

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JUN 27 1988

ALPHONSO CAVE,

Petitioner/Appellant,

v.

STATE OF FLORIDA,

Respondent/Appellee.

CLERK, SUPREME COURT

By

CASE NO. Deputy Clerk

72637

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BRIEF OF APPELLANT ON EMERGENCY APPEAL  
OF DENIAL OF MOTION FOR FLA. R. CRIM. P. 3.850  
RELIEF AND APPLICATION FOR STAY OF EXECUTION

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PRELIMINARY STATEMENT

This is an emergency appeal from the denial by Judge L.B. Vocelle of the Circuit Court for the Nineteenth Judicial District, of Defendant Alphonso Cave's motion for relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, and his concurrent Motion for a Stay of Execution. Mr. Cave's execution is presently scheduled for July 7, 1988, at 7:00 a.m. All matters involved in the Rule 3.850 action, and all matters presented on Mr. Cave's behalf before the lower court, are raised again on this appeal and incorporated herein by reference.

Given the pendency of a death warrant which has been signed against Mr. Cave, and the corresponding emergency nature of the instant proceedings, counsel has also consolidated into this document, Mr. Cave's application for a stay of execution.

With regard to the Rule 3.850 appeal, certain matters should be noted at the outset. Only a limited evidentiary hearing on one issue presented by Mr. Cave's 3.850 Motion was allowed by the lower Court. At the time this brief is being prepared, the complete transcript of the hearing is not available to counsel. Indeed, it is anticipated that counsel will be unable to rely on the full transcript prior to submission of this brief to the Court. Defendant, therefore, requests the Court to stay the execution and afford a full and complete briefing with benefit of the entire record prior to its rendering of any decision herein.

The issues raised by the record below consist of serious and legitimate questions regarding the constitutional validity of Mr. Cave's capital conviction and sentence of death. This brief is intended to demonstrate that a careful, judicious and studied review of the record is proper, necessary, and indeed should be required, that a stay of execution is warranted in this case, and that Mr. Cave can establish his entitlement to relief if given an adequate opportunity. In short, the normal appellate process rather than a truncated, appellate process with no indicia of completeness is warranted upon this record.

Citations in this brief shall be as follows: the original record on appeal from Mr. Cave's capital conviction and sentence of death shall be cited as "ROA (page number)"; the record of the Rule 3.850 proceedings shall be cited as "Tr. (page number)", with regard to the evidentiary portions of the proceedings. References to testimony proffered at the hearing for which a transcript is not available shall be referred to as (TR:N/A) All other references shall be self-explanatory or otherwise explained.

Mr. Cave's execution should be stayed given the substantial nature of the claims he presents to this Court. The issues raised by Mr. Cave, in fact, reflect the substantial, meritorious nature of Mr. Cave's challenge to the proceedings which resulted in his conviction and sentence -- the record developed below amply supports the claims, and the

instant brief reflects the strength of both the evidence and the legal arguments which support Mr. Cave's claims.

This Court has consistently stayed executions when necessary to ensure judicious, deliberate and complete consideration of the issues presented by capital prisoners litigating during the pendency of a death warrant. See Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Dugger, No. 72,300 (Fla. April 28, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Groover v. State, No. 68,845 (Fla. June 3, 1986); Copeland v. State, Nos. 69,429 and 69,482 (Fla. October 16, 1986); Jones v. State, No. 67,835 (Fla. November 4, 1985); Bush v. State, Nos. 68,617 and 68,619 (Fla. April 21, 1986); Spaziano v. State, No. 67,929 (Fla. May 22, 1986); Mason v. State, No. 67,101 (Fla. June 12, 1986). See also Roman v. State, \_\_\_ So.2d \_\_\_, No. 72,159 (Fla. 1988) (granting stay of execution and a new trial); Downs v. Dugger, 514 So.2d 10690 (Fla. 1987) (granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So.2d 426 (Fla. 1986), cf. State v. Sireci, 502 So.2d 1221 (Fla. 1987). The issues Mr. Cave presents are no less substantial than those involved in any of those cases, particularly those raised in Bush v. State, supra, a case involving a co-defendant. In addition to having similar issues as those set forth in Bush, this action includes at least one claim relating to the State's improper and unconstitutional acts related to that case as well. A stay is proper and should be granted.

Because of the time constraints imposed by the emergency nature of this appeal, defendant has been unable to address each and every issue raised by the trial court's denial of defendant's motion for relief pursuant to Rule 3.850. Failure to raise any issue in this brief shall not be construed as a waiver of such issue, and all issues raised below are specifically reserved and incorporated into this appeal.

For the reasons set forth in this Preliminary Statement and during the discussion of certain issues raised herein, Defendant requests that this Court afford him the opportunity to fully and completely address the issues raised by the trial court's denial of the motion below.

## INTRODUCTION

ALPHONSO CAVE was charged with robbery, kidnapping, and first degree murder. The evidence presented by the State at trial, taken in the manner most favorable to the State, showed that the defendant, together with three others, J.B. Parker, John Earl Bush, and Terry Wayne Johnson, met during the afternoon of April 26, 1982. After buying and drinking a gallon of gin and spending some time driving around Fort Pierce, Florida, the four went to Li'l General Convenience Store near Stuart, Florida at around 2:00 a.m. The four men entered the store, and while Mr. Cave held a gun to the attendant, she gave them all the cash in the cash register. After receiving the money, the attendant was led out of the store and placed in the back seat of the car. Mr. Bush then drove the car west from Stuart towards Indiantown. After travelling about 13 miles, Mr. Bush stopped the car. Ms. Slater was taken out of the car and was then stabbed by Mr. Bush. Shortly after that, Mr. Parker shot Ms. Slater. The four men then returned to Fort Pierce. Mr. Cave was arrested on May 4, 1982. After several hours of interrogation, Mr. Cave made a statement which was subsequently introduced at his trial. At the trial, Mr. Cave was found guilty of all charges. The jury, after argument on the penalty phase, submitted a note to the Court indicating that it had reached a split decision, and that there was no place on the forms to publish that decision. The Court then proceeded to pass a note to the jury, which the record indicates instructed them on how to conclude if a vote were 6 or more

in favor of a life sentence. The note was not found or returned to the Court and does not constitute part of the record.

On December 10, 1982, Mr. Cave was sentenced to death by electrocution as a result of his conviction for first degree murder and two concurrent life sentences for the convictions on robbery and kidnapping.

On August 30, 1985, the Florida Supreme Court upheld the convictions and the sentences, including the death sentence, imposed on Mr. Cave. Rehearing was denied on October 21, 1985. Cave v. State of Florida, 476 So.2d 180(1985).

A Petition for Writ of Certiorari to the United State Supreme Court was filed and subsequently denied on June 9, 1986. A warrant setting an execution date between July 6, 1988 and July 13, 1988 was signed by Governor Bob Martinez on April 27, 1988. An execution date of July 7, 1988 at 7:00 a.m. was thereafter set.

On May 27, 1988, Mr. Cave filed a Motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure seeking to vacate or modify his conviction and sentences on the grounds of constitutional violations occurring at the trial level. The Motion set forth the following claims:

1. The State improperly threatened additional charges against Defendant if he invoked his constitutional right to testify on his own behalf;
2. The Defendant did not receive effective assistance

of counsel by virtue of a number of actions of trial counsel set forth in the Petition;

3. The State improperly suggested to the jury, contrary to all known evidence, that Defendant was the shooter at the murder thus elevating Defendant's culpability;

4. The trial court refused to allow questioning of the jurors with respect to the advisory verdict and thus, denied Defendant his right to a fair trial;

5. The wrongful exclusion of prospective jurors on challenge by the State for cause;

6. The wrongful admission into evidence of portions of a statement of a co-defendant;

7. The wrongful admission into evidence of the Defendant's confession;

8. The wrongful exclusion of instruction by the Court as to certain statutory mitigating circumstances;

9. The incorrect instructions given to the jury about the balancing of mitigating and aggravating circumstances, specifically the trial court's repeated instruction that a majority vote was required on a recommendation of either life or death;

10. The State and the Court improperly diminished the responsibility of the jury with respect to the advisory sentence;

11. The imposition of the death penalty in this case, since the crime was not committed for pecuniary gain and was



especially  
not/heinous, wicked and cruel, was a violation of the  
Defendant's constitutional rights;

12. The imposition of the death penalty in this case violated the Defendant's constitutional rights since the State did not prove the Defendant killed, attempted to kill, or intended to kill the victim.

On June 17, 1988, Judge L.B. Vocelle dismissed claims one and three through twelve on the ground that they were all procedurally barred as having either been raised on the direct appeal of this action or issues which could have and should have been raised on a direct appeal.

Judge Vocelle then directed an evidentiary hearing on claim two, the issue of ineffective assistance of counsel. Witnesses for the Defendant, during that hearing, which continued on June 21, 1988, were Karen O'Brien Steger, the Defendant's trial counsel, Dr. Harry Krop, a psychologist who interviewed the Defendant on May 20, 1988 and whose testimony related specifically to an analysis of an earlier examination of the Defendant conducted by Dr. Sheldon Rifkin. Mrs. Connie Hines, the Defendant's mother, Mr. Frank Hines, the Defendant's stepfather, Ms. Emma Andrews, the Defendant's aunt, Ms. Patricia Young, the Defendant's sister, June Dunn, a friend and neighbor of Defendant, Annie Pearl Anderson, a friend and neighbor of the Defendant, Reverend James Carswell and Mrs. Valerie Carswell, landlords of the Defendant at his last residence prior to his arrest.

The State presented the following witnesses:

Karen O'Brien Steger, defendant's trial counsel,

Robert Stone, the State Attorney who prosecuted the action, and

James Midelis, the Assistant State Attorney who conducted portions of the trial.

Prior to the commencement of the evidentiary portion of the hearing, the defense requested an opportunity to address the legal issues raised by the State in its oral motion to dismiss on the grounds herein. Particularly, defense counsel suggested to the Court that the issue of a procedural bar should be briefed before the court and should be one that should be explained and elaborated on prior to the Court rendering a decision. The Court denied the Motion and proceeded to summarily dismiss claims one and three through twelve of Defendant's Petition.

The major points elicited in the testimony of Karen O'Brien Steger, both on direct by the defense and the State, were that she was faced with a "terrible" case because of Defendant's confession to the substance of the charges against him. She testified that she had no legal theory and adopted a defense tactic which would seek to obtain jury sympathy for her and the Defendant by virtue of the fact that she is a small white woman and the Defendant is a black man. Ms. Steger further testified that she hoped that by deliberately misstating the law as it related to felony murder, the jury would be confused sufficiently to render a not guilty verdict o

on the charge of a first degree murder. Ms. Steger testified that her preparation for the penalty phase consisted solely of asking the defendant for names of witnesses, to which he responded by giving her the name of his mother, and the couple who were his landlord at the time of the arrest. She testified that she spoke twice to Defendant's mother who adamantly refused to testify since she was afraid that she would lose her job. She also testified that she never spoke to the Carswells. She responded that her tactical decision in not placing the Defendant on the stand at either the guilt or the penalty phase resulted solely from the Defendant's performance at the Motion to Suppress his confession during which he performed terribly. Ms. Steger could not recall having prepared Mr. Cave for his testimony at the suppression hearing, and although she testified that she "assumes that she did prepare him, her time records indicate that although the suppression hearing was held on December 2, 1982, her last meeting with Mr. Cave prior to the suppression hearing was on November 8, 1982, almost one month prior.

Dr. Harry Krop testified with respect to both an examination that he conducted of the Defendant on May 20, 1988, and his analysis of a report prepared by Dr. Sheldon Rifkin in September of 1982, which report had been requested by trial counsel. The substance of Dr. Krop's testimony was that the objective findings made by both he and Dr. Rifkin were sufficiently similar to indicate confidence in the procedures used

by Dr. Rifkin. He further testified that it was apparent from Dr. Rifkin's report that no relationship of trust existed between Dr. Rifkin and the Defendant and that the differences in the descriptions and narrative statements given to both he and Dr. Rifkin by the Defendant were based primarily on the lack of trust exhibited by the Defendant towards Dr. Rifkin.

Dr. Krop testified that although Dr. Rifkin's report contained certain conclusions which were negative, those conclusions did not always seem to be supported by Dr. Rifkin's own report, and in any event, the report indicated sufficient positive material that additional investigation and examinations should have been performed, particularly after the relationship of trust between Dr. Rifkin and the Defendant had been established.

Mrs. Hines testified that she was the mother of the Defendant, and that with the exception of a short period of time when the Defendant lived in Fort Myers in his early 20s, the Defendant lived with her during his entire life. She testified that Mr. Cave went to the local elementary school in Fort Pierce and later attended Fort Pierce Central High School. Mrs. Hines testified that the Defendant dropped out of school in the 10th or 11th grade, but that other than one isolated instance of marijuana smoking in grade school and a call from the police when Mr. Cave was young, and climbing over a fence, she never had any disciplinary problems with him and never received any reports from his schools that he was a discipli-

nary problem. Mrs. Hines testified that Mr. Cave, while in Fort Myers had a son whom he cared for deeply and brought his son to Fort Pierce on at least one occasion.

Mrs. Hines testified that Mr. Cave was a caring individual, generally not aggressive, violent or hostile, was popular with the neighbors, assisted her and her husband with chores around the house and was generally not a behavior problem. Mrs. Hines testified that she only met Ms. Steger once, at Mr. Cave's arraignment in late May of 1982. She testified that after the arraignment Ms. Steger asked her and her two sisters to come to her office in Stuart to discuss the case. She testified that while at Ms. Steger's office, Ms. Steger asked her about her family, about Alphonso's education and employment habits, and his family background in general. She testified that she advised her at that time of the names and identities of Mr. Cave's stepfather and siblings.

Most importantly, Mrs. Hines testified that she asked Ms. Steger if she would have to testify, and Ms. Steger emphatically told her that she would not. She further testified that she never received a subpoena, and was never contacted again by Ms. Steger.

The testimony of the remaining defense witnesses was consistent with Mrs. Hines appraisal and testimony relating to Mr. Cave's character, his sociability with neighbors and family and friends, his positive relationship with his nieces and nephews and other children in the community, his relationship

with his son in Fort Myers, and his general lack of behavioral difficulties during childhood, adolescence and adulthood.

The cross-examination of these witnesses consisted primarily of asking them whether they knew about certain concessions as to involvement with drugs, and participation in certain racial "race riots", which Mr. Cave had admitted to Dr. Krup. (It was conceded by Mr. Stone and Mr. Midelis during the State's case that they were not aware of this information at the time of the trial and thus, even assuming it is accurate and true, such evidence would not have been introduced at a trial had these witnesses testified). Additionally, all the witnesses testified that they had never been contacted by Ms. Steger and that they had never spoken to anybody in Ms. Steger's employ and they had never been subpoenaed to testify.

Finally, the Carswells, his landlords at the time of his arrest, testified that Mr. Carswell had spoken to someone employed by Ms. Steger but had advised them that he would have difficulty in traveling since he had just recently had two discs removed as a result of a bad car accident, and Mrs. Carswell testified that she did not recall ever speaking to Mrs. Steger or anyone employed by her. Both Mr. and Mrs. Carswell testified that they never received a subpoena to testify at the trial.

During the State's presentation of witnesses, Ms. Steger essentially reiterated and repeated her prior testimony, except reaffirmed in more explicit terms her tactical decision

to delierately misstate the law in the "hope" and the State would not object and the jury therefore would be confused.

Mr. Stone testified that he believed that Ms. Steger had a very difficult case, that the evidence of guilt against Mr. Cave was overwhelming, that he thought it was unlikely that given the evidence presented an acuittal would be obtained.

Over the objections of the Defendant, Mr. Stone was qualified as an expert and offered his expert testimony that he believed Mrs. Steger had represented Mr. Cave effectively. On cross-examination, Mr. Stone conceded that it was not always reasonable strategy to list witnesses with whom defense counsel had not spoken. He believed that Ms. Steger's trial tactic to mislead the jury was a reasonable one which could have been effective, and additionally testified that Ms. Steger's "trial tactic" of not putting any witnessses on was a proper and effective strategy in light of the damaging evidence that would have come out had these witnesses testified. Mr. Stone, however, conceded that the State had only limited evidence of bad acts on the part of the Defendant which the State would have been able to use at a trial.

Mr. Stone, with respect to the charge of aggravated battery, testified that only he or Mr. Midelis would have had the power to order an Information to be filed against the Defendant, against whom they were proceeding on capital charges. Mr. Stone recalled the incident giving rise to the charge of aggravated battery but does not recall any of the

specifics.

Mr. Midelis, now a County Court Judge, testified substantially in accordance with Mr. Stone's testimony. Judge Midelis was also, over the objections of the Defendant, qualified as an expert, and proffered his expert opinion that Ms. Steger's representation of the Defendant was effective. Mr. Midelis, as did Mr. Stone, testified that the only acts of which he knew, and which could have been used to impeach the Defendant's character at the time of the trial were the dismissed charge of attempted rape in Pennsylvania and the untried charge of aggravated battery.

After closing arguments, the Judge indicated that he had heard the evidence and on the basis of the hearing and the evidence adduced, he found that the Defendant's claim of ineffective assistance of counsel had not been established. Judge Vocelle then proceeded to read the factual findings which he made at the conclusion of the trial in 1982 into the record.

The Judge then requested that an Order be prepared for his signature. The State Attorney General's Office immediately produced a 14 page order, which it had not previously provided to counsel for the defense, and the Judge promptly without any apparent review of the contents, signed the Order, which now constitutes the Order of this Court. The Judge then also denied Defendant's Motion for a Stay of Execution. A Notice of Appeal was then filed by Defendant.



THE COURT BELOW IMPROPERLY REFUSED TO CONSIDER  
THE VIOLATION OF CALDWELL V. MISSISSIPPI ON THE  
MOTION FOR 3.850 RELIEF.

Mr. Cave's 3.850 Motion presents a claim that his constitutional rights were violated by the diminution of the importance of the jury's role in the guilt phase of the trial by both the Court and the State. On presentation of this claim at the Circuit Court, the State argued, and the Court agreed, that such claim was barred by its failure to have been raised on direct appeal of this action.

This Court has recently indicated that a stay is proper pending the decision of the United States Supreme Court in Dugger v. Adams, 56 U.S. Law Week at 3601 (March 8, 1988) (cert. petition granted to consider issue). See Darden v. Dugger, 13 FLW 196, 197 (Fla. March 14, 1988). In Darden, the Court stated:

"If this were the first time Darden presented the Caldwell claim to this Court, such a stay may be warranted. However, because this claim was previously rejected by this Court we decline to issue a stay to reconsider this issue."

Of course, this is the first time Defendant has raised this issue before this Court.

In a recent case, almost identical to Mr. Cave's, the en banc Court of Appeals for the Eleventh Circuit ruled that relief under the Eighth Amendment was proper on the basis of Petitioner's claim under Caldwell v. Mississippi, 472 U.S. 320 (1985). See Mann v. Dugger, No. 86-3182 (11th Cir. April 21,

1988) (en banc).

As demonstrated below, this case is nearly identical in facts to that presented to the Eleventh Circuit in Mann. It would be wholly proper and just for this Court to stay this execution until the United States Supreme Court in Adams resolves the important issue of applicability of Caldwell to pre-Caldwell direct appeals.

The first occurrence during Mr. Cave's trial in which the jury's function was discussed was during the Court's initial presentation of the case to the prospective jurors.

Now, under Florida Law, the Judge is responsible for the sentence. The Judge may, or may not, accept the recommendations of the jury, but great weight will be given to these recommendations. (ROA:16): 2173

Later, but still during the jury voir dire, the Court also stated:

Under Florida Law, the Judge imposes the sentence. The Judge may, or may not, accept the recommendations of the jury, but great weight will be given to the jury's recommendation. (ROA:125) 2282

Despite the Court's reference to the "great weight" to be given to the jury's recommendation, subsequent statements by the prosecution undermined and diminished the responsibility which the jury would have with respect to its advisory sentence.

For example, Mr. Stone, the State Attorney, during the voir dire of potential jurors stated:

Do you each understand that your advisory sentence is not binding on the Judge? The Judge has the final decision. He'll give great weight to your advisory sentence, but

he can overrule you, either way. Of course, you understand that that doesn't mean that you should shirk from your duty and say 'Okay, the Judge has got to do it, let's throw it to him.'

But you understand that he's going to be the one that has to make that final decision. Your advisory sentence only has to be by majority of you, and the Court will give great weight to it, but he can accept it, or reject it. (ROA:53-54).

2210-11

In addition to being an incorrect statement of the law with respect to the vote requirement to find an advisory verdict of life, the implication of the prosecutor's statement was clear that the Judge could and potentially would overturn the jury's decision.

In addition, the prosecutor referred twice, in emphatic terms, during the jury voir dire, that the jury would never be required to individually reveal their vote. Thus, Mr. Stone stated:

When I say that, you're not going to have to personally have to come back in here and tell anybody how you voted on the death sentence and look at anybody. We're all going to be in this Courtroom when it is read, is what I mean. None of you is personally going to have to tell how you voted on anything in that jury room. Do you each understand that?

That is your secret forever, as long as you want to keep it. Would you have any problems based on that, under those circumstances? (ROA:118).

2275

Again, the dimunition of the jury's role was effectively made by Mr. Stone in repeating to the jury that no one would ever have to know how they voted with respect to the advisory sentence:

Mr. Stone: I think I said earlier - I'm sure that all of you could hear me -- that no member of this jury panel is going to ever be required to state in open court or any time how you individually voted. So with that in mind, would you have any difficulties at all? (ROA: ~~210-211~~).

2367-68

The combined effect of the prosecution's repeated suggestion to the jury that they would not be the ultimate decision-maker with respect to the sentence and the assurances that no juror would ever be required to disclose how they voted were repeated during the State's closing argument:

"Now, the Judge is going to poll you. The Judge is not going to ask each one of you, did you vote for death, did you vote for life imprisonment? He's not going to do that. He's going to ask each of you whether or not a majority of the jurors concurred in the advisory sentence.

Now it's the easiest thing to do, is to go back in the jury room and say, well, let's let the Judge decide. I submit to you that that would be a violation of your oaths as jurors in this case. It takes courage, it takes courage to uphold the law of the State of Florida. I am asking you to do that." (ROA: ~~755~~)-2932

Thus, by the conclusion of arguments at the penalty phase of the trial, the jury has been told, on no less than three occasions, that they will never have to tell anyone how they voted, had been told three times that the Judge would bear the ultimate responsibility for the sentence, and only twice, but very early on in the proceedings, that "great weight" would be given

to the jury's determination. Thus, the totality of the comments made to the jury reflected a misleading, although arguably accurate, statement of the law, which resulted in an incorrect shift in the responsibility for the sentencing decision.

As has been stated in Caldwell, 472 U.S. 320 (1985), such incorrect and improper statements of the prosecution can be corrected by the trial court if in its instructions the jury's sense of responsibility is not further diminished. However, the instructions of the Judge in this case only served to present the role of the jury in a less than accurate manner, were identical to those given in Mann and found to be in violation of that defendant's constitutional rights. During its instructions, the Court stated as follows:

"Ladies and Gentlemen of the jury, it is now your duty to advise this Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. Now, 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 this Court an advisory sentence, based upon your determination as to the sufficient aggravating circumstances exist to justify the imposition of the death penalty, and were there sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (ROA: ~~704~~).

2941

The Court further stated in its instructions:

"Now, in these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the

determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, you should carefully sift, and you should carefully consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment in reaching your advisory sentence. (ROA: ~~787~~).

2944

The comments made by the State Attorney and the Judge in this matter are almost identical to those found to be violative of the Defendant's constitutional rights in Mann v. Dugger.

Unlike the situation reviewed by the Eleventh Circuit in Mann, however, in this action, on two isolated occasions, did the Court properly advise the jury that "great weight" would be given to the jury's advisory verdict. Those two isolated instances are, however, insufficient to cure the misimpression given by the State Attorney and the Court in its subsequent comments. The Court in Mann, specifically found that it would be important for the finding of a violation of Caldwell that the trial court failed to give a curative instruction restoring the jury's full role to its proper perspective. The Court in Mann held that the Court's instructions in that case did not properly correct the misimpression made by the prosecution's comments. The instructions given by the Court in this action were identical to those given in Mann, and similarly did not serve to once again elevate in the jury's mind the importance of their role in rendering the advisory verdict. Indeed, prior to the argument of counsel and the

Court's actual instructions to the jury, the Court stated:

"Now, the final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant." (ROA: ~~758~~).

2915

As stated in Mann:

"Because the overall effect of the Court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, Petitioner's death sentence is invalid under the Eighth Amendment."

A similar verdict should be reached here.

The trial court below, on Petitioner's Motion for Relief pursuant to Rule 3.850, dismissed the Caldwell claims on the grounds it was procedurally barred as not having been raised on direct appeal and not representing a change of law under Florida law. Copeland v. Wainwright, 505 So.2d 425 (Fla.), vacated and remanded on other grounds sub nom. Copeland v. Dugger, 108 S.Ct. 55 (1987). Defendant respectfully submits that Copeland was incorrectly decided. See also, Foster v. State, 518 So.2d 901 (Fla. 1987)(concurring opinion of Barkett, J.). Indeed, at least one member of this Court has suggested that the practical effect of Mann and Adams is that the Florida death penalty is unconstitutional as applied. Grossman v. State, 13 F.L.W. 127, 352, no.5, concurring opinion of Shaw, J.) (February 18, 1988). On the present record, this case is controlled by Adams and Mann, and not by Copeland. The trial court's reliance on Copeland as a ground for dismissal of this claim on the 3.850 Motion was in error and should be reversed and remanded by the Court.

THE ERRONEOUS, CONFLICTING, AND CONFUSING VERBAL CHARGE, WRITTEN INSTRUCTIONS, AND VERDICT FORMS SUBMITTED TO THE JURY AT THE PENALTY PHASE, COUPLED WITH THE COURT'S UNCONSTITUTIONAL MISHANDLING OF THE JURY'S OBVIOUS RESULTANT CONFUSION DEPRIVED MR. CAVE OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND CREATED THE RISK THAT THE SENTENCE OF DEATH WAS THE RESULT OF A MISINFORMED JURY.

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(A)

In Arango v. State, 411 So.2d 172, 174 (Fla. 1982), the Florida Supreme Court held that a capital sentencing jury must be

told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

(S)uch a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Accord State v. Dixon, 283 So.2d 1 (Fla. 1973). The Florida Supreme Court has, in fact, held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon.

Mr. Cave's sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Cave's sentencing jury was specifically and repeatedly instructed that Mr. Cave bore the burden of proof on the issue of whether he should live or die. Mr. Cave's sentencing jury was instructed at the outset of the sentencing



process:

You are instructed that this evidence, when considered with the evidence you have already heard is presented in order that you might determine first whether there are sufficient aggravating circumstances that would justify the imposition of the death penalty and secondly whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances if any. (RAO:2921,2922) verbal charges: (RAO:310-312, written instructions) (emphasis added)

At the close of the penalty phase, in his instructions before the jury retired to deliberate, the judge again explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

If you find the aggravating circumstances ~~could do~~ not justify the death penalty, your advisory sentence should be one of life in prison without possibility of parole for 25 years. Should you find sufficient aggravating circumstances do exist it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (RAO:2948,49, verbal charge, RAO 310-312 written instructions)(emphasis added).

The instructions, and the standard upon which the court based its own determination, violated the eighth amendment. Arango, supra; Dixon, supra; Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Cave on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Cave's due process rights under Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, \_\_\_ F.2d \_\_\_, No. 86-5630 (11th Cir. Feb. 2, 1988). Moreover, the applica-

tion of this unconstitutional standard at the sentencing phase violated Mr. Cave's right to a fundamentally fair and reliable sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Jackson, supra; Arngo, supra; Dixon, supra; see also Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) as well. Caldwell is new law, and this issue is thus cognizable in the instant proceedings. The instructions and argument, and the sentencing court's own application of the improper standard, "perverted (the sentencer's determination) concerning the ultimate question of whether in fact (Alphonso Cave should be sentenced to death)." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986) (emphasis in original).

The prejudice to Mr. Cave of the burden-shifting was compounded by the failure to present the mitigating circumstances of no significant history of prior criminal behavior. Had the jury been properly instructed, they would have been presented with three aggravating and two mitigating circumstances.

The trial court's instructions allowed the jury and the court to sentence Mr. Cave to death without ever requiring the State to prove that death was the appropriate sentence. Once an aggravating circumstance was established, death was presumed unless and until the defense overcame that presumption

and showed that the mitigating circumstances outweighed the aggravating circumstances. Mr. Cave as deprived of rights which, even in any ordinary misdemeanor, are mandated as a matter of fundamental fairness. See In re Winship, 397 U.S. 358 (1970). Mr. Cave's death sentence resulted from a proceeding at which the "truth-finding function" was "substantially impair(ed)." Ivan v. City of New York, 407 U.S. 203, 205 (1972). The circuit court erred in precluding any inquiry in this regard, and in summarily dismissing the claim. Furthermore, Mr. Cave's sentence of death violated the eighth and fourteenth amendments.

(B)

The trial court also erred in holding that the claims related to the sentencing instructions had already been addressed on direct appeal. On direct appeal, this Court never analyzed the issue of the improper jury instructions with the correct Constitutional standard. The Court in Cave, 476 So.2d 180, 186, dealt with these issues on a strictly State law basis.

The jury in Mr. Cave's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of the Florida Supreme Court have made clear, the law of Florida has never been that a majority vote was necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five

or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So.2d 521 (Fla. 1982); Harich v. State, 437 So.2d 1082 (Fla. 1983). However, Mr. Cave's jury was erroneously told that, to recommend a life sentence, its verdict must be by a majority vote:

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of the proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence. (ROA:2950, verbal charge; ROA:311, written instructions)

Now if a majority of the jury determines that Alphonso Cave should be sentenced to death, your advisory sentence will be:

a majority of the jury, by a vote of blank -- advise and recommend to the Court that it impose the death penalty upon Alphonso Cave. (ROA:2950,9) verbal charge; ROA: 311, written instruction)

The verbal charge differs from the written instruction in that the Court next stated:

A majority of the jury, by a vote of blank, and there will be a place there for the vote. advises and recommends to the Court that it impose the death penalty upon Alphonso Cave. (ROA:2951)

The Court then went on, in contravention of the written instructions, and added the following language:

In other words, if it is 7 to 5, or whatever the vote may be, that all has to be inserted in that

spot on the verdict form. No one will be inquired as to your individual vote. All that will be required is to how the vote was obtained, as to the 7 to 5 or whatever it may be. (ROA:2951; not included in written instructions)

On the other hand, if by six or more votes the jury determines that Alphonso Cave should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Alphonso Cave without possibility of parole for 25 years. (ROA:2951, verbal charge; ROA:312, written instruction).

Now, you will be able to take these instructions in the jury room with you. (ROA:2951; no written instruction) (emphasis added)

You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court. And there are two advisory sentences, as I've indicated. (ROA:2951,54) verbal charge; ROA: 312, written instruction except last sentence)(emphasis added).\*

These erroneous instructions are the type of misleading information condemned by Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), in that they "create a misleading picture of the jury's role." Id. at 2646 (O'Connor, J., concurring). As in Caldwell, the instruction here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in violation of the most fundamental requirements of the eighth amendment.

There is no question that error was committed by the charge in this case. The Court told the jury a majority was needed for a life recommendation. As in Harich, supra, the

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\* The prosecutor also stated during penalty phase argument: "He's going to ask each of you whether or not a majority of the jurors concurred in the advisory sentence." (ROA: 775) 2938

incorrect instructions here were not ameliorated by the single passage later provided which accurately stated that a six or more vote is a recommendation of life.

As a matter of State law, previously approved as such, Cave, 476 So.2d, 186 (Fla. 1985), Mr. Cave's jury was erroneously instructed. Thus he may well have been sentenced to die solely because his jury was misinformed and misled. Such a procedure violates the eighth and fourteenth amendments, for it creates the substantial risk that a sentence of death was imposed despite factors calling for a less severe punishment. By incorrectly repeatedly instructing the jury that it had to reach a majority verdict, the judge "interject(ed) irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instructions may have also encouraged the one juror to change his/her vote to death -- not because of equivocation as to the appropriate penalty but because of a belief that a majority vote had to be reached. The erroneous instruction thus "introduce(d) a level of uncertainty and unreliability into the (sentencing) process that cannot be tolerated in a capital case." Beck, 447 U.S. at 643. It is akin to the giving of an "Allen charge" to the jury during the penalty phase of the trial, for it erroneously directs the jury to reach a majority verdict.

A verdict on life or death should not be the product

of pressure but should be the result of independent and unhampered deliberations. Because the challenged instructions were of the type condemned by Caldwell in that they created "a misleading picture of the jury's role," id. at 2646, Mr. Cave need not show prejudice: under Caldwell, the State must show that the challenged jury misinformation had "no effect" on the sentencing decision. Id. The State cannot carry that burden in this case.

(C)

The trial court erred by denying Mr. Cave a hearing in regard to this portion of his claim. The trial court erred in ruling that this claim was procedurally barred. The manner in which the trial court dealt with the sentencing jury's expressed desire to state and publish its advisory sentence, and obvious confusion precipitated by the Court's instructions and the jury forms submitted constituted fundamental error and to the extent that counsel failed to object, she was ineffective for failing to do so.

This Court's treatment of this issue, and the related point of the Court's refusal to inquire of the jurors to determine the nature of their confusion, and understanding of the Court's response to their statement of having reached an advisory sentence was conducted on a State Law basis and did not subject these two issues to any constitutional scrutiny.

Contrary to the statement in Cave, 476 So.2d 180, 186, the record reveals that the Court told the jury a vote of "six

or more" should result in an advisory sentence of life. This Court's prior panel stated that the jury was in fact told that a vote of six to six was an advisory sentence of life. That statement, while arguably the same, does not accurately reflect the actual instruction given to the jury which was submerged within the numerous, improper instructions complained of in Points A and B of this section. Moreover, the Court's previous treatment of this issue was determined strictly on a State Law basis and indulged in unconstitutional speculation in analyzing the jury's note in direct contravention of the Constitutionally mandated strict scrutiny that must be given issues of this type. Moreover, the Court in the previous opinion decided the issue of the inquiry of the jury as to their understanding on the basis of State Court procedure and relied on two civil cases, neither of which reflect the proper level of Constitutional scrutiny required of possible erroneous jury death determinations.

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which may mislead the jury into imposing a sentence of death. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986). The Eleventh Circuit, in fact, has repeatedly ruled that a defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires."



Wilson, 777 F.2d at 21, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (en banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding or as to the matter which they must consider in making their determination of what is the proper sentence under the circumstances. Wilson; Caldwell.

The trial court's handling of this matter violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983).

A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See Zant v. Stephens, *supra*, at 885.

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the Court articulated when eighth amendment error requires reversal.

Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646.

In Mr. Cave's case, after receiving the erroneous instructions complained of in parts A and B of this section, the jury was given the Court's written instructions which, in

substantial part, conflicted with the verbal charge and were further provided with two advisory sentence forms. They are set forth here, as they appeared in blank:

IN THE CIRCUIT COURT OF THE  
SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY,  
STATE OF FLORIDA.

CASE NO. CRC 82-9546 CFANO

STATE OF FLORIDA,

Plaintiff,

vs.

ALPHONSO CAVE,

Defendant.

\_\_\_\_\_ /

ADVISORY SENTENCE

A majority of the jury, by a vote of \_\_\_\_\_  
advise and recommend to the court that it impose  
the death penalty upon ALPHONSO CAVE.

\_\_\_\_\_  
FOREMAN

\_\_\_\_\_  
DATE

IN THE CIRCUIT COURT OF THE  
SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY,  
STATE OF FLORIDA.

CASE NO. CRC 82-9546 CFANO

STATE OF FLORIDA,

Plaintiff,

vs.

ALPHONSO CAVE,

Defendant.

---

ADVISORY SENTENCE

The jury advises and recommends to the court that it impose a sentence of life imprisonment upon ALPHONSO CAVE without possibility of parole for 25 years.

\_\_\_\_\_  
FOREMAN

\_\_\_\_\_  
DATE

(ROA:321 and 322).

Given the conflicting, and inconsistent nature of the verbal charge and the written instructions which the jury then had in their possession along with these verdict forms, the jury entered into its deliberations.

The deliberations were interrupted when the jury sent a note to the trial judge which set forth the case style, a caption "Penalty Phase", and stated:

To the Judge:

We are at a split decision. We would like it stated and published to the Court of this advisory sentence.

The current form does not allow for this revelation. Please advise.

Thank you,

The Jury  
(ROA:3/3 )

Without recalling the jury to make any inquiry as to their purpose in sending out this note, the trial judge concluded that it was in fact a question. It was plainly a statement on the part of the jury as to what their advisory sentence was, and a request for a form upon which to reduce that announcement. The two forms provided, together with the erroneous instructions, led them reasonably to conclude that they needed a different form to express this decision.

There are two interpretations of this note, and the Court's subsequent conduct, each of which compel reversal of the death penalty in this case.

It is suggested that the clear meaning of this statement by the jury was that they had in fact reached a split decision which they wished published as their advisory sentence. A reasonable interpretation is that they had come to a six-six vote but because of the repetitious instruction of the Court as to the need for a majority vote, and the nature of the advisory sentence forms with which they were provided, they did not feel they had the proper vehicle with which to do so. Alternatively, and equally requiring that the sentence be reversed, is that the jury was thoroughly confused by the erroneous, conflicting, and confusing verbal charge to the jury and written instructions, together with the two form verdicts with which they were provided.

Nonetheless, the Court, as stated, simply treated the note as a request for further instruction. The Court announced that its proposed written response to the jury would be

Under the instructions I have given you, if by six or more votes the jury determines the defendant should not be sentenced to death, your advisory sentence would be: the jury advises and recommends the Court that it impose a sentence of life imprisonment upon the defendant without possibility for parole for 25 year. (ROA:2955,56)

Defense counsel not only acquiesced in that procedure, but in fact validated it. The Court's note was then delivered to the jury by the bailiff. The Court's note was submitted to the jury in lieu of bringing the jury out to inquire as to whether or not their announcement was indeed their recommendation as indicated by the note, or in reality, a request for additional instruction. Counsel acquiesced in this procedure. It is significant to note that the actual note submitted by the Court was not, and is not a part of the record in this case, as it was lost. (ROA:2966,67)

In the absence of that document, in light of the ultimate 7 to 5 vote, together with the notion that the jury either had reached an advisory conclusion based upon a "split vote" or that their note itself demonstrated obvious confusion on the record in this case, it cannot be said that the recommendation by this jury satisfies the requirements of the Constitutional scrutiny which is applicable.

Mills v. Maryland, 43 Cr.L. 3050 argued March 30, 1988 and decided June 6, 1988, case no. 87-5367 was pending at the

time that Mr. Cave's petition to the trial court was mandated by the time constraints imposed upon Mr. Cave by the Governor's decision to sign a warrant. As such, the issue as to the Constitutional scrutiny to be applied to the situation as it related to the jury's statement, the Court's treatment of that statement, and the Court's subsequent refusal to conduct any type of evidentiary hearing to establish extrinsic evidence is controlled by Mills.

It is evident from the plain language of this Court's prior decision on the direct appeal that the previous treatment of this issue was premised entirely on State Law grounds and was decided in a manner whereby the Court gave way to unconstitutional speculation which is in direct contravention of the standard and method of analysis announced in Mills. In Cave, this Court's previous panel stated:

Neither the Judge nor the parties could know whether the split decision referred to an 11 to 1, 6 to 6, or a 1 to 11 vote on the death penalty. Thus, the Judge's response with the positive approval and without objection of defense counsel was the correct response.

The Court went on to indicate that no inquiry would be made as to the jurors' potential confusion or lack of understanding of the instructions given to it would be countenanced. Cave, supra, 186. That decision, again, was based upon State law and of great significance, was premised upon the holdings of two civil cases. The Court did not apply the type of strict scrutiny which the evolving standards of constitutional analysis

require of jury situations such as was then presented. As stated in Mills:

With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground, but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. Citations omitted . . . in reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds

The Court went on to state:

Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing. Mills, supra 3058, 3059.

It is conceded that the Mills Court was dealing with court instructions and jury forms which arguably precluded consideration of mitigating circumstances. However, the underlying analysis, and constitutional scrutiny to be applied, is at least, if not more, compelling in Mr. Cave's case. Further, the trial court's refusal to seek extrinsic evidence as to what the jury thought, was constitutionally improper in light of the nature of the sentence, death. In Mills, the Court went on to state at 3059:

There is, of course, no extrinsic evidence of what the jury in this case actually thought. We have before us only the verdict form and the Judge's instructions. Our reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was misinformed.

That same substantial risk applies to Mr. Cave's case, and the Court in Mills specifically indicates the desirability of

establishing the very extrinsic evidence which was sought by Mr. Cave, and rebuffed by the Court. The Court cannot lose sight of the strict scrutiny to which possible juror misunderstanding or misapplication of the law is subjected to. Unlike Mr. Cave's case, the Mills Court did not even have any record indication of actual confusion. The Petitioner's argument in Mills was "straightforward and well illustrated by a hypothetical situation, he contends it is possible under the Maryland capital sentencing scheme." Mills at 3058. It was that hypothetical situation in Mills, and the absence of any extrinsic evidence as to what the jury in the case actually thought that led to the ultimate holding that the case had to be reversed as it related to the death penalty.

There can be no doubt that Mills defeats the State's alleged procedural bar in that it very clearly demonstrates by its very language as compared to the language in Cave, that Cave's original review by this Court failed to apply the correct standard. The two catalytic statements vividly demonstrate the incorrect approach taken by this Court in Cave:

neither the Judge nor the parties could  
no whether the split decision referred to  
an 11-1, 6-6, or 1-11 vote on the death penalty.  
Cave at 186.

The Supreme Court in Mills stated:

No one on this Court was a member of the jury that sentenced Ralph Mills, or any similarly instructed jury in Maryland. We cannot say with any degree of confidence which interpretation Mills jury adopted. But, common sense and what little extrinsic evidence



we possess suggests that jurors do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation, . . . unless they are expressly instructed to do so. Mills, at 3060. (emphasis added).

It is clear that the Florida Supreme Court in its previous treatment of this issue did not apply the appropriate Constitutional standard and indeed engaged in unconstitutional speculation as to the import of the jury's statement. It cannot be said with any degree of confidence that the Court's handling of the statement submitted by the jury, and the absence of the sought extrinsic evidence as to their understanding did not result in one vote being changed, shifting the balance from 6-6 to 7-5.

This claim is not procedurally barred when account is taken of the strict scrutiny which the United States Supreme Court is now placing upon jury instructions, jury minimization, Caldwell, supra, and now instructions combined with jury forms.

As stated in Mills:

The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that Petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

We conclude that there is a substantial probability that reasonable jurors, upon receiving the Judge's instructions in this case, and in attempting to complete the verdict form, as instructed, may well have thought they were precluded from considering

any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance . . . the possibility that a single juror could block such consideration, and consequently require a jury to impose the death penalty is one we dare not risk. Mills, at 3060. (emphasis added).

The jury's announcement, and effort to publish its advisory sentence, taken in the context of the improper, misleading, and contradictory instructions previously provided, together with the fact that they clearly identify that they did not have a verdict form to express their decision, amply demonstrates, at best, confusion as a result of the instructions and forms. At worst, the Court's note, which was lost, had the effect of rebuffing one of those jurors who had participated in the drafting of their announced intended advisory sentence. The Constitution cannot tolerate this type of uncertainty where life is at stake. Mr. Cave is entitled to have his sentence of death vacated.

The burden of establishing that the error has no effect on the sentencing decision rests upon the State. Booth v. Maryland, \_\_\_\_\_ U.S. \_\_\_\_\_, 107 S.Ct. 2529 (1987), cf. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). That burden can be carried only on a showing of no effect beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell v. Mississippi, supra, and Booth v. Maryland, supra. The State cannot carry this burden with regard to the handling of the jury's statement of this case.

THE KNOWING AND INTENTIONAL MISREPRESENTATIONS  
IN THE PROSECUTOR'S ARGUMENT TO THE JURY  
DIRECTLY SUGGESTING THAT MR. CAVE WAS "THE  
SHOOTER" VIOLATED THE EIGHTH AND FOURTEENTH  
AMENDMENTS AND RENDERED MR. CAVE'S CAPITAL  
SENTENCING HEARING FUNDAMENTALLY UNFAIR AND  
THE JURY'S RECOMMENDATION OF DEATH UNRELIABLE.  
THIS PROSECUTORIAL MISCONDUCT ABROGATED MR. CAVE'S  
EIGHTH AMENDMENT RIGHT TO AN INDIVIDUALIZED AND  
RELIABLE SENTENCING DETERMINATION.

The trial court erred in denying Mr. Cave an evidentiary hearing in regard to this claim. The trial court erred in ruling that this claim was procedurally barred. The actions of the prosecutors in inviting the jury to draw the inference that Mr. Cave was the shooter, which they knew to be false, constituted fundamental error of constitutional dimension and to the extent that counsel failed to object, she was ineffective for failing to do so.

Mr. Cave attempted to raise the issue of the denial of his constitutionally guaranteed right to a fair, individualized, and reliable sentencing determination by the prosecutor's intentional mischaracterization of the evidence. The prosecution's arguments to the jury sought to establish that he was in fact the trigger man. This was done in spite of the fact that the prosecution knew, and conceded that it had absolutely no evidence to demonstrate that Mr. Cave fired the gun. (TR:N/A). The same prosecution team had, in fact, argued in each of the separate co-defendant's trials that that defendant fired the fatal shot. There was but one shot fired. In each of the three separate trials resulting in death penalties for each of the separate defendants, the prosecution attributed the

gunshot to that defendant. In Mr. Cave's case, the intentional misrepresentation of facts known not to be true by the prosecution team impermissibly infected Mr. Cave's sentencing proceedings and rendered them fundamentally unfair and resulted in an unreliable 7 to 5 recommendation of death. The trial court determined that this was an issue that should have been raised before in that Bush's trial was complete at the time of Appellant's.

The trial court completely misconstrues the nature of this claim. It is an assertion of a fundamental violation of due process by the intentional acts of the prosecution. The matters attempted to be developed and asserted in Mr. Cave's Petition were, by definition, collateral. As such, the only way they could be raised would be by way of this collateral attack. They could not be raised on direct appeal of Mr. Cave's trial because they were "extra record matters", and were therefore, likewise unreviewable on direct appeal. Moreover, at the time of Cave's trial, Mr. Parker had not yet been brought to trial. As such, the full extent and conclusive proof of the prosecutor's gross misconduct was not available at the time of the trial and could not properly have been raised on direct appeal. The assertion of the prosecutorial misconduct which would require proof from the record of the two co-defendants' separate trials is a classic form of collateral matters which can only be raised by way of collateral attack. The suggestion that they could or should have been raised in

the direct appeal is totally falacious.

The significance of this prosecutorial misconduct cannot be overstated when viewed in light of all of the surrounding circumstances of Mr. Cave's 7-5 jury recommendation of death. When viewed in the context of the entire record, this deliberate tactic on the part of the prosecution, which intentionally misled the jury by way of argument, cannot be said to have not affected the ultimate recommendation of death. Keeping in mind that Mr. Cave was severely prejudiced by the improper admission of co-defendant Bush's statement that Cave "was implicated and participated in the crime" (See Point - supra) from this, a single, reasonable juror might have concluded that it meant that he had "participated" in the actual killing. That testimony, coupled with the prosecutor's entreaty to the jury to conclude that Cave was indeed the "shooter", despite their knowledge to the contrary, was not only prejudicial, but devastating. It simply cannot be said, that in the absence of the combination of that improperly elicited statement, in conjunction with the prosecutor's misleading argument, that the one vote which tilted the balance of the jury's recommendation would have been different. This Court is well aware that a recommendation of life, once made, completely alters the formula upon which the trial judge's sentencing decision is made and this court's subsequent review is controlled. Tedder v. State, 322 So.2d 908(Fla. 1975) and its extensive progeny.

It is axiomatic that prosecuting officers, being clothed with quasi-judicial powers have a separate, special and distinct obligation to assure defendants of fair trials. That proposition is set forth in an unbroken line of Florida cases which are too plentiful and well known to require specific citation.

Moreover, prosecutors are bound by the professional ethics of the Florida Bar. As the commentary to Section 4-3.3 states:

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. . .The underlying concept is that legal argument is a discussion seeking to determine the legal premise properly applicable to the case.

Additionally, the prosecutor is governed by numerous other ethical mandates guarantee fairness in the conduct of criminal trials. e.g. American Bar Association Lawyers Manual on Professional Conduct, Model rule 3.8, Model code, disciplinary rule 7-103, ethical considerations EC 7-26, EC 7-27, and EC 713. See also ethical consideration 7-14 dealing with government lawyers generally.

More particularly, the American Bar Association standards relating to the administration of criminal justice: Chapter III, the prosecution functions, sets forth the obligations of a public prosecutor in situations such as that before this Court. Of particular significance are sections 3-5.8 dealing with the prosecutor's obligation and arguments to the jury and 3-6.1, the role in sentencing and standard 3-6.2,

information relevant to sentencing. The prosecution's conduct in Mr. Cave's case constituted a gross violation of these guides to fundamental fairness.

The prosecutor also has an affirmative duty to bring to the attention of the Court, or of the proper officials, all significant evidence suggestive of innocence or mitigation. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 at 993 f.n. 25 (1976).

All of these considerations, obligations, and duties, which are special and unique to the prosecutor are best summed up in Berger v. U.S., 295 U.S. 78, 88 (1935):

The prosecutor is the representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

That the prosecution in Mr. Cave's case struck foul blows cannot be denied. The same prosecution team intentionally misrepresented the evidence as to who the shooter was in three separate trials. In the trial of John Earl Bush, which went first, the prosecution showed the jury the photograph of the decedent, and stated:

State's exhibit no. 22 is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater. See trial extracts no. 3 in appendix to case Petition for Relief pursuant to Rule 3.850.

In the prosecution of J.B. Parker, the State told the jury:

I submit to you that it was J.B. Parker that fired the fatal bullet. See appendix to Petition for Relief pursuant to Rule 3.850, section 2.

The crowning blow and absolute demonstration of the State's deliberate misrepresentation of the evidence was demonstrated after the last trial, Parkers, and after the completion of the post-conviction investigation wherein both State Attorney Stone and Midelis say:

Parker was the shooter, and if anyone deserves to be executed, he does.

Nonetheless, in Mr. Cave's case, during the guilt phase, Mr. Stone stated to the jury:

And the only statement you have that he didn't pull the trigger was his own self-serving statement that after he heard Bush's statement implicating him, "I better make the best possible statement now on my own behalf." He's the only one at that point that tells you he didn't pull the trigger.

Who had the gun from the beginning? Alphonso Cave. Who had the gun in the store? Alphonso Cave. Who put her in the back seat? Alphonso Cave. Who took her out of the back seat? Alphonso Cave. Who had the gun? Alphonso Cave. And who was outside with Francis Slater? Alphonso Cave. (ROA: 2814, 2815)

That deliberate mischaracterization of the known facts was carried on in prosecutor Midelis' penalty phase argument. (ROA:2923-2938)\* A full reading of both prosecutor's statements in Me. Cave's case leads to but one conclusion. They were

\* Particularly at 2926, 27 and 2931, 32



inviting the jury to conclude that in light of the fact that Mr. Cave had the gun in the store, Mr. Cave put the gun to Ms. Slater, Mr. Cave took Ms. Slater to the car with the gun, Mr. Cave sat in the back seat with Ms. Slater with the gun, and Mr. Cave got out of the car with the gun. Further, Mr. Stone characterized his (Mr. Cave's) statement that he did not shoot the victim, and was a self serving lie. (ROA: 2814, 2815 ) The clear intent of the prosecutor's argument at penalty phase was to have the jury conclude that Mr. Cave was indeed the shooter.

There can be no doubt, after reading the comments of the prosecution in the trials of Mr. Bush and Mr. Parker that the position taken in Mr. Cave's trial was not only ingenuous, but deliberately misleading. They went to great lengths to lead the jury to draw the inference that Mr. Cave had the best reason to shoot the victim. Nonetheless, the State knew he did not in fact fire the fatal shot. Moreover, a reading of the argument in Mrs. Bush and Parker's cases demonstrate that the ownership and possession of the gun changed at the convenience of the prosecutor to reflect most adversely as to each individual defendant.

The analysis of alleged prosecutorial misconduct of this nature is in fact two pronged.

(A.)

THE DELIBERATE AND INTENTIONAL MISCHARACTERIZATION OF THE EVIDENCE BY THE PROSECUTOR AS TO THIS DEFENDANT'S INVOLVEMENT IN THE ACTUAL KILLING OF THE DECEDENT IS AKIN TO, AND MORE EGREGIOUS THAN

KNOWINGLY UTILIZING FALSE EVIDENCE.

Had Appellant been allowed to develop this issue, it would have been demonstrated that the prosecution violated Defendant's right to a fair trial in two distinct, but comparable fashions. In Troedel v. Wainwright, 667 F.Supp. 1456, (So. Dist. of Fla. 1986), affirmed, 11th Cir. 878 F.2d 670, the Court was confronted with a prosecution which misused expert testimony in the same misleading fashion as the prosecution in the case at bar misstated their asserted reasonable inferences from the evidence. As stated in Troedel:

"The law is firmly established that the 14th Amendment to the Constitution of the United States cannot tolerate a State criminal conviction obtained by knowing use of false evidence or improper manipulation of material evidence. " Cit. omitted. 667 F.Supp. at 1458.

As the Troedel Court stated:

"In order to prevail on this issue, Troedel must establish one, the testimony was in fact misleading, two, the prosecution knowingly used said testimony, and three, the subject testimony was material to his guilt or innocence." Troedel, supra.

In the case at bar, Mr. Cave was precluded from developing that factual issue at the 3.850 Hearing. However, the original records taken as a whole demonstrates: 1) the prosecution in fact argued that each of the three co-defendants, Bush, Cave and Parker were the shooters. This was established through Appendices to Mr. Cave's Petition to Vacate pursuant to Rule 3.850. They conclusively show that the prosecution's argument was factually misleading. Second, the prosecution, knowingly and intentionally misstated the evidence. In fact during the

hearing on the analysis of the ineffectiveness of counsel, State Attorney Stone conceded that there was "absolutely no evidence to indicate that Cave was the shooter." (TR:N/A)

As to the question of materiality, the correct focus here is its impact on the sentencing decision. This, is a matter which constitutionally must be analyzed with even greater scrutiny than as it relates to the issue of guilt or innocence. As stated in Mills v. Maryland:

"With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside, if it could be supported on one ground, but not on another, and the reviewing court was uncertain as to which of the two grounds was relied upon by the jury in reaching the verdict." (Citations omitted.)  
"...In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." Mills at 43 Cr.L. 3058.

As the Court went on there, unless we can rule out the substantial possibility that the jury may have rested its verdict (sentencing recommendation) on the "improper ground", we must remand for resentencing. Thus, under the analysis of the misuse of the evidence, the prosecution's argument in the case at bar demands reversal of the death sentence. As observed in Troedel, the standard for materiality is whether the faults or misleading testimony could in any reasonable likelihood have effected the judgment of the jury.

"Furthermore, it was an equally crucial factor in the jury's recommendation by a vote of 7 to 5 that the death penalty be imposed." Troedel.

Here, Mr. Cave's sentencing trial was rendered fundamentally

unfair by the State's intentional mischaracterization of the evidence. While Troedel involved the utilization of expert testimony,\*the impact and misconduct herein is equally, if not more, egregious. Here, the vote was 7 to 5. Here, the impact of the State's misapplication of the inferences to be drawn by the evidence effectively denied the Defendant a fair sentencing hearing,

(B.)

THE SECOND ANALYSIS OF IMPROPER PROSECUTORIAL  
CONDUCT DEALS SPECIFICALLY WITH THE PROSECUTOR'S  
COMMENTS.

The prosecution's comments as relate other issues in this case are dealt with more extensively under the "Caldwell" claim. However, the prosecution's intentional mischaracterization of the evidence as demonstrating that this Defendant was the shooter fully satisfies the two-fold requirement that 1) the prosecutorial arguments encouraged the jury to take into account matters that are not legitimate considerations, and 2) that the arguments were so prejudicial that they rendered the capital sentencing hearing fundamentally unfair. Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985), Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985), Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985). Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

In those cases, the prosecutorial misconduct which was being scrutinized dealt with Caldwell violations and other

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\* That testimony was used to show each of two separately tried defendants was the "shooter"!

improper, inflammatory arguments by prosecutors. The prosecutorial misconduct extant in this case is infinitely more egregious than that dealt with in any of those cases and fully satisfies the two pronged analysis. The prosecutor's argument herein encouraged this jury to take into account that this Defendant participated in and was in fact the person who inflicted the mortal wounds. In so doing, it cannot be reasonably argued that this argument was anything other than so prejudicial that it rendered the sentencing trial proceedings fundamentally unfair, and the sentence of death unreliable.

The prosecution's intentional, grotesque mischaracterization of the evidence violated the principals of Gregg v. Georgia, 428 U.S. 153 (1986) and California v. Ramos, 463 U.S. 992 (1983) in that the prosecution's argument did not minimize the risks of wholly arbitrary and capricious action as required by these cases, but in fact encouraged and begged for precisely that type of arbitrary and capricious decision in the sentencing phase of this trial.

Mr. Cave was entitled to an individualized determination as to what the proper sentence in his case should be. This determination should have turned on the character of the individual and the circumstances of the crime, Zant v. Stevens, 462 U.S. 862 (1983), Eddings v. Oklahoma, 455 U.S. 104 (1982), Booth v. Maryland, \_\_\_\_\_ U.S. \_\_\_\_\_ 107 S.Ct. 2529 (1987).

The intentional misrepresentation of the evidence in

an effort to get the jury to infer that Mr. Cave was the shooter undercuts and makes a mockery of the narrowing process called for by those cases, and injected considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process. See Zant v. Stevens, supra, at 885. Mr. Cave's sentence of death cannot stand when it has resulted from prosecutorial comments which knowingly, and intentionally misstated the known facts and which were calculated to and indeed did mislead the jury into imposing a sentence of death. Such cannot be the case when the standard applied to prosecutorial comments compels reversals where such comments may mislead the jury into imposing a sentence of death. Caldwell v. Mississippi, 472 U.S. 320 (1985), Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985) reh. denied, 784 F.2d 404 (11th Cir. 1986).

The burden of establishing that this intentional, erroneous deliberately misleading argument to the jury had no effect on the sentencing decision rests with the State. See Booth, supra, cf. Caldwell, supra, Chapman v. California, 386 U.S. 18 (1967).

This burden cannot be met under the facts of this case and Mr. Cave is unquestionably entitled to have his death sentence vacated.

DEFENDANT FULLY DEMONSTRATED AT THE HEARING  
THAT TRIAL COUNSEL RENDERED INEFFEFFECTIVE ASSISTANCE  
WHICH RESULTED IN PREJUDICE TO DEFENDANT.

In order to establish prejudicial ineffective assistance of counsel, a Defendant must show (1) that "counsel's representation fell below an objective standard of reasonableness", and (2) that there is a reasonable probability that, "absent the errors, the factfinder would have had a reasonable doubt as to guilt" or "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death". Strickland v. Washington, 466 U.S. 668, 688, 695 (1984). Both aspects of the Strickland test were demonstrated and proven at the hearing held by the trial court.

Courts have repeatedly held that "(a)n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). Accord, Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983), vacated and remanded, 568 U.S. 1206 (1984), adhere to on remand, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle,

590 F.2d 103, 104-05 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978); see also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("(a)t the heart of effective representation is the independent duty to investigate and prepare"), cert. denied, 460 U.S. 1098 (1983). Counsel have been found ineffective for failing to raise objections, failing to move to strike and failing to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983), cert. denied, 464 U.S. 1053 (1984); for failing to object to improper questions, Goodwin, 684 F.2d at 816-17; and for failing to object to improper jury argument, Vela, 708 F.2d at 963.

Effective assistance in some areas of representation will not be sufficient to defend a finding of ineffective assistance as to other aspects of the representation. Washington v. Watkins, 655 F.2d 1346, 1355 rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard. Nero v. Blackbaum, 597 F.2d 991, 994 (5th Cir. 1979).

Defense counsel must also properly discharge significant responsibilities at the sentencing phase of a capital trial. In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die (made) by a jury of



people who may never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In Gregg and its companion cases, the Supreme Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Robert s. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Trial counsel a in capital sentencing proceedings has a duty to investigate and prepare mitigating evidence for the jury's consideration, to object to inadmissible evidence or improper jury instructions, and to make an adequate closing argument. Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, 107 S. Ct. 1292 (1987). Mr. Cave's counsel performed none of these duties adequately.

As will be demonstrated below, trial counsel's sole theory of defense was to contrast a young white woman, which she is, with a black defendant, to seek the sympathy of the jury, to confuse legal issues of felony murder by deliberately misstating the law, and doing woefully little to prepare for a penalty phase which she "hoped" she would never reach.

TRIAL COUNSEL DEVELOPED NO LEGAL THEORY OF DEFENSE  
AND RELIED ON IMPROPER AND UNETHICAL CONDUCT  
INTENDED TO CONFUSE THE JURY.

The most significant claim made by Petitioner's 3.850 Motion was that trial counsel failed to comprehend the legal charges against the Defendant. This claim was based on the conduct of the trial by Ms. Steger as evidenced by the trial

record. First, in her opening statement, Ms. Steger conceded that the Defendant was guilty of robbery and kidnapping. Additionally, she conceded that the Defendant was present at the murder and that the murder was committed following the robbery and the kidnapping. Thus, her opening statement effectively established all the elements required to convict her client of felony murder.

Further support for the allegation that Ms. Steger failed to comprehend the charges against the Defendant came during her closing argument during which she incorrectly and erroneously stated to the jury that the offenses charged against Mr. Cave, i.e. first degree murder, robbery, and murder, were three separate and distinct offenses which had no relationship to the other. Clearly, that statement is an incorrect statement of Florida Law and was promptly and vigorously objected to by the State. Ms. Steger, nevertheless, insisted that she was simply reading from the jury instructions which the Court would later read to the jury, subsequently, conceded that she was leaving out the crucial word "accomplice", and when pressed further to clearly and accurately enunciate the doctrine of felony murder remarked to the trial judge, "Well, Judge, I don't know what you want me to do. All I've left out is one word, "accomplice" and I'll put it in, Judge. I don't know what else I can do. (ROA:681).

The explanations prepared by Ms. Steger at the hearing on the 3.850 Motion suggest a more fundamental form of ineffec-

tiveness - an ineffectiveness based on the selection of hopelessly implausible and unethical trial strategy.

At the Hearing, Ms. Steger testified that the portion of the record relating to her closing argument did not demonstrate her lack of comprehension of the legal charges against Mr. Cave, but rather supported her contention that she had devised a trial strategy which was intended to confuse the jury. (TR:N/A). She conceded at the Hearing that the statement made by her in her closing argument was an incorrect statement of Florida Law and further testified that she "hoped" that the prosecutors would not object. (TR:N/A).

On direct examination, during the defendant's case, Ms. Steger testified as follows:

Q And could you tell me please what--what theory did you develop or did you adopt, were going to adopt with respect to the defense of Mr. Cave?

A Well, as you know there was a confession in this case which concerned me greatly since Mr. Cave admitted to taking Miss Slater out of the convenience store at gun point, which obviously is a problem. My theory was, of course, that there were several very seasoned prosecutors trying the case, Mr. Stone, the then State Attorney, Judge Midelis, who was then his assistant, Dave Phoebus and they had several investigators. So my theory, which had always been very successful for me in the past was that I looked young, I was young and that the jury -- I wanted to present the scene to the jury that Mr. Cave and Mrs. Steger were against all of these big guns and that--you know, that's basically all I had Mr. Valdespino. I had a confession which, of course, we tried to have suppressed. If that were allowed into evidence we had very major problem with a conviction for first degree murder. So my theory was to present a very, very innocent to get the sympathy to the jury quite frankly for myself and my client.

Q I -- I think that that's -- that's an interesting strategic approach to take. On a legal -- on a legal issue did you develop a legal theory that you were gonna present to the Court and to the jury at the trial other than the fact that you were young and it was you and Mr. Cave against the -- big boys.

A I couldn't -- there really -- I -- I would welcome someone to think of a legal theory to find -- to get an acquittal in this particular case, sir. Obviously, we had an issue here of first degree felony murder with Mr. Cave's involvement. And what I was attempting to do during my closing argument and during the case was hopefully to confuse the jury enough so that they would come back with something other than what they came back with. That -- there was very little to work with here as I'm sure you know. (TR: 106-108)

During cross examination by the State, Ms. Steger amplified on her "theory":

Q Turning to this particular case, State versus Alphonso Cave. Defense asked what your legal theory of defense in this case was. I'm going to ask you differently. I'm going to ask what was your tactical strategy that you intended to proceed with in front of the jury in this case. And then I'm going to ask you what's the difference between a legal theory and a tactical strategy in a case?

A Well, as I've said my tactical strategy was one that's probably I feel is unique to me because of what I am and who I am. It was all of the experience and these big bad prosecutors against Alphonso Cave, who -- and Karen Steger, who is five foot three and a hundred pounds. Who is --

Q Let me -- let me interject in the record, your're of course a white female.

A Yes.

Q Basicly I would say small of stature rather than contrasted to a large lady. Do you feel that that would be important in reference to the jury to see a small white female seated next to a black Defendant charged with a crime against a white victim and the seriousness of those crimes against a white victim?

A I've found in the past, for example, my rape trial that that was very effective with the jury. And I felt that in this particular case Alphonso and I were -- we spoke, we -- you know, we touched each other. We, you know, there was conversation going on between us during the trial. I felt that all those things were important as body language to the jury that I believed this man. That he had been honest with the police and that we hoped that they would take all those things into consideration because we can give juries all the instructions we want about following the law and don't have sympathy and don't let Mrs. Steger or -- or the prosecutor sway you, but that's the -- that's the name of the game is to sway the jury with all of those things. So that to me was important.

Q What -- what have you done to understand first degree murder and felony first degree murder in order to prepare for this case?

A Well, first of all I had done -- I had re -- I had all the case law with respect to first degree murder, felony murder, we all discussed it, you know, how our -- what our strategies -- and when I say we all I mean the four of us or Elton, too, sometimes, Mr. Schwarz, would be involved and, you know, as to how these things would be handled and et cetera and how felony murder played. And obviously we had the jury instructions and -- and I was very familiar with it. And I'm saying intentionally misstating the law that the State made the allegation during my closing argument, but I was hoping that I could confuse the jury because felony murder is a very difficult concept for anyone to understand. And I knew that they couldn't get Mr. Cave for first degree premeditated. I felt in my heart they couldn't. And that if the jury could possibly be confused with respect to felony murder that perhaps they would -- would do something with us on that and not find him guilty of murder. (TR: 162-63, 182)

Later, during her direct examination by the State, Ms. Steger conceded that she had deliberately and intentionally misstated the law in order to confuse the jury. (TR:N/A).

Thus, Ms. Steger's testimony at the Hearing was that her entire trial tactic was to 1) appear young and use her

"unique qualities" in her representation of a black defendant, 2) to arouse sympathy from the jury and 3) attempt to confuse the jury on the issue of felony/murder by deliberately misstating Florida Law of felony murder.

Although Defendant submits that the record of the trial supports the conclusion that Ms. Steger simply did not comprehend the doctrine of felony murder herself, even assuming the truth and accuracy of Ms. Steger's testimony, the development of such a trial tactic is ineffective, unreasonable under the circumstances, and falls far below the standard required for a finding of effective assistance of counsel.

Ms. Steger testified at the hearing that it was a difficult case, a "terrible case for us" (TR:168) and that faced with the defendant's confession, which she was unable to suppress, she faced a tremendous hurdle in attempting to obtain an acquittal. (TR:168-169) The State's own witnesses, Mr. Stone and Mr. Midelis, joined in that assessment of the case testifying that, in light of Mr. Cave's own statement, it would have been very difficult to develop any legal theory of defense. (TR:N/A)

Assuming the truth and accuracy of Ms. Steger's testimony, Defendant submits to this Court that it is ineffective per se to develop a trial strategy which is based on the hope of confusing the jury by deliberately misstating the applicable law of the case. Such conduct is a direct violation of the canons of professional responsibility. Rule 4-3.3 of the

Florida Rules of Professional Conduct, specifically directs that "(a) a lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal. The comment accompanying that Rule further states that

legal argument based on a knowingly false representation constitutes dishonesty toward the tribunal.

Professional Ethics of the Florida Bar, 1313, 1314 (2d Ed.)

A defendant cannot be placed in the hands of an attorney who, once she has determined that she has a difficult case, appears to rely on nothing more than her "unique ability" and to do things that other attorneys were not able to do (TR:87) "because of the fact that I am a woman". (TR:158) Certainly, this Court may not find a reasonable trial strategy a tactic so wholly dependent on deliberate misstatements of the law.

Indeed, the State, which now applauds Ms. Steger's trial tactics as effective and reasonable, objected not only during the course of the trial, but in a vehement response during the direct appeal of this case.

The trial court's decision to compel a proffer by defense counsel of a portion of her closing argument, was neither inappropriate or improper. Said ruling resulted from the consistent attempts by defense counsel to urge erroneous constructions, about the nature and legal consequences of felony-murder. (R:2835-37) (2838-2842). The nature of said misstatements, including those in the proffer, were properly regarded by the trial court as inappropriate comments on the applicable law, and deletion of some parts of the felony-murder jury instruction which resulted in incorrect statements of law. (R:2835, 2846)

Defense counsel did not properly have the prerogative to instruct the jury, during her closing argument; further, it was improper to give and argue non-applicable, confusing and misleading instructions to the jury. (Citations omitted) In view of the circumstances, the trial court properly required and denied defense proffer, on objection by the State. (Citations omitted)

This Court, in its decision on the direct appeal denied Appellant's argument that the trial court's requirement that Ms. Steger proffer her closing argument was error.

This was appropriate under the circumstances. First degree felony murder does not require that the accused personally perform the killing. Counsel may not contravene the law and the jury instructions in arguing to the jury.

Cave v. Florida, 476 So.2d, 180, 186 (Fla., 1985).

Indeed, Ms. Steger's testimony at the hearing suggests that despite the bad facts and the bad case with which she was presented, and her feeling that the evidence of Mr. Cave's guilt was overwhelming, she still harbored hope, and indeed confidence that Mr. Cave would be acquitted. (TR:109)

Defendant urges this Court to find that such conduct on behalf of trial counsel constitutes prejudicial ineffectiveness per se.

Trial Counsel's Failure to Properly Prepare  
For The Penalty Phase Constituted Prejudicial  
Ineffective Assistance By Precluding The Jury  
From Considering Positive Mitigating Circumstances.

Assuming the strategy undertaken by Ms. Steger was not ineffective per se, such a strategy cannot be considered reasonable if the trial counsel does not realize that notwithstanding such outlandish tactics, a conviction is almost



certain to be rendered. The only manner in which Ms. Steger's purported theory of defense can be justified, assuming it can be justified at all, is if she had then concentrated all her representation efforts on developing facts and circumstances to be used during the penalty phase of the trial in order to avoid imposition of the death penalty. A theory such as that purportedly used by Ms. Steger cannot possibly be relied on as obtaining an acquittal, and any admission by the trial attorney that there was even a "hope" of obtaining an acquittal renders such representation patently ineffective.

The facts adduced at the hearing further demonstrated that Ms. Steger was ineffective in failing to properly prepare for the penalty phase of the trial. Once again, Ms. Steger's testimony at the Hearing more than amply demonstrates her ineffectiveness. In light of the time restraints and the unavailability of the transcript of the hearing on June 21, 1988, defendant will rely solely on the testimony of trial court to demonstrate this issue. The Court should be aware, however, that the hearing adduced testimony which was directly conflicting the testimony related in this section. Defendant requests an opportunity to fully brief the conflicting testimony which further highlights trial counsel's ineffectiveness. Ms. Steger admitted at the Hearing that in looking for witnesses for the penalty phase, she relied only on Mr. Cave and requested that he give her names of potential witnesses. (TR: 103) She testified that he provided her with the name of his

mother, Connie Hines, and his landlords at the time of his arrest, the Reverend and Mrs. James Carswell. (TR: 103) Ms. Steger further testified that she spoke to Mr. Cave's mother only twice and was told by her that she would not testify since she had a job with a white lady at the beach and did not want the woman to know that her son was involved in the Slater murder. (TR:114) She testified that she never spoke with Reverend or Mrs. Carswell. (TR: 104) Ms. Steger nevertheless listed these three individuals as witnesses who would testify during the penalty phase of the trial. She conceded at trial that she spoke to no other potential witnesses, (TR:119) stated that she did not know that Mr. Cave had a stepfather, (TR:104) did not have the names of any friends or acquaintances who would be willing to testify, (TR:195) did not acquire or obtain school records since she assumed they would not be helpful, (TR: 119, 173) and made no further attempt to have Mr. Cave examined by any medical personnel other than Drs. Vaughn and Rifkin who issued what, in her terms, were negative reports. (TR:178) Thus, Ms. Steger's entire efforts for preparation of the penalty phase of the trial were to talk to Mr. Cave about three witnesses and to have only two conversations with his mother. \*

Again, assuming the truth of Ms. Steger's testimony, it is blatantly unreasonable trial strategy, in a case which she conceded to be doubtful of acquittal, to focus so little attention on the penalty phase and preclude any further

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\*Incredibly, Ms. Steger testified that although she was aware that Mr. Cave's brother attended the trial and, in fact, spoke with him, she did not ask him to testify and had "no idea" why she did not. (TR: 202)

investigation simply because the Defendant did not give her more names. Ms. Steger made no effort beyond the two conversations to pursue Mr. Cave's mother's testimony, to further discuss with Mr. Cave's mother other potential witnesses, to ascertain from Mr. Cave's mother other family members who might have testified who were not in the particular employment predicament she was in, and indeed made only minimal efforts to persuade Mrs. Hines to testify on behalf of her son.

With respect to the Carswells, Ms. Steger testified that she did not speak to them. Assuming the truth of this testimony it is an unreasonable trial tactic and cannot possibly be considered strategic to list the Carswells as witnesses and anticipate the testimony of witnesses during such a crucial stage of a trial as the penalty phase without ever speaking to them and without ever knowing precisely what their testimony would be. Indeed, it is interesting to note that Mr. Robert Stone, the State Attorney who prosecuted this case testified on his cross examination that he did not generally think it advisable for defense attorneys to list witnesses with whom they had not spoken. (TR: NA)

Even assuming the accuracy of Ms. Steger's testimony, further indication of her ineffectiveness stems from her admitted failure to issue subpoenas to any of the witnesses she listed as potential witnesses on the penalty phase. Despite her advice to the Court during the trial that the witnesses were under subpoena, Ms. Steger admitted at the Hearing that no

subpoenas were issued. (TR:N/A). Her explanation for not issuing a subpoena to Mr. Cave's mother was that she did not wish to have the compelled testimony of a hostile witness. (TR:NA) She offered no explanation for why the Carswells were not subpoenaed other than to suggest that since they had medical reasons not to attend, she would not have been able to compel them to attend in any event; (TR:NA) thus, by her own testimony, Ms. Steger's entire efforts in preparation for Mr. Cave's penalty phase consisted of speaking with his mother and listing two additional witnesses who would have had difficulty traveling to St. Petersburg. In light of the favorable evidence which would have been adduced at trial from members of Mr. Cave's family with respect to his character and background, such a limited and meager investigation cannot be considered effective assistance of counsel.

Trial Counsel Inadequately Prepared for Presentation  
Of the Mitigating Circumstance of "No Significant  
Prior Criminal Activity."

Ms. Steger was additionally ineffective in her representation of Mr. Cave as a result of her intentional waiver of an instruction with respect to mitigating circumstance of "no significant prior criminal activity". There is no dispute that prior to the trial Mr. Cave had nno criminal convictions. It is also not in dispute that the jury was never made aware of this fact. The trial record indicates that Ms. Steger requested that the trial judge instruct the jury with respect to the mitigating circumstance of "no significant prior crimi-

nal activity". In response to her request, the State advised Ms. Steger that if she wished to proffer any evidence to the Court and the jury with respect to this mitigating circumstance, they would introduce rebuttal evidence relating to 1) an alleged rape committed by Mr. Cave in Pennsylvania at an undisclosed time and 2) a charge of aggravated battery arising from an incident in the Martin County Jail while Mr. Cave was awaiting trial. (ROA: ) Although Ms. Steger seemed to be surprised at the trial at the revelation of the State's intention with respect to this mitigating circumstance, two things are clear: 1) the State had never advised Ms. Steger that it intended to use the alleged charge of rape in Pennsylvania to rebut any mitigating circumstance, and 2) that the charge of aggravated battery had only been disclosed in a discovery response filed by the State less than one week earlier. Indeed, it was developed at the Hearing on this Motion that the charge of aggravated battery stemmed from an alleged incident which occurred on July 21, 1982, but on which formal charges were not filed until November 30, 1982, literally on the eve of commencement of Mr. Cave's trial. The trial record is clear that Ms. Steger made no objection to the introduction of either of these statements after she ascertained the "error" she had made in characterizing a State discovery response as an admission by the State that it had no knowledge of any significant criminal activity on the part of Mr. Cave. (TR: )

There can be little doubt that of all the statutory mitigating circumstances which possibly existed at the trial court level, even in the absence of any other evidence which was not prepared by Ms. Steger, the most positive factor which the jury could have considered was lack of any significant involvement with criminal activities by Mr. Cave. Indeed, Mr. Stone and Judge Midelis, during their testimony at the 3.850 Hearing conceded that the only negative evidence that they had relating to Mr. Cave was a charge of rape which had been dismissed in Pennsylvania some years earlier and a charge of aggravated battery relating to an incident which took place at the Martin County Jail while Mr. Cave was awaiting trial, and as to which the State apparently deliberately waited to file formal charges.

Given that Mr. Cave did not stab or shoot the victim and Ms. Steger's repeated attempt to rely on his truthfulness as a defense, the lack of any prior criminal conviction would have been extremely helpful in swaying at least one member of the jury to vote a recommendation of life.

The record shows that shortly before the commencement of Mr. Cave's trial, the State advised defense counsel that it had a witness with respect to the mitigating circumstance of no significant criminal activity in Michael Bryant. (ROA: ) That discovery demand was filed the same day that the State Attorney's Office filed an Information against Mr. Cave relating to an aggravated battery allegedly having taken place

in the Martin County Jail on July 21, 1982. Ms. Steger admitted having received the response, knowing the State's position, and admitted that she never contacted Mr. Bryant, or did anything with respect to investigating the charge of aggravated battery.

Ms. Steger's testimony as to the aggravated battery charge is instructive to demonstrate her lack of comprehension of the factors on which she should have been focusing her attention: the penalty phase and development of mitigating circumstances. Ms. Steger recalled receiving the disclosure of the aggravated battery charge. (TR:145) She also admitted that she did not talk to the witness listed by the State. She then testified:

Q Okay. This was the first time you ever heard of this man.

A Right. I had heard about an incident in jail, but I -- that seemed sort of incon -- inconsequential to me at the time since the man was facing first degree murder charges and nobody seemed to be doing anything about it. In fact nothing was done until right before trial.

Q The -- do -- do you recall what you said to Mr. Phoebus when he said that -- that the State will bring this us in mitigation, I mean in the penalty phase, do you recall anything at all?

A I just know Dvae said to me Bob wanted me to show you this. And I said fine. And that was the end of the conversation. I had other things on my mind. (TR:146, 149)

Ms. Steger's own testimony is clear that she never realized the potential effects of the aggravated battery charge on her own case. She was of the opinion that it was

"inconsequential" since he was already being tried for first degree murder. Either Ms. Steger didn't understand the legal elements of statutory mitigating circumstances, or she was so confident her "theory" would succeed that she failed, at all times, to focus on the penalty phase. Either approach is unreasonable.

Having decided to ignore the aggravated battery charge as inconsequential, Ms. Steger is then outmaneuvered by the prosecutor after her request that the trial court instruct the jury with respect to the mitigating circumstance of no significant criminal activity. No sooner does she make this request than the charge reappears. The record discloses that Ms. Steger objects to the introduction of the aggravated battery charge and any evidence relating to the rape charge in Pennsylvania on the ground that the State had previously said that it had no such evidence. Such a position at the trial level was not only completely untenable, at least as to the aggravated battery charge, but also illustrates Ms. Steger's lack of comprehension of the precise nature of statutory aggravating and mitigating circumstances. The trial record further reflects that after a short recess Ms. Steger concedes that she had been incorrect about the State's prior position and essentially conceded that no instruction on that mitigating circumstance would be requested.

At no time did Ms. Steger respond to the State's attempt to introduce the alleged rape in Pennsylvania on the



grounds that it had never been previously disclosed.

With respect to the charge of aggravated battery, moreover, Ms. Steger similarly did not object, even though at the time of the trial the only reported decision relating to circumstances similar to this had allowed non-conviction evidence in rebuttal of this mitigating circumstance only of crimes to which the Defendant had confessed. Washington v. State, 362 So.2d 658 (Fla. 1978) cert. denied 441 U.S. 937, 99 S.Ct. 2063 (1979).

Thus, through the simple expedient of responding late to a discovery request by the Defendant, the State was able to orchestrate trial counsel's complete surrender to any request to instruct the jury on the one mitigating circumstance that had strength and vitality and ability in light of her failure to obtain any witnesses for Mr. Cave.

Additionally, Ms. Steger's explanation of her decision not to pursue the mitigating factor is absolutely and totally inconsistent with her general theory of the case. As previously discussed, Ms. Steger's sole trial strategy was to try to obtain sympathy for the Defendant by portraying herself as the innocent defense attorney being taken advantage of by the more experienced, more financially well-off State Attorneys. By failing to realize that the aggravated battery charge had been filed on November 30, 1982, on the eve of trial, although the incident underlying the Information occurred on July 21, 1982, Ms. Steger missed the opportunity to argue to the jury

that they should not consider the aggravated battery charge as indicative of anything since no charges had been proven, since anyone can make an allegation about anything, since it was obvious that the State Attorney's Office didn't have much faith in the charge of aggravated battery since they didn't file it immediately after the event, but rather waited until Mr. Cave was not in a position to defend himself to do so, that the State Attorney's Office could have gotten a disposition of the charge, that had the State Attorneys had any confidence and faith in the charge they would have proceeded and filed the Information earlier, and that this was further proof that the State Attorney's Office was using bad faith. Such argument would have been persuasive and could have specifically enhanced her argument and her trial strategy of portraying herself as the poor underdog defense attorney.

In any event, the jury was never advised that Mr. Cave had never had any significant prior criminal activity. When considered in conjunction with the close jury vote to recommend death, the prejudicial effect of her failure to present such evidence is overwhelmingly apparent.

Trial Counsel's Belated Characterization of her  
Failure to Cross-Examine the Medical Examiner is  
Not Plausible Considering the Effect of her  
Decision.

An additional instance of ineffective assistance of counsel cited in Defendant's claim is Ms. Steger's failure to cross examine the medical examiner with respect to the extremely harmful and damaging testimony relating to Ms. Slater's

release of her bowels. As clearly indicated from the transcripts attached to both defendant's Motion and the State's response the trial of Mr. Cave's co-defendant, Terry Wayne Johnson, Mr. Robin Frierson, counsel for Mr. Johnson, was able to refute the medical examiner's testimony that the release of Ms. Slater's bowels were consistent only with her being in fear prior to her death. Ms. Steger's testimony at the hearing, prompted in great measure by State Attorney Barlow, was that she intentionally did not do any cross examination since she was fearful that the issue of Ms. Slater's bowel release would then be heightened on redirect by the effective and potent examination of Mr. Stone who would have, in her hindsight, done exactly what he did at the Terry Wayne Johnson trial and had Dr. Wright concede that although it was consistent with both release of bowels upon death and release of bowels in fear, it was more consistent with fear than death. Yet, such examination could hardly have been more harmful than Ms. Steger's failure to do any cross.

It is difficult to imagine any other single piece of evidence that was more dramatic, and that was relied upon by more parties than Dr. Wright's testimony that Ms. Slater definitively released her bowels as a result of being in fear. That testimony was used by the State in its closing argument, in its argument during the penalty phase, was specifically relied on by the trial court to support a finding that the crime was heinous, atrocious, and cruel, and was specifically

cited as a factor, and in the Supreme Court's decision affirming the conviction below. Given the effect which this testimony obviously had, Ms. Steger's trial strategy cannot be considered reasonable. A cross examination such as that undertaken in the Terry Wayne Johnson case would have at least diminished the emotional and explosive nature of this testimony. It is difficult to conceive that given specific testimony by the medical examiner himself that that evidence was consistent with two potential theories, the trial court would have relied on such testimony as much as it did, or that the Supreme Court of Florida would have relied on the testimony as much as it did. Indeed, it would have been difficult for the State to credibly have argued this factor during its own closing statement. Again, assuming the truth of Ms. Steger's testimony, it is not reasonable trial strategy to leave standing without question testimony which was so damaging, and which was employed to such great extent against Mr. Cave.

Moreover, Ms. Steger did not take the deposition of Dr. Wright prior to the trial. In light of the trial testimony of Dr. Wright, this decision not to take his deposition prior to trial cannot be supported as reasonable trial strategy.

Trial Counsel's Explanation for her Allowing  
Testimony of a Co-defendant's Statement is  
Indicative of her Inability to Understand the  
Legal Ramifications of her Acts.

Finally, another factor which was developed at the Hearing was Ms. Steger's ineffectiveness in allowing testimony of a co-defendant's statement to be admitted by her own waiver of any objection to its introduction. The record is clear that Ms. Steger made no objection to the introduction of any evidence relating to the contents of a statement made by Mr. Cave's co-defendant. Indeed, her failure to object allowed the introduction of the testimony by Officer Lloyd Jones that Mr. Bush's statement "implicated" Mr. Cave and that Mr. Bush stated that Mr. Cave "participated in the crime". The decision of the United States Supreme Court in Bruton v. United States, clearly states that a statement of a co-defendant will not be admitted and will not be allowed into evidence absent the opportunity by the Defendant to cross examine the co-defendant. Had Ms. Steger objected to any testimony about Mr. Bush's statement,

the entire statement and all the testimony about the statement would never have been introduced. Ms. Steger's explanation at the Hearing for her failure to make a broader objection was that she was intentionally trying to disassociate Mr. Cave from the other defendants in the action, and that the testimony was not all that damaging. Assuming that to be her correct thought process at the time of the trial, it is difficult to perceive of anything more damaging than what she did. Officer Jones' testimony simply told the jury that Mr. Cave was implicated and that he participated in the crime, without any further explanation or detail. Ms. Steger, together with the State, argued at the hearing that the minor nature of the testimony of participation and implication negated any possible harmful effect upon the jury. Such an argument is untenable. Moreover, it is inconsistent with her own theory of the case. Had Ms. Steger indeed been attempting to disassociate Mr. Cave from the other defendants, she would never have allowed testimony that stated that Mr. Cave participated in the event. Similarly, she should have never allowed the evidence that Mr. Cave was implicated by Mr. Bush's statement.

Ms. Steger's failure to fully understand the Bruton rule and to then concoct a theory to support her initial misunderstanding are ample indications of her ineffectiveness in representing Mr. Cave. It is difficult to argue, as the State does, that the testimony of Officer Jones that Mr. Cave was implicated and participated was minor in nature and would not

have made any difference given Mr. Cave's own confession. Mr. Cave's confession simply stated that he was part of the robbery and further stated and made clear that he did not commit either the stabbing or the shooting. It further suggested, as Ms. Steger attempted to argue in closing, that he had no intention of killing Ms. Slater and had thought they were just going to release her after the car ride. It is not beyond the realm of possibility that the testimony that Mr. Bush's statement implicated Mr. Cave and that Mr. Cave participated in the event, surrounded by the illogical objections made by Ms. Steger during this testimony could have persuaded one or more jurors that Mr. Bush's statement, if it were admitted, would show more participation in the event than Mr. Cave's statement had indicated at that point. The sum result of Ms. Steger's misunderstanding of Bruton or, as she would prefer to have it, her intentional strategic tactic to allow such evidence in, was that the jury was exposed to testimony which suggested a participation in the crime by Mr. Cave to a degree much higher than that suggested in his own statement and absolutely at odds with Ms. Steger's admitted trial theory.

The totality of Ms. Steger's ineffectiveness can certainly be reasonably seen as having affected the outcome and the sentence rendered by the jury. The jury vote to render an advisory verdict of death was 7 to 5 indicating that a shift in only one vote from the group of 7 would have effectively rendered a life sentence for Mr. Cave. Ms. Steger's ineffective

assistance produced the following scenario: Ms. Steger had no perceptible legal theory upon which she could defend Mr. Cave so she resorted to an unfounded and unwise trial tactic which would hopefully confuse the jury by purposely misstating Florida Law. Despite the inherent unreasonableness of that position, Ms. Steger nevertheless totally ignored the possibility of a conviction on first degree murder and the necessity to present any evidence of mitigation at the penalty phase. Assuming Ms. Steger's testimony to be true, Ms. Steger simply did not follow through and perform an adequate investigation in an attempt to find witnesses who would testify on behalf of Mr. Cave. Thus, she had no legal theory upon which she could anticipate an acquittal, and she had no evidence and no witnesses prepared for penalty phase. Despite this difficult position, Ms. Steger suggests that her trial strategy compelled her to allow evidence that Mr. Cave's co-defendant conceded that he participated and was implicated in the entire crime, she purposely did not cross examine the medical examiner for fear of highlighting a fact which, as a result of her failure to cross examine, became a primary source of a factual finding against Mr. Cave, and with no apparent reason and with no full understanding of the legal implications of her decision, waived any instruction to the jury that Mr. Cave had no prior significant criminal activity. This scenario is built upon her own testimony, and does not take into account the significant contradictory evidence. Even assuming that everything that Ms.



Steger testified to was correct, her representation fell far below the level expected of competent and reasonable counsel. There can be no doubt that all of these factors taken together, and indeed each of them individually, would support a conclusion that based on her ineffective representation, Mr. Cave was prejudiced by the imposition of the death penalty.

As previously stated, the jury's determination in this case was 7 to 5 in favor of death. The State suggested at the Hearing below that the 5 votes in favor of a life sentence indicate the extraordinary level of effectiveness exhibited by ms. Steger. Accepting that argument as true, although rather implausible, it would not be difficult to conclude that had Ms. Steger done even a small amount more preparation for the penalty phase, had the jury been aware that Mr. Cave had no prior significant criminal record, had the jury been aware of Mr. Cave's background and his character, had Mr. Midelis not been able to argue that no person had come forward to testify on Mr. Cave's behalf, that one additional juror would have been swayed to vote in favor of a life sentence.

The Hearing below conclusively demonstrated that trial counsel was a) ineffective and that b) her ineffectiveness can reasonably be considered to have had an effect on the sentencing verdict rendered by the jury.

THE APPLICATION OF RULE 3.851 TO MR. CAVE'S  
CASE VIOLATES HIS RIGHTS TO DUE PROCESS AND  
EQUAL PROTECTION OF LAW AND DENIED HIM HIS  
RIGHT TO UNIMPEDED ACCESS TO THE COURTS.

In the absence of a warrant in this case, Mr. Cave had until June 9, 1988 to file his Motion for Relief under Rule 3.850. However, the Governor of Florida signed a death warrant against Mr. Cave on April 27, 1988, and Mr. Cave's execution is presently scheduled for July 7, 1988. Under Rule 3.851, Mr. Cave's pleadings, therefore, had to be filed by May 27, 1988. The signing of Mr. Cave's death warrant thus accelerated the time within which he must file for post-conviction relief by thirteen (13) days. Unlike other inmates sentenced by Florida courts who have two years from final judgment to bring such actions, Mr. Cave was arbitrarily deprived of the full extent of time during which he could timely file under Rule 3.850. This acceleration was unreasonable and furthered no legitimate state interest. To the contrary, it impeded Mr. Cave's right to properly investigate, research, prepare, and present a Rule 3.850 motion. As the Florida Supreme Court has recognized, Rule 3.850 proceedings are governed by due process principles. See Holland v. State, 503 So.2d 1250 (Fla. 1987). The timing of the litigation of Mr. Cave's post-conviction actions, however, has now been dictated by the Governor, a non-judicial officer and a party opponent, through the signing of a death warrant. Due process and equal protection do not countenance such a result.

Rule 3.851, under these circumstances, indeed creates an unreasonable, unwarranted and unnecessary crisis environment. The Florida Supreme Court, however, through the creation and implementation of Rule 3.851, could not have intended that the State receive a windfall benefit, or that the inmate suffer a significant detriment, i.e., the arbitrary acceleration of the litigation of this action and resultant loss of additional time to prepare his case. No rule of criminal procedure could possibly be interpreted as an attempt by the Court to provide a strategic advantage to one of a controversy's litigants. (In this case, not only does Rule 3.851 provide the State's executive with such a strategic advantage, but it has allowed the executive (a party opponent) to specifically determine the timing of this action.) On the contrary, the Court's rationale in establishing the rule was that Rule 3.851 "(was) necessary to provide more meaningful and orderly access to the courts when death warrants are signed." In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So.2d 320, 321 (Fla. 1987) (emphasis added). The arbitrary and discriminatory acceleration of the filing requirements applicable to Mr. Cave's case, however, denied that very right to "orderly access to the courts," and disrupted precisely the order sought by the Florida Supreme Court. Cf. Davis v. Dugger, 829 F.2d 1513, 1521 (11th Cir. 1987) (Dismissal of habeas petition reversed and case remanded, because "(i)t was . . . the scheduling of petitioner's execution . . . that both made petitioner's delay

unreasonable and created the prejudice that respondent contends justified the district court's (dismissal) of the habeas petition . . . (P)rejudice must be due to the petitioner's delay and not to some other factor . . ." (emphasis in original)); see also id. at 1520 ("(I)t would be anomalous to hold that pursuit of collateral relief within the two-year statutory limitations period in Florida might nevertheless constitute unreasonable delay . . .").

Rule 3.851 provides:

Expiration of the thirty-day period procedurally bars any later petition unless it is alleged (1) that the facts upon which the claim is 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 period, . . .

This rule, to the extent that it grants to the Governor of Florida, a non-judicial officer, and a party opponent, the ability to curtail access to the courts by shortening the two year period in which a Rule 3.850 motion may be filed is unconstitutional. Moreover, the facts supporting a post-conviction claim for relief cannot become known unless the case is adequately investigated. A case cannot be adequately investigated when counsel's duties are made impossible to fulfill, or where, as here, a death warrant is arbitrarily signed.

The United States Supreme Court in a long line of cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), recognized the right of convicted inmates to restricted access to the courts in order to use established avenues for seeking

post-conviction relief.

In Lane v. Brown, 372 U.S. 477 (1963), the United States Supreme Court addressed the Indiana post-conviction procedure which authorized an appeal to the Indiana Supreme Court from the denial of a writ of error coram nobis. The appeal, however, was dependent upon the filing with the Indiana Supreme Court of a trial transcript -- in fact this was a jurisdictional requirement. An indigent petitioner could only get a transcript for purposes of meeting the jurisdictional requirement if the state public defender believed there was merit in the appeal and agreed to direct that the transcript be prepared and sent to the Supreme Court. The United States Supreme Court held this procedure unconstitutional saying: "The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all." 372 U.S. at 485.

Three years later in Rinaldi v. Yeager, 384 U.S. 305 (1966), the Court addressed the constitutionality of a New Jersey provision which authorized the withholding of prison pay from an unsuccessful indigent appellant in order to recoup the cost of the appeal. In striking the provision down, the Court pronounced: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The Court again discussed the Griffin progeny in

Bounds v. Smith, 430 U.S. 817 (1977). There the question was an inmate's right to a law library or legal assistance. The Court's opinion observed: "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." 430 U.S. at 821. Implicit in the Court's reasoning was the notion that Griffin and its progeny are founded upon the fundamental right to court access and thus that under either substantive due process or equal protection analyses distinctions between individuals and/or groups must withstand strict scrutiny.

The United States Supreme Court has thus made it very clear that although a state is not required to provide inmates with a procedure for seeking post-conviction relief, where such a procedure has been established there arises the fundamental right of access to the courts in order to take advantage of it. Distinctions that are made between those who would seek relief cannot impede open and free access: there must be equal access. At issue here, in the application of Rule 3.851 to Mr. Cave's case, are two distinctions: first, the distinction between the capital defendant and the non-capital defendant; and second, the distinction between the capital defendant under warrant and the capital defendant not under warrant. For Rule 3.851 to be constitutionally applied to deprive Mr. Cave of any of his remaining time to seek Rule 3.850 relief the distinctions must be shown to be necessary to a compelling state interest. There exists no such interest.

Obviously, the two-year limitation established by Rule 3.850 itself for seeking relief was created to give convictions finality. However, if that was the only consideration, the court could have easily established a one month, or one week, as opposed to a two year limitation. The Court could not but have had another competing concern in mind: the realization that time is essential to prepare a Rule 3.850 motion -- time to investigate, to research, and to prepare. Two years is necessary in order to ensure sufficient time for the investigation and the preparation of the pleading. Rule 3.850 contains no distinction between capital and non-capital movants; the rule applies equally to all. However, the time that the death row inmate has to marshal his resources and prepare his Rule 3.850 motion can without warning and at the whim of the Governor, be slashed to thirty days. An unlawful distinction can arbitrarily be made between one death row inmate and another death row inmate, and between capital and non-capital litigants. The distinction is made by the executive, a party opponent, when he signs a warrant before the two year period to file a Rule 3.850 motion expires. When that occurs, whatever remains of the two year period under Rule 3.850 is automatically converted to thirty days. See Rule 3.851. Mr. Cave has been denied quite an important portion of that two year period.

The distinction that the Governor made when he signed a warrant in Mr. Cave's case along with eight other warrants

during the period between April 21 and May 6, was in the words of Rinaldi v. Yearger, supra, 384 U.S. 305, "unreasoned". Constitutional error arises when the two year limitation is applied only against the death row inmate but not against the State, which effectively grants the State the power to use 3.851 as a sword. The two year limit in Rule 3.850 represented a balancing which gave to the State a date certain and which created, in return, an obligation on the State to honor that date.

To the extent that Rule 3.851 is interpreted to permit the Governor to shorten the two year period established by Rule 3.850, it creates a distinction which, in the words of Lane v. Brown, "confers upon a state officer outside the judicial system (the) power to take from an indigent." In Lane the state officer involved was the public defender, not a party opponent. Even this, however, was not enough -- the Court struck down the statute. Certainly, the application of Rule 3.851 against Mr. Cave gave to the Governor the power to impede open and equal access to the courts; exactly what has been held time and again to be improper.

To be constitutional, Rule 3.851 must be construed as only applying to Rule 3.850 motions or writs of habeas corpus which are or may be filed beyond the two year time limit. Its application to those cases in which the two years has not run infringes upon the very right of access to the courts which Rule 3.850's two-year standard sought to protect.



Moreover, due process and equal protection cannot be squared with the fact that although Rule 3.850 provided Mr. Cave with two years within which to prepare and file a Rule 3.850 motion, the executive was arbitrarily permitted to deny that state-created "liberty interest" through the signing of a death warrant. Cf. Hicks v. Oklahoma, 447 U.S. 343 (1980); Vitek v. Jones, 445 U.S. 480, 488-89 (1980). Rule 3.850's two year limitation was created, in part, to assure the inmates' right to reasonable access to a post-conviction forum. The dictates of Evitts v. Lucey should apply to Mr. Cave's case and make clear his entitlement to the relief sought herein:

(W)hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause.

469 U.S. 387, 401 (1985); see also Johnson v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). The Governor's arbitrary action in this case violated the very test of due process which the United States Supreme court made mandatory in such instances. See Michael v. Louisiana, 350 U.S. 91, 93 (1953); Reece v. Georgia, 350 U.S. 85 (1955).

Finally, due process was violated because this case involves a classic example of "interference by (State) officials" -- i.e., the Governor -- which impeded Mr. Cave's rights to full and fair access to courts. Cf. Brown v. Allen, 344 U.S. 443, 486 (1953), quoted in Murray v. Carrier, 106 S.Ct. 2639, 2646 (1986).

As the en banc Eleventh Circuit Court of Appeals stated in Spencer v. Kemp, 781 F.2d 1458, 1470 (1986):

(A) state procedural rule that is facially valid and has been consistently followed by the state courts will not preclude review of federal claims where its application in a particular case does not satisfy constitutional requirements of due process of law. Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

Mr. Cave was denied the protections of Rule 3.850 through the arbitrary actions of the state's executive -- actions whose purposes can have no relationship to any legitimate and constitutionally recognized state interest.

Additionally, the issuance of the warrant reduced Mr. Cave's time to fully prosecute and appeal any order relating to his Motion for Relief pursuant to Rule 3.850. In the absence of a warrant, the Defendant would have more time to file a Notice of Appeal to the Florida Supreme Court. The briefing schedule would also permit full and thorough appellate review. See Fla. Rule of App. Proc. 9.140. Yet, by signing the warrant, the Governor has reduced requirements to the point where this Court has scheduled oral argument of the denial of the Motion for a date less than one week after the entry of the Order denying that very Motion. The prejudice to the defendant under these circumstances is evident. Counsel is required to fully brief a denial of a motion, a portion of which was subject to two days of hearings, without benefit of a complete transcript of the proceedings. It is obvious, that insistence by this Court on the usual process of appellate review would

extend the time period beyond the date set for the execution. Such a denial of defendant's access to the court is, as previously stated, constitutionally deficient.

In light of the patent violations of defendant's constitutional rights by the truncating and denial of his access, fully and unfettered, to judicial review, including review by the Court, it is evident that only a stay of the execution from this Court with an accompanying order setting forth a reasonable briefing schedule consistent with the briefing schedule accorded all other prisoners in non-warrant cases under Rule 3.851 is the only manner in which this court can remedy the present crisis situation, and correct the constitutional violations inherent in the Rule 3.851.

THE ORDER BELOW DID NOT  
FIND FACTS TO SUPPORT ITS  
ERRONEOUS CONCLUSIONS OR  
ATTACH PORTIONS OF THE  
RECORD WITH RESPECT TO  
THOSE CLAIMS WHICH WERE  
SUMMARILY DENIED

Rule 3.850(f) provides, in pertinent part:

If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and . . . determine the issues and make findings of fact and conclusions of law with respect thereto. (Emphasis added.)

The order below is devoid of any findings of fact to support the court's conclusion that, with respect to Defendant's claim of ineffective assistance of counsel, "none of the evidence establishes either prong of the Strickland test." (Order, page 13). The court below simply signed an order, prepared by the State Attorney's Office prior to completion of the evidentiary hearing, which contains no required factual findings.

Additionally, with respect to those portions of the motion which were denied without benefit of a hearing, the court failed to attach portions of the record which conclusively determine that no relief was warranted.

Accordingly, the order below must be reversed.

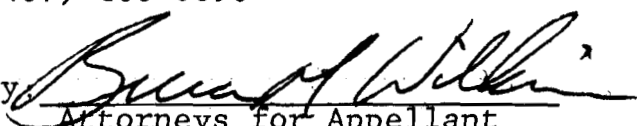
CONCLUSION

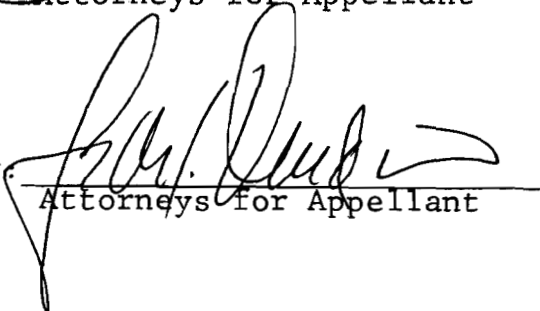
Based on the foregoing discussion, Mr. Cave urges that the Court enter an order staying his execution, reverse the Order entered below and direct the the court consider, on additional proceedings, all claims asserted by Mr. Cave on the motion for relief pursuant to Rule 3.850, grant the post-conviction relief sought herein and grant all other and further relief which the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of  
the foregoing has been furnished by hand delivery to the office  
of the Attorney General of the State of Florida,

Tallahassee, Florida, this 27<sup>th</sup> day of June, 1988.

  
\_\_\_\_\_  
ANDRES J. VALDESPINO