics as a basis for severance, which prejudiced Mr. Woods, in violation of the sixth, eighth and fourteenth amendments.

CONCLUSION

All claims presented below are preserved herein, whether specifically pled or not. A stay of execution and relief is proper.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

JANE ROCAMORA
Staff Attorney

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

By: _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by (U.S. MAIL/HAND DELIVERY) to Ed Hill and John Koenig, Assistant Attorneys General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301, this 14 day of December, 1987.

_____
Attorney