IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,757**

BARRY HOFFMAN,

Appellant,

v.

STATE OF FLORIDA.

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DWAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Hoffman's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. **3.850,** and involved claims traditionally brought under Rule **3.850.** However, no evidentiary resolution of the facts was allowed.

The following shall be used in this brief to designate references to the record: "R. **"** (Record on Direct Appeal): "App. __**"** (Appendix to the Rule **3.850** Motion). All other citations shall be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Hoffman has been sentenced to death and the resolution of the issues involved in this action shall affect the question of whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Hoffman through counsel accordingly respectfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE

A. INTRODUCTION

This case is before the Court on appeal of the summary denial of Mr. Hoffman's Rule 3.850 motion. Even though numerous factual issues were raised -- issues classically resolved through an evidentiary hearing in Rule 3.850 proceedings -- the lower court summarily denied the motion without allowing an evidentiary hearing, without making any findings of fact, without ever resolving the factual questions involved, and without attaching to the one-line orders denying Rule 3.850 relief and then rehearing anything from the record that conclusively established that Mr. Hoffman was entitled to no relief. The files and records in this case by no means conclusively show that Mr. Hoffman is entitled to no relief -- to the contrary, the files and records demonstrate that Mr. Hoffman may well be entitled to relief and that he certainly is entitled to the opportunity to present the facts supporting his claims at an evidentiary hearing. This case also involves one of those few instances in which the state attorney's office and circuit court have refused to allow disclosure of law enforcement and state attorney files pursuant to section 119, Fla. Stat. That matter has also been appealed to this Court in a separate but directly related action, and a brief in that regard is being filed in conjunction with this appeal.

B. STATEMENT OF THE FACTS

On September 7, 1980, Frank Ihlenfeld, a 54 year old narcotics trafficker and Linda Sue Parrish, a 20 year old prostitute were murdered in their motel room at the Ramada Inn in

Jacksonville Beach, Florida. An intensive investigation that included wire taps and undercover operatives was undertaken, and the investigtion focused on James Provost, who had procured the murders. Through a series of events still not fully disclosed to the defense, the investigation ultimately resulted in the arrest of Barry Hoffman, a heroin addict, caught up in the drug world to support his habit. Mr. Hoffman was under the influence of narcotics when apprehended and questioned, and without counsel present gave statements that purported to be incriminating.

Mr. Hoffman then entered guilty pleas in exchange for concurrent life sentences. Then, without the benefit of counsel, the pleas were withdrawn after Mr. Hoffman refused to testify against Leonard Mazzara. Mr. Hoffman had no counsel present when he was put on the stand at Mr. Mazzara's trial, nor apparently through many hours of meetings with the prosecutor during the proceedings.

Mr. Hoffman was then charged with two counts of murder and one count of conspiracy to commit murder. The defense at trial was one of innocence, that while Mr. Hoffman knew the people involved and had been hired to watch them, he never actually arrived at the Ramada Inn that day and did not participate in the killings. Defense counsel's investigation, however, was woefully inadequate, both for trial and sentencing. Just as significantly, counsel never properly advised or assisted his client during the court of the aborted guilty plea.

The facts relevant to the claims for relief are discussed in the body of this brief, as they relate to the claims presented.

C. PROCEDURAL HISTORY

Mr. Hoffman was indicted on two counts of murder on October 28, 1981, and was later charged by information with conspiracy in March of 1982. The cases were consolidated upon the State's motion (R. 37). On June 28, 1982, the Court accepted Mr. Hoffman's pleas of guilty to two counts of first degree murder, and agreed to sentence him to two concurrent life sentences with the conspiracy charge nolle prossed (R. 78). This plea was withdrawn, as discussed in the body of this brief, on September 24, 1982 (R. 52).

The trial took place in January, 1983. Mr. Hoffman was convicted of one count of first degree murder, one count of second degree murder, and one count of conspiracy (R. 120-21).

The penalty phase was conducted on January 20, 1983. Mr. Hoffman made a brief statement to the jury. No witnesses were presented by defense counsel. The jury recommended death by a vote of nine to three (R. 122).

The court imposed a sentence of death on February 11, 1983 (R. 127). Mr. Hoffman was also sentenced to 100 years imprisonment for the second degree murder conviction (R. 128), and 30 years imprisonment for the conspiracy conviction (R. 140). This Court affirmed on direct appeal. Hoffman v. State, 474 So. 2d 1178 (Fla. 1985). Counsel pursued no certiorari proceedings.

On October 2, 1987, Mr. Hoffman timely filed a motion to vacate pursuant to Fla. R. Crim. P. 3.850. The Motion was summarily denied in a one-line order by the circuit court on October 7, 1987. A motion for rehearing was timely filed on

October 22, 1987. This motion was summarily denied on January 17, 1989. This appeal follows.

SUMMARY OF ARGUMENTS

I. The lower court erred in summarily denying Mr. Hoffman's Rule 3.850 motion. The files and records do not conclusively show that Mr. Hoffman is entitled to no relief. Indeed, no portion of the record was attached to the lower court's one-line orders. Numerous facially sufficient claims were presented to the trial court that alleged facts not "of record." This Court's precedents make it plain that evidentiary resolution is required in a case such as this. The lower court's order should be reversed and this case remanded for proper evidentiary resolution.

II. Mr. Hoffman was unrepresented by counsel during critical stages of the proceedings at which he made decisions crucial to his defense and his life. Mr. Hoffman never waived his right to counsel and consistently requested the assistance of counsel. This case involves a **per se** violation of the sixth amendment's right to counsel and no prejudice need be shown. However, Mr. Hoffman can show that he was substantially prejudiced. An evidentiary hearing is required.

III. The State failed to disclose critical impeachment and exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. The State's failures to disclose information continue to this day, as the State has flatly refused to comply with the dictates of Fla. Stat. section 119. This case should be remanded for an evidentiary hearing on the Brady issue, and disclosure pursuant to section 119, Fla. Stat., should be

ordered.

IV. Mr. Hoffman, a life long substance abuser dependent on numerous brain damaging drugs, was under the influence of narcotics at the time of his arrest and interrogation, and was rendered incapable of knowingly and voluntarily waiving ~~Miranda~~ rights. He in fact believed that he had preserved his right to silence by signing the waiver form provided to him by law enforcement personnel. His mental impairment was of such a severity that any statements made during that time could not have been knowingly, intelligently, and voluntarily made. His attorney, however, failed to properly investigate and prepare, and therefore rendered prejudicially deficient assistance on this issue. An evidentiary hearing is necessary, on the basis of the facts alleged in the motion to vacate, in order for this claim to be properly resolved.

V. Trial counsel's investigation and preparation were woefully lacking and inadequate. He consequently was not prepared to effectively represent Mr. Hoffman at trial, and was grossly deficient at sentencing. As discussed in the body of this brief, and as pled below, each of counsel's failures is sufficient to warrant relief. Taken together, there can be no question that Mr. Hoffman's right to a fair trial and an individualized capital sentencing determination were denied by counsel's deficient performance. An evidentiary hearing is required.

VI. During his closing arguments at the guilt-innocence and the penalty phases of trial, the prosecutor intentionally

misstated facts, testified, manipulated evidence, and bolstered the credibility of the government's witness, so infecting the proceedings as to make the conviction and sentence of death fundamentally unreliable. Trial counsel's failure to do anything at all about this pervasive prosecutorial misconduct was prejudicially deficient attorney performance. Here, there was no objection, no motion for mistrial, nothing. An evidentiary hearing is necessary.

VII. The court improperly applied the "cold, calculated, premeditated" aggravating circumstance, and no limiting construction was provided to the jury, in contravention of the constitutional requirements of Mavnard v. Cartwrisht, **108** S. Ct. **1853 (1988),** and of what this Court has defined as "cold, calculating, and premeditated" in Rogers v. State, **511** So. 2d **526** (Fla. **1987).** Although the Court addressed this issue in Mr. Hoffman's pre-Cartwright direct appeal, it is respectfully submitted that fundamental fairness requires that relief be granted in light of Cartwrisht.

VIII. Mr. Hoffman's trial counsel rendered ineffective assistance during the penalty phase proceedings by failing to object to the trial court's improper instruction concerning the mitigating factors stipulated to by the State and the defense, to the prosecutor's argument which directly contravened the stipulation, or to the judge's bias concerning the mitigating factors applicable to Mr. Hoffman. Counsel's failures resulted in violations of the sixth, eighth, and fourteenth amendments, and an evidentiary hearing is necessary in order for this claim to be properly resolved.

IX. This capital jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted its sense of responsibility for sentencing. Appellant recognizes that this Honorable Court has held that Caldwell v. Mississippi does not apply to Florida capital sentencing proceedings. He respectfully urges, however, that in the interests of fundamental fairness those holdings be revisited. Moreover, defense counsel ineffectively failed to object to the comments and instructions, and an evidentiary hearing is necessary for this aspect of the claim to be properly resolved.

ARGUMENT

ARGUMENT I

THE RULE **3.850** COURT'S SUMMARY DENIAL OF MR. HOFFMAN'S MOTION TO VACATE WITHOUT *AN* EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

The lower court summarily denied Mr. Hoffman's claims in a one-line order without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims for Rule **3.850** relief (it does), without any explanation as to whether (and why) the files and records conclusively showed that Mr. Hoffman is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Hoffman is entitled to no relief (the record supports Mr. Hoffman's claims). The lower court's order in its entirety reads as follows:

> It is, upon consideration, ORDER AND ADJUDGED that the Defendant's Motion To Vacate Judgment and Sentence With Special Request For Leave To Amend should be, and the same is hereby DENIED.
>
> DONE AND ORDERED in Chambers, Jacksonville, Duval

County, Florida this 7th day of October, 1987.

A motion for rehearing was timely filed by Mr. Hoffman. The rehearing motion discussed the errors in the trial court's disposition. The lower court denied rehearing on January 17, 1989, by an order which stated, in its entirety:

> Upon consideration of the Defendant's Motion For Rehearing of his Motion to Vacate Judgment and Sentence with Special Request For Leave To Amend and the record herein, it is, upon consideration, hereby ORDERED AND ADJUDGED that said Motion For Rehearing should be and the same is hereby Denied.
>
> DONE AND ORDERED in Chambers, Jacksonville, Duval County, Florida this 17th day of January, 1989.

The lower court's summary denial of Mr. Hoffman's Rule 3.850 motion was incorrect. Many of the issues presented in the Rule 3.850 motion were of the type plainly requiring evidentiary resolution of facts that are not "of record." Questions relating to the State's failures to provide discovery, questions concerning Mr. Hoffman's capacity to knowingly and intelligently waive Miranda rights during questioning, of the admissibility of any resulting statements, and of counsel's conduct in litigating these issues, questions of trial counsel's deficient performance at both the guilt and penalty phases of trial, questions relating to counsel's failure to appear with Mr. Hoffman at critical stages of the proceedings, and questions concerning counsel's failures during the aborted guilty plea, were all presented by the motion to vacate and all involved matters that must be dealt with in an evidentiary hearing.

Mr. Hoffman also raised claims involving violations of Bradv

v. Maryland, 373 U.S. 83 (1963), and its progeny.[1] The Ihlenfeld/Parrish murder case involved just a small part of an intensive narcotics investigation focused on James Provost. There were many hours of wire taps, many individuals under surveillance and after the murders, many suspects. Most of this information was not and still has not been turned over by the State, even though much of it is exculpatory as to Mr. Hoffman, and in any event has significant impeachment value. Mr. Hoffman has repeatedly requested this information through Fla. Stat. 119.01 et seq., but has been flatly denied access to public records. The documents and facts presented with Mr. Hoffman's Rule 3.850 motion (and more thoroughly discussed in subsequent portions of this brief) present a claim that information that had impeachment value for, and/or was exculpatory as to, Mr. Hoffman was not provided to the defense. The claim involved non-record facts concerning which the lower court allowed no evidentiary resolution. Evidence as to one serious suspect, Maurice "Bubba" Jackson, linked Jackson to Frank Ihlenfield in business and criminal dealings. This evidence also provided a witness, David Jack, to whom Jackson had stated:

> a very bad thing had gone down at the Ramada Inn and that it was something that [Jackson] had to do

(App. R). Mr. Jack went on to explain that Jackson was talking about the killing of Frank Ihlenfield and Linda Parrish. As pled in the Rule 3.850 motion, this type of significant information

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[1] As noted previously, a separate, albeit directly related action involving the State's refusal to comply with requests made for information pursuant to Fla. Stat. section 119 is also before the Court.

was never heard by the jury either through the State's misconduct or through defense counsel's failure to investigate. In either event, the question is certainly one that needs to be resolved at an evidentiary hearing. Surely, whether the State withheld evidence of suspects who confessed to the crime for which Mr. Hoffman was convicted, witnesses who knew the identity of the killers, hair samples that could have eliminated Mr. Hoffman as a suspect, or whether these facts were simply not used by the trial attorney because of inadequate investigation, are matters that must be resolved at a fact-finding hearing.

As this Honorable Court's precedents and Rule 3.850 itself make clear, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Hoffman's motion alleged facts which, if proven, would entitle him to relief. The files and records did not "conclusively show that [he] is entitled to no relief," and the trial court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous. Indeed, the circuit court attached to its one-line orders nothing which rebutted Mr. Hoffman's claims.

Mr. Hoffman's verified Rule 3.850 motion alleged (supported by factual proffers) the extensive non-record facts concerning

claims which have traditionally been raised in Florida post-conviction proceedings and tested through evidentiary hearings. Mr. Hoffman is entitled to an evidentiary hearing with respect to these claims: there are no files and records which conclusively show that he will necessarily lose. Even if that was what the lower court judge believed, in such instances the judge must attach "a copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief . . ." Fla. R. Crim. P. 3.850; Lemon, supra. Otherwise, an evidentiary hearing is proper. The lower court attached no portion of the record, nor addressed any of these matters in his order. This case involves matters that are not "of record," and the circuit court erred in denying an evidentiary hearing and in summarily denying the motion to vacate. Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review. The lower court erred in declining to allow factual, evidentiary resolution.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." See also Vauaht v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler V. State, 452 So. 2d 537 (Fla. 1984); Vausht, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith V. State, 382 So. 2d 673 (Fla. 1980); McCrae V. State, 437 So. 2d 1388 (Fla. 1983); LeDuc V. State, 415 So. 2d 721 (Fla. 1982); Demps V. State, 416 So. 2d 808 (Fla. 1982);

Aranao v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Hoffman was (and is) entitled to an evidentiary hearing, and the trial court's summary denials of the Rule 3.850 motion and motion for rehearing were erroneous.

ARGUMENT II

MR. HOFFMAN WAS DENIED HIS RIGHT TO COUNSEL, AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN CRITICAL STAGES OF THE PROCEEDINGS WERE CONDUCTED WITHOUT COUNSEL.

The sixth amendment guarantee of the right to the assistance of counsel is beyond dispute:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)(footnotes omitted).

> [L]awyers in criminal courts are necessities, not luxuries. . . . A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:
>
> > "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. **He requires the guiding hand of counsel at every step in the proceedings against him**. Without it, though

> he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 68-69, 53 S.Ct., at 64, 77 L.Ed. 158.

Gideon V. Wainwright, 372 U.S. 335, 344-45 (1963). The right to the assistance of counsel during critical stages, i.e., when the defendant must deal with the government or the court, is carved in constitutional stone: "The adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate,'" United States v. Cronic, 466 U.S. 648, 656 (1984), quoting Anders v. California, 386 U.S. 738, 743 (1967), the proceedings are rendered fundamentally unreliable and unfair if a criminal defendant is deprived of the right to counsel at a "critical stage" of the proceedings. Cronic, 466 U.S. at 659.

Mr. Hoffman, however, stood by himself at critical stages of the proceedings at which he was entitled to counsel, and for which there was no waiver of counsel. This is a **per se** violation of the sixth amendment. While specific prejudice need not be proven, the prejudice resulting from this fundamental error is apparent: proceeding alone, but without having waived counsel, Mr. Hoffman did things and made statements which placed him in the electric chair. When he appeared with counsel, he was guaranteed a twenty-five year prison sentence. When he appeared without counsel, he set in motion his death sentence.

Mr. Hoffman was arrested in October of 1981, and attorney Nichols was appointed to represent him on October 29, 1981. On June 25, 1982, Mr. Hoffman filed, **pro se**, a pleading entitled "Dismiss Ineffective Counsel" (R. 40). The motion recited that

counsel had not performed properly, had not done what Mr. Hoffman requested, and was indifferent and unconcerned about Mr. Hoffman's case. A hearing was held on the motion that same day.

At that hearing, counsel requested permission to withdraw. After inquiry, the Court learned that the differences between Mr. Hoffman and Mr. Nichols concerned what the attorney was and was not doing in the case (**see** R. **46**), that Mr. Hoffman did not wish to represent himself, and that he simply wanted other counsel (**see** R. **42**, **46-47**). The Court made specific findings with regard to whether Mr. Hoffman was representing, should represent, or could represent himself:

> Now, whatever you consider -- you don't have the qualifications to make a judgment call on a trial.
>
> You have the right to represent yourself if you wish, but you know the State is asking for the death penalty in this case.
>
> MR. HOFFMAN: I know.
>
> THE COURT: So, your life is at stake.
>
> MR. HOFFMAN: That's why I'm doing what I'm doing.
>
> THE COURT: I don't think **it's** proper you should represent yourself when you are playing with your own life. I think you are adequately represented by Mr. Nichols. I will not allow him to withdraw or allow you to "fire him." You don't have that luxury. It just isn't available to you. If I thought for one moment that he was not representing you properly, I would discharge him. But I don't feel that way.

(R. **47**).

Three days later, Mr. Hoffman entered a plea of guilty in the presence of counsel:

> MR. NICHOLS: . . . The agreement made between the State and defendant is that this recommendation is being made in exchange for the defendant's agreement to assist the State in the prosecution of another defendant charged in the same incident, Mr. Mazzara, and that the

sentencing on Mr. Hoffman would be postponed until after the trial of Lennie Mazzara.

Other than that, I believe there are no other terms or conditions as part of the agreement.

* * *

THE COURT: Mr. Hoffman, I want you to listen very carefully to me.

You have entered a plea of guilty and by doing so you have given up the right to trial by jury or by the Court.

You have given up the right to require the State of Florida to prove your guilt beyond a reasonable doubt;

You have given up the right to cross examine witnesses that might testify against you;

You have given up the right to compel witnesses to come into court and testify in your defense:

You have given up the right to remain silent or your right against self-incrimination;

You have given up the right to an appeal;

Do you understand that?

MR. HOFFMAN: Yes, sir.

THE COURT: Has anyone threatened you or made any promises to you to make you plead guilty?

MR. HOFFMAN: No, sir.

THE COURT: Are you pleading guilty because you are guilty?

MR. HOFFMAN: (Pause) Yes, sir.

THE COURT: Do you know that you could be, if you went to trial, be facing electrocution?

MR. HOFFMAN: Yes, I do.

THE COURT: Have you discussed it with Mr. Nichols and are you now satisfied with his services?

MR. HOFFMAN: Yes, sir.

THE COURT: The facts, please.

I would like the record to reflect I have already been through the trial of one defendant and I know the facts backward and forward.

MR. OBRINGER: Your Honor, the State would be prepared to show that in **81-9299** on or about August 7th, **1980** in Jacksonville Beach, Florida, this defendant, along with another, James White, acting together and in concert, effected the death of one Frank Ihlenfeld and one Linda Sue Parrish, both being human beings.

The evidence would show, Your Honor, that Mr. Ihlenfeld's throat was cut. That was personally done by Mr. Hoffman. Further, that he aided -- at least aided and abetted in the killing of Linda Sue Parrish who was the female companion of Mr. Ihlenfeld at the time.

All this occurred in Duval County, Florida, and it was accomplished by Mr. White and Mr. Hoffman acting in concert to effect the deaths.

THE COURT: Any exceptions to the facts as outlined by the State?

MR. NICHOLS: Only that I think the date is September 7th, **1980** instead of August 7th.

MR. OBRINGER: I meant to say September 7th, **1980,** Your Honor.

THE COURT: . . . . I will pass it for sentencing until August 20th with the understanding, Mr. Hoffman, so you won't have any misunderstanding, that you will get a one lifetime sentence on each count, with 25 years minimum mandatory, to run concurrently. That means you will only serve one lifetime sentence. The State would then nol pros the conspiracy case. But in order to accomplish this you must testify candidly and truthfully at the trial of Mr. Mazzara.

Do you understand?

MR. HOFFMAN: Yes, sir.

THE COURT: Your failure to do that will mean the **"deal"** is off and you will go to trial and then the chips will fall where they may:

Do you understand?

MR. HOFFMAN: Yes, sir.

(R. 77-81).

Approximately three months later, Mr. Hoffman was indeed

called as a witness in the trial of a co-defendant. Mr. Hoffman's attorney was not Present. Neither was he present during various discussions between Mr. Hoffman and the state attorney. The record does not contain a waiver of counsel. Mr. Hoffman made decisions, answered questions from the Court and the State, and performed acts which required counsel's input, advice, and assistance, all without the assistance of counsel, which critically prejudiced him:

Q I'm going to call your attention to July, late July, early August of 1980.

During that time period did you ever have a conversation with Mr. Marshall, Rocco Marshall, concerning doing some work for Mr. Mazzara?

A No.

Q Have you ever had a conversation with him concerning doing any job or doing any type of special work?

A No, I did not.

Q For Mr. Mazzara?

A No.

Q How about for Mr. Marshall?

A No.

Q You never had any conversation?

A No, I did not.

MR. OBRINGER: Your Honor, may Counsel approach the Bench?

THE COURT: Yes.

(Counsel for the State and Defense approached the Bench where the following side-bar conference was had outside of hearing of jury:)

MR. OBRINGER: Judge, I'm going to request leave of the Court to take the jury out. I think I

will have to call him as a hostile witness.

THE COURT: I will excuse the jury.

MR. OBRINGER: All right.

THE COURT: We will get into it and see what is going to happen.

MR. OBRINGER: All right.

. . . .

BY MR. OBRINGER:

Q Mr. Mazzara, did you ever -- excuse me. Mr. Hoffman, did you ever conspire with Mr. Mazzara or Mr. Rocco Marshall to kill Linda Sue Parrish or Frank Ihlenfeld?

A No. I didn't.

Q Who hired you?

A No one hired me.

Q You did it all on your own?

A I didn't kill anybody.

Q You didn't kill anybody?

A No, I didn't.

Q You have entered a plea of guilty, even though you killed no one?

A Yeah.

Q Okay.

A I was told if I didn't I would get the electric chair.

Q That's the only reason you entered a plea of guilty?

A Yes, I did.

Q Have you ever told me to the contrary?

A Yes, I did.

MR. OBRINGER: Your Honor, at this time I have to inform the Court that this is a surprise to me,

coming as late as 9:45 this morning in view of Mr. -- Mr. Hoffman's testimony in my office with Ms. Lipsitz at which time he testified in my presence similar to the testimony he gave at deposition to Mr. Dempsey and at numerous pretrial conferences in this case.

I am at this time moving the Court for permission to call this witness as a Court witness in order for me to cross examine and impeach this witness.

I'm informing the Court in the State of Florida's opinion the plea asreements with the witness herein. Barry Hoffman, are now null and void. We intend to try him for both first desree murders.

But he is still subject to subpoena here today.

That's my request of the Court.

A Your Honor, I would like to withdraw my plea at this time myself.

THE COURT: Well, this is not the appropriate time to do it. We have to take first things first.

. . . .

THE COURT: Yes.

MR. OBRINGER: Would you announce that to the jury, please; that he is now being called as a witness by the Court and both sides have the opportunity to cross examine and impeach him.

THE COURT: That's correct.

The witness has returned to the room and the defendant is present.

Are you ready for the jury to come back in?

MR. OBRINGER: Yes, sir.

THE COURT: All right.

You may bring the jury back.

(Jury present)

THE COURT: All right.

Go ahead.

MR. OBRINGER: Your Honor, I think you have an announcement for the jury.

THE COURT: Yes.

Mr. Barry Hoffman is now being called as the Court's witness, which gives both the attorneys an opportunity to cross examine him and he will be considered now as a hostile witness.

MR. OBRINGER: A what witness?

THE COURT: Hostile witness.

MR. OBRINGER: Thank you, Your Honor.

BY MR. OBRINGER: [jury present]

Q Now, you have entered a plea of guilty to killing Ihlenfeld and Parrish, have you not?

A That's true.

Q You say now you didn't do it?

A That's true.

Q Have you told me as little as an hour ago that you did in fact kill them?

A I would have told you anything.

MR. OBRINGER: Okay.

. . . .

CROSS EXAMINATION

BY MR. DEMPSEY:

Q Mr. Hoffman, would you tell this jury and the Court why you have made these statements in the past which are inconsistent with your present testimony under oath?

A Yes, sir. I was told by my lawyer that I was going to get convicted no matter what, no matter if I did it or not, and the best thing for me to do was plead guilty and that way I would not get the death penalty, I would get twenty-five years. Since that time I have been threatened daily with the death penalty; that if I didn't lie about it, lie against Mr. Mazzara, that I would get the death penalty.

Q Who has threatened you?

A Mr. Obringer. The State.

Q Anyone else?

A My lawyer really didn't threaten me. He just told me what was going to happen.

. . . .

RECROSS EXAMINATION

BY MR. OBRINGER:

Q Do you understand your testimony today violates your plea agreements?

A Yes, sir, I sure do.

BY MR. OBRINGER:

Q Do you understand you plea agreement is off now?

A Yes, sir.

Q And we will seek to have the death penalty imposed upon you?

A Yes, sir.

Q Now, the Court appo nted an attorney for you, Richard Nichols, did they not?

A Yes, sir.

Q And did Mr. Nichols advise you to enter a plea of guilty?

A Yes, he did.

Q Didn't he tell you that the evidence against you is overwhelming?

A No.

(R. 220-236)(emphasis added).

Two days later, Mr. Hoffman filed a pro **se** Motion to Withdraw Plea. A hearing was held a week after that. Mr. Hoffman's attorney appeared at this hearing, to move to withdraw.

No motion by Mr. Hoffman was filed requesting that Mr. Hoffman be allowed to proceed **pro se**, no record inquiry occurred regarding whether Mr. Hoffman wished to proceed **pro se**, and, in fact, ultimately new counsel was appointed. The proceeding occurred thusly: a) counsel was allowed to withdraw; b) Mr. Hoffman alone (without an attorney, without an attorney's advice and input, and without a waiver of counsel), was allowed to withdraw his guilty plea; and c) preparations began to obtain new counsel for Mr. Hoffman. The plea was withdrawn without benefit of counsel.

The withdrawal of counsel was fairly detailed and took some time:

> **MR.** OBRINGER: **81-9299** and **82-2527**, Barry Hoffman.
>
> MR. NICHOLS: Your Honor, since I have returned I have been advised about the events at the trial of Mr. Mazzara. I have had an opportunity to talk to Mr. Hoffman a few moments this morning. I don't have a written motion, but I want -- I would like to make an oral motion to withdraw from representation of Mr. Hoffman and explain the reasons to the Court.
>
> It is my understanding from the events at the trial of Mazzara and my conferences with Mr. Hoffman that it seems to me that, at least hypothetically, that he will have to rely as part of his defense upon either inadequacy or incompetency of counsel, to-wit: myself prior to his making statements to Mr. Obringer. It may be that I could hypothetically continue to represent Mr. Hoffman until some point down the road, but I -- in view of an efficient way to handle the case from this point on it would seem to me more appropriate to have someone else take up the defense now rather than let more time go by and then get forced into a situation where we have to start everything again. I have discussed that with Mr. Obringer this morning. I don't want to speak for him, but I don't think that he really seriously has a different point of view on it.
>
> MR. OBRINGER: Your Honor, I have spoken with Mr. Nichols about it. My problem is, as the Court may have heard during the trial, we have probably **20** hours of depositions with Mr. Hoffman in which he describes in great detail his participation in the murders and

conspiracy. That deposition was given with the counsel and advice of Mr. Nichols pursuant to his plea of guilty to these two murder cases. I can see where it may very well be possible that his explanation for that will be advice to which he does not now agree and that he would probably claim he got bad advice from his lawyer. I can see where that's going to be a problem. I can tell the Court in all likelihood that in our case in chief, if not then certainly our rebuttal, we will use the sworn testimony of Mr. Hoffman and certainly his involvement in these murders.

THE COURT: All right.

I will allow Mr. Nichols to withdraw.

(R. 115-16).

It took much less time for the then uncounseled (not by choice) defendant to withdraw his plea:

But I will appoint an attorney and he will be in touch with you.

MR. NICHOLS: Your Honor, would you like me to file a written motion withdrawing from and prepare an order?

THE COURT: Yes. I think you had better.

Detail it.

MR. NICHOLS: I will, sir.

MR. OBRINGER: Do you want to set it for next Friday for appearance of counsel?

THE COURT: Yes, that's a good time. I'm sure I can get an attorney by then.

MR. OBRINGER: What's that date, Your Honor; the lst?

THE COURT: October 1st. That's on both cases. Keep them together.

MR. OBRINGER: Your Honor, there is also a pro se motion by Mr. Hoffman to withdraw any and all guilty pleas that have been entered.

The State would urge the Court to grant it. The State, as it announced at trial, does not feel bound by any plea negotiations.

THE COURT: Yes. At the Mazzara trial he wished to

withdraw the pleas. I told him at that time it wasn't the proper time to do it. This is a good time for the Motion to Withdraw.

MR. OBRINGER: Your Honor, the pleas were entered as to the two murder counts in **81-9299**. There was no plea entered in **82-2527** pursuant to the plea agreement.

I would ask the Court to announce that the plea has been withdrawn.

THE COURT: I will allow you to withdraw your guilty plea on the murder charges, two counts, in **81-9299**.

I will enter the not guilty plea on his behalf.

MR. NICHOLS: Yes, sir.

THE COURT: I will look at the motions just to be sure.

All right. I have read your motion. It's highly critical of the attorney.

I will grant the motion.

But I don't want any granting of the motion to indicate that I'm being critical of Mr. Nichols. I'm not.

MR. HOFFMAN: Yes, sir.

THE COURT: So, I shall enter a not guilty plea on your behalf.

I will set it for appearance of counsel on October 1st.

(R. 117-19).

Of course, a criminal defendant has a constitutional right to represent himself, however:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Johnson v. Zerbst, **304** U.S., at **464-465, 58** S.Ct., at **1023**. Cf. Von Moltke v. Gillies, **332** U.S. **708, 723-724, 68** S.Ct. 316, **323, 92** L.Ed. **309** (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience

> of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242.

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 2541 (1975). No "knowing and intelligent" waiver of the right to counsel was ever made by Mr. Hoffman. To the contrary, he had indicated previously to the court that he did not want to proceed without counsel, cf. Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988), and the court specifically found that Mr. Hoffman did not "have the qualifications to make a judgment call on a trial" (R. 47).

It is thus plain that Mr. Hoffman was without counsel, although he never waived the right to counsel. It is similarly clear that Mr. Hoffman did not have the assistance of counsel at critical stages of his capital prosecution. See Stano v. Dugger, F.2d (No. 88-3375, 11th Cir. Nov. 17, 1989). Moreover, there were at least twenty hours of depositions, and many meetings between Mr. Obringer, the State Attorney, and Mr. Hoffman, the defendant, which apparently took place in counsel's absence.

In this context, there can be no showing of harmless error. While holding that some constitutional violations may be subjected to a harmless error analysis, the United States Supreme Court has noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and cited the rule established in Gideon v. Wainwright (the right to counsel) as one such right. Chapman v.

California, 386 U.S. 18, 23-24 (1967). Mr. Hoffman's entitlement to relief is clear, for his sixth amendment rights were denied. This error is quite troubling in a capital case, particularly where the decisions made by the defendant without counsel literally resulted in a sentence of death. At the least, an evidentiary hearing is required, for the files and records not only do not rebut Mr. Hoffman's claim, they support it. See Lemon v. State, 498 So. 2d 923 (Fla. 1986).

An evidentiary hearing is also required on Mr. Hoffman's related claim of prosecutorial vindictiveness -- a claim involving facts which are not "of record" and which are not rebutted by the "files and records" in the case. Here, as in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc), Mr. Hoffman "contends the . . . decisions to seek and impose the death penalty against him for the same acts that earlier merited a term of years were vindictively motivated." Id. at 1017.

The due process clause of the fourteenth amendment protects against prosecutorial vindictiveness, see Blackledse v. Perry, 417 U.S. 21, 27 (1974), particularly in the context of a capital prosecution. See United States v. Jackson, 390 U.S. 570 (1968); ~~see also~~ Corbitt v. New Jersey, 439 U.S. 212, 217 (1978); United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1977); Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974). Moreover,

> [n]o actual showing of malice or retaliatory motive is necessary to assert a vindictive prosecution claim. Blackledse, 417 U.S. at 28, 94 S.Ct. at 2102; see also United States v. Burt, 619 F.2d 831, 836 (9th Cir.1980). Rather, vindictiveness will be presumed when the circumstances surrounding the prosecutorial decision at issue create the appearance of vindictiveness. United States v. Robison, 644 F.2d

1270, 1272 (9th Cir.1981); see also United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir.), cert. denied, 449 U.S. 863, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980)(mere appearance of vindictiveness may give rise to presumption sufficient to establish due process violation); United States v. Groves, 571 F.2d 450, 453 (9th Cir.1978)("it is the appearance of vindictiveness rather than vindictiveness, in fact, which controls")(emphasis in original). A presumption arises whenever "it reflects the very real likelihood of actual vindictiveness" on the part of the prosecution. United States v. Martinez, 785 F.2d 663, 668 (9th Cir.1986)(quoting United States v. Gallegos-Curiel, 681 F.2d 1164, 1167 (9th Cir.1982)).

Adamson v. Ricketts, supra, 865 F.2d at 1018-19. In Adamson, a federal habeas corpus action arising out of a state court capital prosecution, the Ninth Circuit remanded the case for an evidentiary hearing on the question of prosecutorial vindictiveness. The same result is warranted in this case.[2]

Although prejudice need not be shown under these facts, Mr. Hoffman was prejudiced by making critical decisions regarding his case without benefit of counsel. The vindictiveness then shown by the prosecution and the court further emphasize the disastrous

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[2]It should be noted that Mr. Hoffman has been severely punished as a result of exercising his constitutional rights. Not only was he sentenced to death on Count I of the Indictment, he was also more severely punished on Count II than he would have been under the plea agreement. By pleading to first desree murder under Count 11, Mr. Hoffman was to receive life imprisonment with a minimum mandatory twenty five years, to run concurrently with the same sentence on Count I. After being convicted of second desree murder, Mr. Hoffman was sentenced to one hundred years imprisonment, with the trial court retaining jurisdiction for a third of that term [after being informed by the State that he could not retain jurisdiction for half of the term] (R. 1236-38). Mr. Hoffman was also sentenced to a term of thirty years imprisonment on the conspiracy conviction, to run consecutive to the other sentences (R. 1236-37). Of course, judicial vindictiveness is also forbidden. North Carolina v. Pearce, 395 U.S. 711, 723-26, (1969).

results accomplished by Mr. Hoffman's inadequate[3] and, at certain critical stages, nonexistent representation.

Mr. Hoffman's claims are facially sufficient to show that he may be entitled to relief. An evidentiary hearing on these questions is necessary, in order for the non-record facts to be fully aired, assessed, and fairly reviewed.

ARGUMENT III

MR. HOFFMAN'S RIGHTS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND BY BRADY V. MARYLAND, 373 U.S. 83 (1963), AND ITS PROGENY, WERE DENIED WHEN THE STATE WITHHELD FROM THE DEFENSE IMPORTANT MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE.

There was much more to the Ihlenfeld-Parish murders than was ever revealed to the jury at Mr. Hoffman's trial. Indeed, there was much more than was ever revealed to Mr. Hoffman's attorney. As pled in the Rule 3.850 motion and supported by the documentary submissions in the accompanying appendix, much of the undisclosed information was exculpatory and/or impeachment evidence, and all of it was "material". Even more evidence remains undisclosed to this day as the State Attorney and Sheriff of Duval County persist in refusing to allow access to public records in this case.' This case is especially suspect since the claim involves some nineteen hours of wire taps, undercover surveillance, and countless suspects. Mr. Hoffman's trial defense attorney was

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[3] An evidentiary hearing is also necessary to resolve the questions arising from Mr. Hoffman's allegations of lack of investigation and inadequate advice and assistance when he did have counsel.

'That matter is presently pending before this Court in Mr. Hoffman's appeal of the circuit court's denial of his motion to compel disclosure of public records.

never permitted access to any of that information (nor have Mr. Hoffman's present counsel). The type of operation that went on here (secret, covert law enforcement operations) are notoriously suspect, since facts related to the questions of whether law enforcement was **"overreaching",** "entrapping", etc., are kept hidden by the very nature of the operation itself. To be sure, the law permits this type of operation, but there are proper limits. When the judgments and sentences are imposed on all convicted, the investigation ceases, and the public and the accused are permitted then to see if those operations (and thus the resulting convictions) were lawful. In Mr. Hoffman's case, the State Attorney would have Mr. Hoffman executed before permitting access to any of the relevant public files, and would keep secret the evidence which would disclose whether Bradv and its progeny were complied with.

Even without the State Attorney's and Sheriff's compliance with the dictates of section **119,** Fla. Stat., Mr. Hoffman has presented a valid claim pursuant to Bradv and United States v. Bagley, **473** U.S. **667, 105 S.** Ct. **3375 (1985),** a claim which requires evidentiary resolution.

The law has long recognized that in criminal cases there is a "particular need for full cross-examination of the State's star witness." McKinzy v. Wainwriaht, **719** F.2d **1525, 1528** (11th Cir. **1982).** Here, the State's "star witness" was a cooperating accomplice about whom critical information was withheld from the defense, court, and jury. George Rocco Marshall's testimony about his status was incomplete and misleading. During trial, the jury was told that Marshall was offered immunity for simply

"telling the truth." The prosecutor, himself, elicited that testimony (See R. 683-684). However, there was more to this agreement with the State than was ever heard at Mr. Hoffman's trial. Marshall had additionally agreed to provide the state with "all knowledge of the Provost organization he ha[d] prior to and after the homicides" (See App. V). The importance to the prosecutor of failing to reveal this information is obvious. If Marshall were shown at trial to be an important member of the Provost organization, the jury would have given his testimony little, if any, weight. More importantly, however, the terms of the agreement between Marshall and the State demonstrate the nexus between the investigation of the narcotics dealers and the murders. Marshall's incomplete and misleading testimony on these issues was not corrected by the trial prosecutor. This case thus falls into the class of cases which involve more than the prosecution's failure to fully disclose any deals it may make with its witnesses, United States v. Bagley, 105 S. Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150 (1972), but also into the class of cases where the State fails to alert the defense when one of its witnesses provides false or misleading testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935), and the State fails to correct such testimony. Alcorta v. Texas, 355 U.S. 28 (1957). An evidentiary hearing is required in order for the facts involved in this claim to be heard.

Information derived from law enforcement's investigation was critical to an effective defense. The State has still refused

access to that information. Some nineteen hours of wiretap tapes of this investigation reportedly exist to which Mr. Hoffman's attorneys have been refused access. The information independently obtained by Mr. Hoffman's post-conviction counsel shows the "tip of the iceberg" with regard to the results of the State's investigation:

As late as July 27, 1981, state investigators suspected that Jame Maurice "Bubba" Jackson was involved in the Jacksonville murders (See App. s). The affidavit accompanying the arrest warrant for Jackson stated:

> David Jack is a personal acquaintance of James Maurice Jackson, Jr., aka Bubba Jackson, who is the subject individual of this affidavit and search warrant.
>
> The following information was personally given to your affiant by the said David Jack:
>
> > Approximately a week to ten days after the homicides referred to in this affidavit occurred, James Maurice Jackson, Jr., aka Bubba Jackson, came to the residence of David Jack and engaged David Jack in a conversation. James Maurice Jackson, Jr., aka Bubba Jackson stated that a very bad thing had gone down at the Ramada-Inn and that it was somethins that he had had to do. James Maurice Jackson, Jr., aka Bubba Jackson stated that he was talking about the two people that had been killed at the Ramada-Inn in Jacksonville Beach, Florida. James Maurice Jackson, Jr.. aka Bubba Jackson further explained that one of the persons he had killed was named Frank and that it was a shame that a person so young had to be involved in something like that and that this person was a girl (Linda Sue Parrish. the female deceased was twenty (20) Years old). When asked by David Jack why he did it. James Maurice Jackson, Jr.. aka Bubba Jackson responded that his people (the deceased Ihlenfeld) were blackmailing his (Jackson's) people.
> >
> > James Maurice Jackson, Jr.. aka Bubba Jackson further stated that the handle of the knife he had used had broken from the blade durins the killing. He also stated that he had attempted to clean up the room after the murders.

> David Jack also stated that he has been in the presence of the said James Maurice Jackson, Jr., aka Bubba Jackson on several occasions during which James Maurice Jackson, Jr., aka Bubba Jackson discussed his dealings in controlled substances. He has also personally witnessed James Maurice Jackson, Jr., aka Bubba Jackson receiving messages on a beeper device. The messages were to call "Frank" immediately.

The body of the deceased male, Frank Ihlenfeld, was found to contain a knife blade which had become detached from the blade handle and the blade was located in the back of Frank Ihlenfeld when found by investigators in Room #205 of the Ramada-Inn, Jacksonville Beach, Florida. Your affiant as investigating officer and the Jacksonville Beach Police Department and the Florida Department of Law Enforcement have not released any information concernins the broken knife blade found the deceased back [sic] to any media or news service. This information has been confined solely to law enforcement officials. James Maurice Jackson, Jr., aka Bubba Jackson has been arrested and convicted for possession of controlled substances on at least two occasions. James Maurice Jackson, Jr., aka Bubba Jackson is presently under two five-year concurrent sentences for possession of controlled substances for which his probation has been revoked. He is presently free on supersedeas [sic] bond of $10,000 pending an appeal of these convictions.

Your affiant also personally interviewed the wife of David Jack, Mrs. David Jack:

> Mrs. David Jack stated that she was at her home with her husband, David Jack on the evening in which James Maurice Jackson, Jr., aka Bubba Jackson came to the home as referred to by David Jack in this affidavit. She stated that she was not in the presence of her husband or James Maurice Jackson, Jr., aka Bubba Jackson during the entire time that James Maurice Jackson, Jr., aka Bubba Jackson was in her home. She was able to overhear a portion of his conversation with her husband, David Jack. **She** stated she overheard James Maurice Jackson, Jr.. aka Bubba Jackson state that he had to kill those two people at the request of his people in order to repay a debt. Mrs. David Jack is a long time resident of Duval County, Florida, is the mother of one child and had no criminal record.

(App. R)(emphasis added).

Another of the suspects here was Wayne Merrill who, according

to his wife, admitted being the "look-out" man for the two men that killed Ihlenfeld and Parish (App. T). Mr. Merrill never testified at Mr. Hoffman's trial. Other suspects were Junior Jordan, Leon McCumbers (App. Θ), Clarence Eugene Robinson (App. P), Chris Steve Sprinkle and Keith William Hode (App. Q). Certainly when a murder investigation involves more than one suspect, particularly a suspect who admits complicity, the defense is entitled to such information. None of this, however, was provided, and none of it was uncovered by defense counsel, whose investigation was woefully inadequate.

The investigation also showed that the medical examiner had recovered:

> specifically from the hands of the female deceased, Linda Sue Parrish, . . . several hairs. These exhibits have been examined by a hair and fabrics comparison expert from the Florida Department of Law Enforcement. That examination revealed that these exhibits, from the hands of the female deceased, Linda Sue Parrish, were male Caucasian head hair and male Caucasian pubic hair. The expert states that the male Caucasian head hair is not the head hair of the male deceased, Frank Ihlenfeld. No samples of the male deceased's, Frank Ihlenfeld, are available for compariosn [sic] with the male pubic hair found in the hands of the female deceased, Linda Sue Parrish.

(App. C). No mention of this hair was ever made during Mr. Hoffman's trial. Certainly, when the evidence at trial was that Barry Hoffman and James White, a black man, were the only two who actually went into the room, it seems obvious that hair samples would be a critical piece of information. The male victim's head hair was not consistent with that found in Ms. Parrish's hand, ruling out the possibility that it was simply his hair found on her. It is then an obvious assumption that this head hair came from one of the murderers. Since James White was a black man,

the evidence would have gone to the other assailant -- Barry Hoffman? Someone else? The head hair was a vital piece of evidence that either was never turned over to the defense or was ineffectively ignored by defense counsel. If the State's tests showed Mr. Hoffman's hair to be consistent with that found on the victim, then it would have been introduced into evidence by the State. Since it was not, Mr. Hoffman's hair was likely inconsistent with what was found.[5]

It is obvious that many questions went unanswered at trial, questions critical to Mr. Hoffman's claim of innocence. Certain material (that which has been independently uncovered) has been presented by Mr. Hoffman in his Rule **3.850** motion and appendix. However, this is just the **"tip** of the iceberg." What was uncovered during, indeed the very extent of law enforcement's investigation remains to this day undisclosed by the State.

Here, even with the State's continued withholding, material has been uncovered which states a valid claim for relief. Proper resolution should be had through an evidentiary hearing where evidence could be heard and tested in the fact-finding forum of the trial court. The lower court erred in failing to permit an evidentiary hearing since the **"files** and records do not conclusively show that [Mr. Hoffman] is entitled to no relief." Lemon v. State, **498** So. 2d **923** (Fla. **1986);** State v. Crews, 477

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[5]**At** this juncture, although a valid claim is presented, many of the questions cannot be answered precisely because of the State's continued withholding of information, now in contravention of section **119,** Fla. Stat.; at trial in contravention of Brady v. Maryland and its progeny.

So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

An evidentiary hearing should be ordered, disclosure pursuant to Fla. Stat. section 119 should be directed, and, thereafter, Rule 3.850 relief should be granted.

ARGUMENT IV

THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. HOFFMAN'S CASE: HIS MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING, AND VALIDLY WAIVING, THOSE RIGHTS, DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN LITIGATING THIS ISSUE, AND THE LOWER COURT ERRONEOUSLY DENIED THIS CLAIM WITHOUT AN EVIDENTIARY HEARING.

Mr. Hoffman was under the influence of drugs and alcohol at the time of the offense and at the time of his interrogation by the police. His state of mental impairment made it impossible for him to understand the **"rights"** to which he was entitled under the Constitution, or to in any way knowingly, intelligently, and voluntarily waive what he did not comprehend.

The inquiry into the validity of a waiver has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both a free choice and the requisite level of comprehension may a court properly conclude that the Miranda

rights have been waived. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141 (1986). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938); Miranda v. Arizona, 384 U.S. 436, 475 (1966)(applying Johnson v. Zerbst standard to waiver of Miranda rights). The accused's mental state is the critical factor. But here the accused's mental state was never properly investigated by trial counsel.

In Mr. Hoffman's case, his ability to rationally and understandingly waive his rights to silence and counsel should have been evaluated at the time of trial. Counsel, however, conducted no investigation into the facts and circumstances surrounding the statements made by his client (who was a serious drug addict, as counsel knew, or should have known). Counsel sought no mental health assistance whatsoever on the issue. All he did is put his client on the stand, unprepared. This is not effective assistance. Given the particular importance of the statement, a statement made during a time when the client was under the influence of narcotics, counsel's failures to investigate and prepare were prejudicially deficient performance. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

Mr. Hoffman's attorney made a motion to suppress, in part because "At the time said statements, admissions and/or confessions were allegedly made, the Defendant, BARRY HOFFMAN,

was substantially under the influence of certain narcotic, hallucinogenic, hypnotic, and/or mind-altering drugs" (R. 38). At the hearing, defense counsel presented only Mr. Hoffman's testimony, but failed to present other available lay or expert testimony, and failed to even prepare his client prior to his client's taking the stand. As a result, important facts were never heard.

A psychiatric evaluation of Mr. Hoffman performed by Dr. James Fox (a mental health examination concerning an issue about which counsel should have asked originally), concluded that Mr. Hoffman suffers from mixed substance abuse and stated, in part:

> Drug addiction is one of the most crippling diseases recognized in the medical profession. As a psychological disorder, drug addiction, and its attendant features, is divided into two broad classifications: substance use disorders and substance-induced organic mental disorders. Substance use disorders refer to the maladaptive behavior associated with addiction. Substance-induced organic mental disorders refers to the direct acute or chronic effects of substances in the central nervous system. Mr. Hoffman has suffered from both disorders.
>
> Mr. Hoffman has a life-long history of substance dependence. Opiate dependence is documented, and it is a disorder that is so devastating that, once dependence is established, substance procurement and use usually dominates the individual's life. Persons with opiate dependence have a high annual death rate. Suicide rates are obviously high.
>
> While under the influence of opiates, an individual may suffer from a substance-induced organic mental disorder. For example, opiate organic mental disorders feature neurological dysfunction, impairment in attention and memory, and extremely poor judgment. Cocaine organic mental disorder features violence, hypervigilence, and grandiosity.

(App. A).

While Mr. Hoffman testifed on three different occasions as to his drug usage during that period of time, his statements

alone were apparently viewed by the court as self-serving and therefore not given much weight. Counsel rendered ineffective assistance in failing to produce available lay or expert testimony regarding Mr. Hoffman's dependence on drugs and in particular his use of drugs on the day of his arrest and "confession". That testimony was available (and was discussed in Mr. Hoffman's Rule 3.850 motion and accompanying appendix).

Dr. Fox's assessment of Mr. Hoffman's mental state at the time of arrest was:

> As reported in the above evaluation and based on Mr. Hoffman's history it seems likely that at the time of his arrest that he was significantly addicted to and intoxicated with both opiate and sedative hypnotic substances. If a legal question exists regarding voluntariness of a confession, a mental health expert could provide probative evidence regarding the effect of substance use disorder and substance use organic mental disorder on voluntariness. It is, for example, highly plausible that Mr. Hoffman was not at the time of the confession fully able to comprehend the nature of the questions being asked him by the arresting officers, nor to comprehend the seriousness of his situation. Because of his life-long dependence and intoxication it is likely that he could have made statements at that time to satisfy the needs of the moment without an ability to comprehend their long range impact on his situation.
>
> At the time of my evaluation, his mental status evaluation reveals a man with a history of drug abuse and drug addiction with some mild evidence of organic impairment of his brain. This is not surprising considering his drug history. It is also indicated that confusion, irrationality, and impaired judgment at the time of his arrest for the offense was due to the acute nature of his drug abuse (substance-use organic mental disorder) and not to long term organic brain syndrome.

(App. A).

All of this evidence supports the fact that Mr. Hoffman, even though he may have "seemed" coherent and rational at the time of the interrogation, clearly was not. Because of his long

term drug dependence (which was not investigated), his emotional makeup and his intoxication on the night involved (which also were not investigated), Mr. Hoffman did not possess the mental state by which he could have rationally understood the consequences of "waiving" his Miranda rights. In fact, he stated that he believed that by signing the "form" he was asserting his right to silence (R. 241). Testimony of friends and family (See Appendix to Rule 3.850 motion, detailing available evidence) and expert testimony could have established the lack of comprehension under which Mr. Hoffman was operating at the time statement were elicited.

Any waiver by Mr. Hoffman could not have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Counsel failed his client when he failed to develop and present evidence that would have established that Mr. Hoffman's waiver was not voluntary, rational, or intelligent.

Claims such as the instant are precisely the type necessitating an evidentiary hearing for proper resolution. This Court has held as much. See Squires v. State, 513 So. 2d 138 (Fla. 1987). As demonstrated by Mr. Hoffman's Rule 3.850 motion and accompanying appendix, there was much lay evidence which should have been presented to establish Mr. Hoffman's longstanding drug addiction and abuse and his resulting mental state on the night of his arrest, and expert testimony should have been pursued. An evidentiary hearing is necessary on this claim.

ARGUMENT V

MR. HOFFMAN WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT-INNOCENCE AND THE PENALTY PHASES OF HIS CAPITAL TRIAL, AND HIS CONVICTIONS AND SENTENCE OF DEATH VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hoffman alleged in his 3.850 Motion that he was denied the effective assistance of counsel at the guilt-innocence and the penalty phases of his capital proceedings. The trial court summarily denied these claims in a one-line order, without an evidentiary hearing, without saying anything about them, and without attaching any files and records which showed that Mr. Hoffman was **"conclusively"** entitled to **"no** relief." There are none. This Court has repeatedly recognized that evidentiary hearings are often necessary on claims of ineffective assistance of counsel because the facts necessary to the disposition of this type of claim would not appear on the record. O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Vauaht v. State, 442 So. 2d 217, 219 (Fla. 1983); Jones v. State, 446 So. 2d 1056, 1062-63 (Fla. 1984); Squires v. State, 513 So. 2d 138 (Fla. 1987). The summary denial of the Rule 3.850 motion was erroneous.

A. PREJUDICIALLY DEFICIENT PERFORMANCE AT THE TRIAL PHASE

Mr. Hoffman's court-appointed defense attorneys' performance was prejudicially deficient in a number of respects. The inadequate performance involved the actions and inactions of the original attorney and successor counsel. Some of these matters have been discussed in preceding portions. The representation afforded Mr. Hoffman was unreasonably and prejudicially deficient in a number of respects.

1. Failures Pretrial

Counsel ineffectively failed to investigate, secure, and present for the supression hearing expert and lay testimony regarding Mr. Hoffman's long-term drug addiction, and the influence of drugs on his mental state at the time of his interrogation, and thus failed to present evidence that would have supported Mr. Hoffman's testimony that at the time of his interrogation he was highly intoxicated and mentally impaired. Indeed, counsel failed completely to conduct any reasonably effective investigation pretrial. There were numerous suspects in the case. Others had confessed to this crime. Counsel's failure to thoroughly investigate these other suspects and the other information surrounding law enforcement's investigation was prejudicially deficient: exculpatory evidence as well as information which could have been used to impeach the State's key witness was not uncovered.

Counsel failed to be present during the many hours when Mr. Hoffman was interviewed by the State, and never appeared to advise, counsel, and assist Mr. Hoffman when he was called to testify at the Mazzara trial. This was part of Mr. Hoffman's plea agreement. Counsel's failure to even be present at this critical proceedings was inexcusable. It goes without saying that reasonably competent counsel would have been there. Neither did counsel show up during the interrogations and de-briefings, between Mr. Hoffman and the prosecuting attorney prior to the Mazzara trial. Mr. Hoffman was thus never adequately represented and advised by counsel -- counsel's failures to advise his client

resulted in his client's taking actions which ultimately resulted in his death sentence. Mazzara, who according to the State was the instrumental procurer of these murders, was not sentenced to death. Mr. Hoffman, who appeared unrepresented at critical stages of the proceedings, was sentenced to death.

2. Failures at Trial

The defense attorney's pretrial failures to conduct an adequate investigation resulted in his inability to conduct a proper cross-examination of the State's witnesses, particularly Rocco Marshall. Marshall received great benefits from his testimony, including the fact that he walked free after having been indicted on two first degree murder charges. But Marshall had also agreed to tell the State "all he knew" of the drug operation. Counsel investigated nothing, relying on the State's discovery.

Counsel also failed to investigate the information on "Bubba" Jackson. Bubba Jackson, a man who, according to the police affidavit, had confessed to this crime, and who had given specific details that only the culprit would know, was never even mentioned at Mr. Hoffman's trial. There was also evidence (e.g., an F.D.L.E. lab report) that Mr. Hoffman's hair was inconsistent with that found on the victim, Linda Parrish. Certainly, this was another critical piece of exculpatory evidence that should have been used by the defense. Given the present posture of this case (the State's refusals to comply with Fla. Stat. section 119 and the lower court's failure to allow an evidentiary hearing at which the facts may come to light) it is impossible to discern at this juncture whether the fault is solely with the State (i.e.,

because of violations of Brady and its progeny) or with counsel (i.e., because of failures to investigate and prepare). Confidence in the outcome of the proceedings, however, is undermined. Mr. Hoffman has pled these claims alternatively. An evidentiary hearing is required in order for a factfinder to hear the relevant facts, and to properly, fully, and fairly answer these questions. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Squires v. State, supra, 513 So. 2d 138.

B. PREJUDICIALLY DEFICIENT PERFORMANCE AT THE PENALTY PHASE

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

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Penrv v. Lvnaush, 109 S. Ct. 2934, 2947 (1989)(citation omitted).

Courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate avenues of mitigation which can be presented for the sentencers' consideration. O'Callaghan V. State, 461 So. 2d 1354 (Fla. 1984); State v. Michael, 530 So. 2d 929 (Fla. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). A decision not to present mitigating evidence is deficient performance unless it is founded on a reasonable investigation. Harris, supra; Michael, supra. Reasonably effective counsel must look into the available facts before deciding what to do.

Indeed, the decision as to what, if any, evidence to present in mitigation "must flow from an informed judgment," Harris v. Duaaer, 874 F.2d 756, 763 (11th Cir. 1989). Mr. Hoffman's trial counsel did not meet these constitutional standards. He never conducted a sufficient investigation on which to base any "informed judgment." Indeed, he conducted virtually no penalty phase investigation at all.

The sixth amendment right to counsel is also inextricably related to the right to expert mental health assistance. There is a critical interdependency between the right to effective assistance of counsel and the right to competent mental health assistance for a criminal defendant. Mental health experts are essential for the preparation of a defense and for sentencing whenever the State makes mental health relevant to those issues.

Ake v. Oklahoma, 105 S. Ct. 1087 (1905). This independent due process right is necessarily enforceable through the right to effective counsel -- what is required is a competent mental health evaluation, and it is counsel's duty to obtain it. Blake v. Kemp, supra. Preparation and investigation in such cases likewise takes on added dimensions. Mental health and mental status issues permeate the law, and careful investigation and assessment of the client's mental health (e.g., as regards mitigating factors) is necessary before any decisions as to what to present are made by counsel. The right to have the sentencer afford full consideration to mitigating evidence, Penry, supra, is lost from the outset when counsel fails to reasonably investigate mental circumstances relevant to sentencing, State v. Michael, supra; Blake v. Kemp, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). In such instances, ineffective assistance is demonstrated. Mr. Hoffman's case is such an instance.

In Mr. Hoffman's case, trial counsel's failure to investigate, prepare, and present available evidence in mitigation and the resulting prejudice were properly pled below. The lower court, however, declined to allow any hearing at which it could here the facts. An evidentiary hearing is certainly required on this issue. See Heiney v. State, No. 74,099 (Fla. Feb. 1, 1990).

All participants knew that this case involved drugs. The State in its opening argument at the guilt-innocence phase presented the motivation for the conspiracy and murder as a drug partnership gone bad (R. 470), and references to the drug world

and Mr. Hoffman's purported role in it continued throughout. What the jury never learned is that Barry Hoffman's true role in the drug world was that of a serious narcotics addict, a victim of that very drug world, and that his drug abuse and drug addiction resulted in the mental, emotional and behavioral dysfunction that serious and prolonged drug use engenders.

1. Failure to Investigate Evidence Concerning Mr. Hoffman's Drua Addiction

Barry began ignorantly using drugs at the age of twelve or thirteen, more as a result of his tragic home environment than volitionally. Since then, he was never able to do without drugs. Without exception, family and friends who have known him throughout his life have observed the tragic role that drugs played in determining Barry's destiny. Miriam Hoffman, Barry's mother recalls:

> I know that Barry began using drugs at the age of 13. He would **leave** empty glue and cough syrup containers in the basement. At about this time, the school frequently called me at work to say that Barry was truant. I didn't know what to do with Barry, and my energies were directed towards making sure the family had a place to live and food to eat. In retrospect I believe that Barry should have been given drug treatment and counseling. Instead what happened is that his drug use escalated, and he finally ended up addicted to heroin.

(App. B). Mrs. Hoffman also discussed her son's chronic drug addition throughout his teenage and adult years and how it destroyed his marriage and, indeed, his very life.

Tillman Pollack, a family friend remembered Barry as a boy:

> When Barry was 12 or 13, Sam told me that Barry had been sniffing glue. He seemed upset that Barry was doing this, but he didn't do anything about it. Sam was a drug user himself; he smoked marijuana long before it was fashionable. Though Sam smoked marijuana, he looked

down on people who used stronger drugs. Sam never spoke to me again about Barry's drug use.

(App. E).

Kate Berry, Barry's sister-in-law, also recalled the problems:

> Barry's drug addiction was one of the things that Sheldon and I frequently discussed. I know that Barry has a serious history of drug abuse. Sheldon reported that Barry began taking cough syrup with codeine when he was 12 or 13 years old. Sheldon said he always found it strange that Barry left the empty bottles around the house; it was as if he wanted to be caught and be helped by his family. In spite of these "pleas for help," Barry's drug use continued, and he began using stronger drugs.

(App. C).

Pat Richman, a longtime friend of Barry's brother, remembered Barry's drug use:

> Barry was on drugs for almost the entire time I knew him. I've always considered him something of a lost soul. He was a good kid, but his addiction to drugs always seemed to be stronger than he was. He began using cough syrup with codeine at a very young age, and progressed to heroin, cocaine, dilaudid and quaaludes. Barry is a passive person, and was very easily led into drug use by his **"friends."**
>
> I know that Barry tried to stop using drugs, and that Sheldon put him in substance abuse programs several times. His main addictions were to heroin and dilaudid, and he could never quit taking them for long. It broke my heart to watch him deteriorate over the years. He was a sweet, gentle person whose life was taken over by a powerful and devastating drug dependency. Because he was chemically different than other people, he never really matured normally. At the age of 30, he thought and acted more like a teenager than a grown man.
>
> The last time I saw Barry was in the Fall of 1981, a few weeks before he was arrested in Michigan. He was in Baltimore and we happened to run into each other. I remember that the first thing I said to him was "Barry, are you straight?" I asked him that because I instantly knew that he was still addicted to the opiates; he just looked thin and unhealthy. We had some coffee and talked for a while. He wanted to talk about the past, and I tried to follow his conversation. He spoke very

slowly, rambled, and was generally confused. Though I was very happy to see Barry, I came away from that visit more worried about him than ever.

(App. D).

Other than Barry's brother, Sheldon, the family allowed Barry Hoffman to live as a drug addict, without help or treatment, despite his obvious use of serious, brain damaging drugs. His mother had neither the will nor the ability to give him the help that he needed. His father, preoccupied with gambling, smoking marijuana, and stealing, gave him little attention, and none of any value. Mrs. Hoffman reports the following:

> Barry, Sheldon, Sam and I lived almost exclusively on what I earned at Sears and Roebuck. I worked there for **28** years. Sam wasn't much of a provider, nor was he much of a husband or father. When the children were young, we lived on about **$40.00** a week. This amount was significantly depleted by Sam's stealing. He would take the household money and use it for gambling and God knows what else. I often suspected that he spent it on other woman, and direct proof of this would not have surprised me in the least. Sam also had a habit of forging my name on loan applications.
>
> Sam would take a job every now an then, but more often than not he was at home watching television or out gambling. He mostly gambled on pool and at the racetracks. One of the reasons Sam didn't work often is because he stole from his employers. He was once forced to leave Baltimore when one such employer threatened him with prosecution when a cash register was **$600.00** short at the close of a business day. It apparently hadn't been difficult for the **boss** to figure out who had stolen the money. I divorced Sam in **1964** because I could no longer cope with his stealing and gambling. All he did was make life more difficult for me and my sons. He was immature, and I thought he set a very bad example for Barry, who was easily influenced by him. Sam moved to New Orleans and remarried. He died in **1979** of a blood disorder. I have been single ever since my divorce.
>
> Because I had to work, I was not at home when Barry was growing up. Sam, who was often home, paid little attention to Barry and what Barry was doing.

Barry was a follower, a passive type. He was also a slow learner. The school once suggested that Barry be kept back a year, but I was afraid that the other children would be too young for him.

(App. B).

Tillman Pollack, a long time friend of Sam Hoffman, verifies what Miriam Hoffman had to say about Barry's life:

Though I loved Sam like a brother, I'd be a liar if I said that he was anything other than what he was--a lazy, complacent person. He always wanted to play the part of a "big guy," someone with money and standing in the community, but the truth is that he never really made any money. He and his family lived in a modest apartment on a modest budget. Sam would never have even owned a used car if it hadn't been for his wife, who worked steadily at a sales job. He gambled some, but never had the large sums he would have liked to spend this way.

Sam was always getting fired from his jobs because he would steal from his employers. He lost a job in a store in Washington, D.C. in the early 1960s this way. He was once forced to leave Baltimore to keep from being prosecuted for theft by another company for which he worked.

Because Sam wasn't much of a provider, his wife belittled him and didn't respect him. Though that made for a rocky relationship, I don't believe her treatment of Sam was inappropriate.

(App. E).

Sheldon's widow describes the Hoffman family's failure to help Barry in the following way:

Sam and Miriam Hoffman never got along terribly well. I think this was largely due to Sam's gambling and embezzling. Sam was a real dandy. He spent the household money on clothes and gambling, even when there wasn't enough to pay for the necessities the family needed. Though the family clearly knew of Barry's drug problem, the parents never tried to help him in any way. Miriam wasn't home during the day, and she had her hands full with making whatever money she could; Sam just had different interests.

(App. C).

Barry grew up in a family which constantly and unfairly

compared him with his older brother, Sheldon. His mother still does, even though Sheldon died in **1979:**

> **...** [Barry] was very different from his brother, who was very bright and succeeded at everything he did.

(App. B).

Other people who knew Barry and his family remember how badly Barry was affected as he began to realize that he was the unfavored son:

> My name is Kate Berry and I am Sheldon (Hoffman) Maas' widow. I knew Barry, Miriam and Sam Hoffman. Sheldon and I often spoke of his family, Barry in particular. Sheldon loved Barry and felt sorry for him. Sheldon was the family favorite, and he always thought that fact must have been painfully obvious to Barry. Sheldon was good looking and bright. He went to college and dental school, and he had lots of friends. Barry was four years younger, rather passive, dropped out of school in the 10th grade, and never could seem to make much out of his life because of his drug addiction and other problems.

(App. C).

Even though Barry understood that he was disfavored over his brother, Sheldon, he still admired Sheldon. Sheldon, in fact, was the one person in his life who he could turn to for support. Miriam Hoffman explains:

> Sheldon died of a heart attack in **1979,** within a few months of Barry's father. My family has a strong history of heart disease. I have had three heart attacks and am on medication. Barry had a heart attack a few years ago in Florida State Prison. I have never recovered from Sheldon's death. <u>When Sheldon died, Barry lost the **only** relative he ever went to for help and support</u>.

(App. B) (emphasis added).

This evidence and much, much more was available. Mr. Hoffman was consumed with drugs throughout his life and up until the time of his arrest on these charges. The drugs affected (and

damaged) this drug addict's brain. Defense counsel did nothing to investigate any of this. Not even the effort to make one long-distance phone call to Mr. Hoffman's mother was expended. Had counsel done even that, he would have uncovered a wealth of information about Mr. Hoffman, all critically important to the capital sentencing determination that the jury would be called on to make. Miriam Hoffman, Tillman Pollack, Kate Berry, and Patricia Richman, among others, have all attested to their willingness to provide whatever information they could, if only his attorney had contacted them. But that contact was never made, and the jury that decided that Barry Hoffman should die made that decision in complete ignorance about who he was.

2. Failure to Obtain Mental Health Assistance

Reasonably competent defense counsel have long known that addiction to opiates and their long-term use have serious consequences on an individual's mental functioning, behavior, and behavioral controls. The dysfunction caused by drugs is real, severe, and debilitating. Lawyers are not the only people who know this -- virtually anyone does. Defense counsel, however, did nothing.

A reasonably competent investigation in a case in which a defense attorney represents a serious drug addict requires the assistance of a mental health professional in order for counsel to ascertain the effects of the drugs on his client's functioning. Here, the debilitating effects of drug dependency and the constellation of factors in Mr. Hoffman's life that made him vulnerable to long term drug dependency were never

investigated. Drugs affect the addict's brain. Counsel, however, sought no mental health assistance.

During post-conviction proceedings, Mr. Hoffman had the benefit of a mental health evaluation. Counsel should have asked for one pretrial, for the results of such an evaluation would have provided many significant facts.

Dr. Robert Fox, M.D., a highly qualified psychiatrist and neurologist, was provided with historical evidence concerning Mr. Hoffman and conducted an extensive psychiatric and neurological examination of Mr. Hoffman. His diagnosis reveals that Mr. Hoffman has suffered from one of the most crippling diseases recognized in the medical profession. Dr. Fox's report was reproduced in full in Mr. Hoffman's Rule 3.850 motion, and was included in the motion's accompanying appendix. Some pertinent portions of the report are reproduced immediately below:

> V. PSYCHIATRIC EVALUATION
>
> Barry Hoffman is the second son of Miriam Hoffman born in Baltimore Maryland, 11/8/47. He had an older half-brother, Sheldon, who was the son of a previous marriage. His father was both a shoe salesman and an aluminum siding salesman. His parents were divorced when Barry was approximately fourteen years of age and at that time his father left Baltimore and moved to New Orleans. He describes his mother as having been a very stern and hard working woman who, as his father was a failure at most of his work, was the breadwinner in the family, working primarily at Sears Roebuck and other jobs to support Barry and his brother. He was consequently not well-supervised as a youth. He recalls always having had a difficult life because he was over shadowed by an older, smarter and more well liked brother. His memory of his childhood is one in which he spent all of his time away from the house and on the streets. He had a significant school history of truancy and began using illicit drugs at around the age of twelve. He says that he began by drinking cough medicine with codeine and sniffing glue and then he progressed to heroin at around the age of sixteen.

He left school in the tenth grade and from that time on spent much of his time by his report involved in the using and dealing of drugs. He joined the Armed Services in April 1966 and was discharged in November 1966 with an honorable discharged, under medical conditions. The medical conditions apparently was his prior heroin addiction which was discovered. Through the mid-1960's to the early-1970's he was married. When he finished the drug treatment program that he was involved in, he and his wife separated and he moved to New Orleans to live with his father. He remarried. He later separated from his second wife and, while living in Jacksonville, Florida, he worked intermittently at the only trade he has had which is as a pipe fitter. During this period of time he again resumed his drug use and this was controlled primarily by the amount of money that he had available to him to purchase drugs. During 1979 and 1980 when he was living in Jacksonville, Florida he became involved by his own report with a number of local drug dealers, primarily Leonard Mazzara and George Marshall with whom he was dealing quaaludes and other drugs. The details of his involvement with these individuals can be found in the appendices to this report.

For the year following the crime in this case, he was continuously a heavy dilaudid and cocaine user. He says that during the course of this year on a number of occasions he heard that the Jacksonville police were looking for him in regards to the murders and in fact he said he spoke with Officer Dorn in regards to these murders and was told that he was not under suspicion for them. In early September of 1981 he left the area and went to visit two of his friends living in Ontario, Canada. It was during this trip that he was apprehended by the FBI in Jackson, Michigan.

He states that at the time of his arrest at the bus station in Jackson, Michigan that he had been injecting combinations of dilaudid and cocaine generally referred to as "speed balls" on a daily basis and that morning he had injected in the Detroit bus station approximately twelve milligrams of dilaudid and one gram of cocaine. On the bus from Detroit to Jackson he had been smoking marijuana and at the time of his arrest he had a number of quaalude capsules and a small quantity of cocaine that was not discovered by the police. He says that during the course of his interrogation he was able to go into the men's room and take these drugs that he had with him. His recounting of the interrogation with Special Agent Lukepas and Detectives Dorn and Maxwell are essentially the same as found in the record of his trial and will not be repeated here.

In the course of the evaluation he reiterated that

during this interrogation he was significantly intoxicated with dilaudid, cocaine and marijuana and that he was sleep deprived. He feels that his memory was significantly impaired because of the presence of these drugs and in addition because of the length of time that he was being held in the police station that he began to withdraw from the dilaudid he had been using on a daily basis and this made it even more difficult for him to understand the questions that were being asked of him and the statements that he was being asked to make. As he stated during the examination and on cross examination at his trial, he does not recollect making any incriminating statements about himself in regards to these murders but only responding to statements and descriptions of the murders made by the arresting officers. He has no recollection as to how they concluded that he confessed to these murders. My opinion as to the veracity of his statements will appear below in another section of this report.

VI. MENTAL STATUS EXAMINATION

Barry Hoffman is a thirty-nine year old white male who appears his stated age. He is cooperative during the examination and maintains good eye contact. On the day of this exam, his speech was within normal limits, his mood and affect appear normal. He is oriented times 3, he is able to remember 3 items after five minutes. He is able to perform serial sevens with a few mathematical mistakes. He is able to spell the word world both forward and backwards, he is able to complete simple similarities. He knows the President of the United States and the previous presidents back to Johnson. His sense of direction is normal and his general fund of knowledge is normal. He is able to complete the trail making test without error.

VII. NEUROLOGICAL EXAMINATION

On gross neurological examination his cranial nerves are intact his reflexes are two-plus and symmetrical, his manual dexterity is normal, his balance is normal.

It should be noted that while in prison he suffered a midocardial infraction and required defipiliation but has apparently survived this illness without significant cardiac disability.

VIII. PSYCHIATRIC CONCLUSIONS

1. Psychiatric Diagnoses - Barry Hoffman carries the following psychiatric diagnosis:

Mixed Substance Use - 305.9

Drug addiction is one of the most crippling diseases recognized in the medical profession. As a psychological disorder, drug addiction, and its attendant features, is divided into two broad classifications: substance use disorders and substance-induced organic mental disorders. Substance use disorders refer to the maladaptive behavior associated with addiction. Substance-induced organic mental disorders refers to the direct acute or chronic effects of substances in the central nervous system. Mr. Hoffman has suffered from both disorders.

Mr. Hoffman has a life-long history of substance dependence. Opiate dependence is documented, and it is a disorder that is so devastating that, once dependence is established, substance procurement and use usually dominates the individual's life. Persons with opiate dependence have a high annual death rate. Suicide rates are obviously high.

While under the influence of opiates, an individual may suffer from a substance-induced organic mental disorder. For example, opiate organic mental disorders feature neurological dysfunction, impairment in attention and memory, and extremely poor judgment. Cocaine organic mental disorder features violence, hypervigilence, and grandiosity.

2. Conclusions - On the basis of review of the background information available and the psychiatric evaluation performed, it is possible to offer the following opinion in regards to Barry Hoffman. It is clear that Barry Hoffman has suffered from significant problem with drug addiction since he was an early teenager. This drug abuse and drug addiction history has been the primary guiding factor during the past twenty-five years of his life and has a direct bearing on any and all activities that he has engaged in during that time period. Without question, this serious disorder would have to be considered highly relevant and mitigating, if he is guilty, particularly any substance use organic mental disorder.

As reported in the above evaluation and based on Mr. Hoffman's history it seems likely that at the time of his arrest that he was significantly addicted to and intoxicated with both opiate and sedative hypnotic substances. If a legal question exists regarding voluntariness of a confession, a mental health expert could provide probative evidence regarding the effect of substance use disorder and substance use organic mental disorder on voluntariness. It is, for example, highly plausible that Mr. Hoffman was not at the time of the confession fully able to comprehend the nature of the

questions being asked him by the arresting officers, nor to comprehend the seriousness of his situation. Because of his life-long dependence and intoxication it is likely that he could have made statements at that time to satisfy the needs of the moment without an ability to comprehend their long range impact on his situation.

At the time of my evaluation, his mental status evaluation reveals a man with a history of drug abuse and drug addiction with some mild evidence of organic impairment of his brain. This is not surprising considering his drug history. It is also indicated that confusion, irrationality, and impaired judgment at the time of his arrest for the offense was due to the acute nature of his drug abuse (substance-use organic mental disorder) and not to long term organic brain syndrome.

Mitigating circumstances unquestionably accompany mixed substance use disorder and substance use organic mental disorder. Mixed substance use disorder seriously compromises an individual's ability to function in the world. When substance procurement and use become the motivating forces in a person's life, all else becomes relatively insignificant. The ability to adequately access situations and events, especially those requiring reasoned judgments, is diminished.

A person suffering from a substance-induced organic mental disorder may present signs of neurological dysfunction. Attention, memory and judgment are impaired. The consequences of these impairments on an individual's ability to appreciate and/or conform his or her behavior to accepted norms can be dramatic. Impairments of this type make reasoning and adequate mental functioning difficult at best. The compromised attention, memory and judgment produced by this disorder are often severe enough to produce mental disturbance that is extreme in nature.

Each of these disorders has serious implications regarding mental functioning, behavior, and behavioral controls, and statutory and non-statutory mitigating circumstances under Florida capital sentencing law. Mr. Hoffman has suffered from them both.

Many mental health professionals were available in Florida and the Jacksonville area to conduct a mental health evaluation at the time of Mr. Hoffman's trial. Virtually every mental health professional is familiar with substance abuse and its resulting effects. Defense counsel never even asked for an evaluation.

See State v. Michael, 530 So. 2d 929 (Fla. 1988). This is prejudicially deficient performance. Michael; O'Callaghan, 461 so. 2d 1354 (Fla. 1984).

3. Other Failures

In addition to this information, Mr. Hoffman's trial counsel had other information in his file which, had he used it, would have provided the sentencing jury with a better understanding of Mr. Hoffman's alleged participation in the crimes for which he was convicted.

During the sentencing phase charge conference, defense counsel mentioned to the judge that he would like a jury instruction which would reflect the fact that Mr. Hoffman acted under the substantial domination of his alleged-conspirator, Leonard Mazzara (R. 1155). Later, for no apparent reason whatsoever, he declined to argue for the instruction (R. 1164).

Mr. Hoffman's trial attorney had the deposition of Thomas Maxwell, taken on February 11, 1982, in his files. Detective Maxwell had played a prominent role, in abstentia, in the guilt-innocence proceedings as Detective Dorn's partner. Most importantly, he was present and acting as note-taker during the presentation of Mr. Hoffman's **"confession"** (R. 238). When Maxwell's deposition was taken, he testified that his notes of the interrogation contained a statement by Mr. Hoffman. During the "confession", Mr. Hoffman, according to this evidence, supposedly stated that he had performed for alleged co-conspirator Mazzara as he was requested because he lived in terror of Mazzara and James Provost:

Q (by Mr. Westling): What did he [Barry

Hoffman] say, to your knowledge?

A (by Detective Maxwell): Is it okay if I --

Q You can read it if you want to.

A Refresh my memory (examining documents).

Q Would it be easier to read it in the record?

A No, because it wouldn't make any sense. These are just notes. He had stated that he had killed the people in the room. He said that it was either them or me, which he was -- seemed to be -- he stated he was afraid of Provost and Mazzara, and Lennie wanted these people killed. And he said, you know, he just felt like either I kill them or they're going to kill me.

Q Why was he afraid of Provost?

A He had just heard so much about him.

Q Did he feel that Provost had anything to do with this?

A He said that since the relationship of Jimmy and Lennie, you know, was so close, that, you know, it was like a little family, and if he was afraid of one of them, just like being afraid of somebody in the whole family.

(App. J).

Because facts concerning Mr. Hoffman's **"confession"** were presented by the State and already in evidence, there could have been but one explanation for counsel's failure to present this probative information to the jury: he forgot. That was unreasonable, and prejudicial. Such evidence, from the government's own witnesses, would have necessarily had a dramatic impact on the jury's determination of whether Mr. Hoffman lived or died. The evidence mitigated, and there was nothing to be gained by keeping it quiet.

4. Conclusion

Mr. Hoffman's claim of ineffective assistance of counsel at sentencing requires an evidentiary hearing for its proper resolution.

The jury never learned the truth about Barry Hoffman. The truth is that he suffered from a serious and crippling disease -- drug addiction. The jury had no way of knowing that Barry's addiction began when he was little more than a child, and that his heavy and prolonged drug intake caused neurological dysfunctions, impaired judgment, impaired capacity, and extreme emotional disturbance. Cf. Michael, supra. The jury knew nothing of Mr. Hoffman's background and history or how the factors in his life made him vulnerable to long-term drug dependency. The fact that Detective Maxwell had recorded Mr. Hoffman's fear of and domination by Leonard Mazzara was not presented. The principle of Penry, supra, is applicable here: Mr. Hoffman's jury needed to know who he was. The jury, however, never learned who he was because of counsel's deficiencies. Because of counsel's failure to investigate and present this crucial and readily available evidence in mitigation, confidence in the outcome of the penalty proceedings is undermined. Michael, 530 So. 2d at 930.

Mr. Hoffman's factual allegations -- which must be accepted as true at this juncture, see Blackledge v. Allison, 431 U.S. 63 (1977) -- demonstrate deficient performance and prejudice. None of the significant lay and mental health evidence outlined above was provided to the judge and jury who were to decide whether Mr.

Hoffman was to live or die. An evidentiary hearing is required. Michael; Lemon; Heiney.

ARGUMENT VI

THE PROSECUTOR'S CLOSING ARGUMENTS SO INFECTED THE PROCEEDINGS WITH UNFAIRNESS AS TO RENDER THE RESULTING DEATH SENTENCE FUNDAMENTALLY UNRELIABLE AND UNFAIR, IN DEROGATION OF MR. HOFFMAN'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO DO ANTHING ABOUT IT.

During his closing arguments at the guilt-innocence and penalty phases, the prosecutor intentionally misstated facts, testified, manipulated evidence, and bolstered the veracity of the State's witnesses. His statements so infected the proceedings with unfairness as to make the ultimate sentence of death unconstitutional.

At the time of the penalty proceedings, the jury had already convicted Mr. Hoffman of the second desree murder of Linda Sue Parrish. In fact, the prosecutor had essentially argued at the conclusion of the guilt-innocence proceedings that Mr. Hoffman's alleged co-conspirator, James White, actually killed the second victim:

> Now, ladies and gentlemen, I will go back to what I said a moment ago. Principals. If you believe the way the chain of events happened, that Hoffman did not cut Parrish's throat, I would submit to you he is still equally guilty because he aided, assisted and helped James Robert White slice the girl's throat and kill her. Under the law Judge Haddock will read you, as a conspirator and as a principal he is equally guilty for the actions of his co-defendant, co-conspirator, James White. He helped him, assisted him in subduing the girl.
>
> Remember Dr. Lipkovic's testimony? There was a big bruise on the girl's ear and -- on her ear lobe. Remember that? If fits perfectly, doesn't it, just like Hoffman said it happened? He punched out the girl, hit her to the floor, subdued her. White killed her. Both

are equally guilty of first degree murder.

(R. 1060-1061)(emphasis added).

At the penalty phase, however, the prosecutor changed his mind. In order to elicit a recommendation of death from the jury, the prosecutor, in the penalty phase, had to alter the strategy he had used in his closing argument during the guilt-innocence proceeding. He needed to argue first that Mr. Hoffman, not Mr. White, killed the second victim. So, he did:

> Linda Sue Parrish was a young woman in the wrong place at the wrong time. I would submit to you the evidence showed, number one, that Barry Hoffman told Rocco Marshall that she begged for her life; that she promised not to tell anyone. He said, "Sure, baby," but hit her, knocked her down and either he killed her or he helped kill her. The evidence is contradictory there. Regardless of what he did, whether he was the actual man who cut her throat, as he bragged he was to Rocco Marshall, or whether, as he told Special Agent Lukepas, "I just knocked her down and James White did the actual murdering," -- regardless, he participated in that murder. I would submit to you from the evidence that you saw what kind of person he is; the way he butchered Frank Ihlenfeld. I would submit to you it's more likely that he was the man who actually killed Linda Sue Parrish by cutting her throat. Regardless, he assisted, aided and abetted in that murder of Linda Sue Parrish, and I would submit to you the evidence shows the reason it was done was to cover up the murder of Mr. Ihlenfeld, to prevent her from being a witness. Not only has he committed a capital crime, but in the same transaction he committed murder in the second degree, another murder. That's one aggravating circumstance.

(R. 1184-1185)(emphasis added).

Once the prosecutor had **"established"** with the jury that the degree of Mr. Hoffman's involvement in the death of the second victim was again an issue for their consideration, he could focus the rest of his sentencing argument on aggravating factors (statutory and nonstatutory) related to **her** death, not the death of the victim for which Mr. Hoffman was subject to a capital

sentencing proceeding. He therefore made repeated references to the manner by which **she** died, why **she** died, and how scared **she** was when **she** died. In fact, the prosecutor referred to the second victim twenty-four times during his sentencing argument (R. 1181-1191).

In addition to the prosecutor's impermissible references to the second victim, he also argued "facts" to the jury which were not in evidence from Mr. Hoffman's trial, and which were intended to undermine mitigation. In his comments, he mentioned Mr. Hoffman's alleged co-conspirator, James White. About White, the prosecutor stated the following:

> James Robert White, was a fairly immature, relatively uneducated 18-year-old black kid who fell under the domination of two would-be bigshots, Leonard Mazzara and Barry Hoffman.

(R. 1188).

> James Robert White, as I described a few minutes ago, was an 18-year-old, uneducated black kid at the time this happened. He does not share the same spotlight as Barry Hoffman.

(R. 1189).

Except for the fact that White, Mr. Hoffman's alleged co-conspirator was black, none of the information that the prosecutor provided about White is in the record. Indeed, much of it had no factual basis at all. The prosecutor argued (and slanted) "facts" which were outside the record, and which were never subjected to cross-examination by the defense, and thus could not be shown to be inaccurate and misleading.

During the pretrial conference, the judge and counsel had agreed that certain aggravating circumstances did not apply to this sentencing proceeding. The prosecutor, however, did a

complete turnabout, and disavowed the agreement once he appeared before the sentencing jury.

Pretrial, all agreed that aggravating factor (5)(e) did not apply to Mr. Hoffman. The judge had interpreted that provision as meaning that **"witness-elimination"** constituted an aggravating factor, but that in this instance it was inapplicable because it was the second victim that was murdered to eliminate a witness, not the first; of course the jury had returned a verdict of second degree murder for the second victim, and thus the death penalty was not a possibility for that offense (R. **1161).** The prosecutor argued it anyway:

> I would submit to you **it's** more likely that he was the man who actually killed Linda Sue Parrish by cutting her throat. Regardless, he assisted, aided and abetted in that murder of Linda Sue Parrish, and I would submit to you the evidence shows the reason it was done was to cover up the murder of Mr. Ihlenfeld, to prevent her from being a witness.

(R. 1185).

> That woman's life was snuffed out for the mere simple purpose to keep her mouth shut so she couldn't go to the police. She couldn't identify Hoffman and White. As the old story of the late show goes, dead pigeons don't talk.

(R. 1189).

Similarly, the prosecution disregarded what he himself had represented pretrial **(R. 1163),** and argued another aggravating circumstance that the parties and the court had all agreed was not applicable, that the murder was heinous, atrocious and cruel:

> . . . the legislature and Courts have determined that certain murders are worse than others. We don't think it makes any difference to the deceased, but to society certain murders are worse than others. In certain cases society has a right to extract from -- from the perpetrators of these, the especially heinous murderers,

the ultimate penalty.

(R. 1190)(emphasis supplied).

During his guilt phase closing, the prosecutor also improperly vouched for the truthfulness of his witnesses:

> I guess the inference is that these men have come in here and not told you the truth. The inference is that three men like Poleski, a 55 or 56-year-old lawyer from Michigan with nothing to do with this case, he is retired from the FBI and now does approximately what I do in Michigan, Mr. Lukepas, a middle-aged man, and Mr. Dorn would sacrifice their careers and take a chance on lying in court for this? For Barry Hoffman? They are going to throw their jobs away and commit perjury and conspire to commit perjury with Rocco Marshall for this? Use your good common sense. Who does he think he is that he is that important that these men would risk not only their reputations but risk perjury to convict Barry Hoffman? Use your good common sense. You know, it's a little easy for -- like Mr. Harris said, -- did Lukepas come in here and lie? Did Poleski come in here and lie? Did Dorn come in here and lie? And if you think the State of Florida put on a retired FBI agent and now Prosecutor in Michigan, and put on an agent of the federal government, United States Department of Justice, and a Jacksonville Beach detective and had them lie to you, you let Barry Hoffman out of this courtroom in one hour. Right now if you want to. Because if that's what you think the State of Florida did, go right ahead and let Barry Hoffman walk out on the street this afternoon. Ladies and gentlemen, Barry Louis Hoffman is certainly not worth those gentlemen's reputations and those gentlement's liberty. I wonder who Hoffman thinks he is that he is that important.

(R. 1098-99). He further stated:

> Mr. Poleski, a 25-year retired FBI agent, a lawyer since the '50s, now an Assistant District Attorney, Mr. Lukepas, an FBI agent, ten years experience, a thousand miles away, it's not their case, -- Mr. Roy Dorn, a ten-year detective with the Jacksonville Beach Police Department, that's your choice. You can believe those people. Rocco Marshall, totally corroborated by Poleski, Lukepas and Dorn, or you can believe the testimony of Barry Hoffman, a man who, I would submit to you, by his own admission is a drug dealer, drug courier, a man who I would submit to you is a contract murderer. The choice is yours. Guilty or not guilty.

(R. 1109).[6]

It is certainly improper for the prosecutor to bolster the credibility of his own witnesses as was done here. But the prosecutor's improper argument also included his own testimony as to why the State offered immunity to one witness:

> Let's first of all talk about Rocco Marshall. I told you on Monday that immunity is a very sensitive subject. Believe me, it gives the State of Florida no enjoyment whatsoever to give someone immunity, to let someone involved in crime go free. In fact, it makes me sick to my stomach. But, ladies and gentlemen, the only person named in that conspiracy is not the man seated behind me. And the State of Florida is not obsessed with Barry Louis Hoffman. There are other people to consider. Remember the situation, ladies and gentlemen, what Dorn said about the arrest of Leonard Mazzara? He didn't give a statement. And who knew about this conspiracy? James White, a murderer by the testimony today, a backup murderer at that, but a murderer nonetheless. Barry Louis Hoffman; the number one murderer who wanted a backup. A man, a middleman, who went out and found these people and the man who hatched the plot, Leonard Mazzara. Now, those people -- those are your witnesses. If you have got to deal with somebody, use your good common sense, who was the State of Florida going to deal with? Well, do you want us to give immunity to Lennie Mazzara, the man who conjured up this plot to assassinate two people? Do you want James Robert White to get immunity, a backup murderer, at

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[6] In United States v. Young, 470 U.S. 1, 18-19 (1985), the United States Supreme Court noted that a prosecutor breaches the constitutional guarantee of due process when he implies that he has more information than what is presented to the jury:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence.

least the backup murderer who kicked Frank Ihlenfeld and who probably cut the throat, if not assisted in cutting the throat of Linda Sue Parrish? Or do you want Barry Louis Hoffman to walk out of his courtroom?

Rocco Marshall is no angel. Ladies and gentlemen, the State of Florida would gladly trade Rocco Marshall and a hundred more like him for two actual murderers and the man who hatched the plot. It's not a nice decision to make. But this is sometimes not a nice business. And consider and evaluate the State's actions, what our alternative were. Is that what you want on the street of your city with immunity?

(R. 1095-1097). This was not argument based on the evidence presented: it was the State's testimony of why it purportedly made certain decisions. This was clearly improper closing argument.

In the penalty phase argument the prosecutor finally added his own personal recommendation to the jury:

I recommend to you, ladies and gentlemen, and I will submit to you ~~that this crime is far and away above your ordinary murder. . . . This case is special~~. This case demands the ultimate penalty.

I would humbly request of you as the **attorney** for the State to recommend to Judge Haddock that this defendant receive the ultimate penalty. The law and the evidence justify it.

(R. 1191)(emphasis added).

These comments impermissibly injected the prosecutor's personal opinions and testimony into the entire process. **See** Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(in banc). These improper comments certainly were intended to lead the jury to believe that the prosecutor had access to information undisclosed to the jury and thus that he was in a better position to determine whether Mr. Hoffman deserved the death penalty.

Such comments also tend to diminish the jurors' sense of responsibility by signalling them that a higher, more

knowledgeable authority -- their State Attorney -- had already decided that Mr. Hoffman deserved death. See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). Arguments such as that described above is also flatly improper because it urges the jury to rely on impermissible victim impact. See South Carolina v. Gathers, 109 S. Ct. 2207 (1989).

Simply put, the prosecutor's arguments at the guilt-innocence and sentencing phases so infected the proceedings as to render the convictions and death sentence fundamentally unfair and unreliable.

Defense counsel failed to do anything about any of this. He idly sat by and allowed this presentation to go unchecked, interposing no objections. Whether because of ignorance of the law, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or indifference, see Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988), counsel's non-performance was grossly deficient. His failures to object at all, or to ever ask for a mistrial cannot be deemed the result of any conceivable reasonable tactic or strategy. This is a case of ineffective assistance of counsel. An evidentiary hearing is required.

ARGUMENT VII

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. HOFFMAN'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hoffman raised this claim on direct appeal. However, this Court did not then have the benefit of Maynard v. Cartwright, 108 S. Ct. 1853 (1988), on the basis of which the

jury instructions regarding the "cold, calculated and premeditated" aggravating factor could be properly evaluated in this case. In its decision in Maynard v. Cartwrisht, the United States Supreme Court held that state courts had failed to comply with Godfrey V. Georgia, 446 U.S. 420 (1980), when they did **not** require adequate jury instructions which guided and channelled the jury's sentencing discretion. Maynard V. Cartwrisht also applies to the judge's sentencing where there has been a failure to apply the limiting construction which the eighth amendment requires. Adamson V. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). The same channelling and guiding of the sentencer's discretion is required for the "cold, calculated and premeditated" aggravating circumstance as was required regarding the aggravating factor at issue in Cartwrisht.

The proper definition of this aggravating factor, and accordingly proper instructions and limiting principles thereon, remained vague at least until 1987. See Rogers V. State, 511 So. 2d 526, 533 (Fla. 1987). More importantly, however, the jury was not told in Mr. Hoffman's case what was required to establish this aggravator. In fact, the prosecutor told the jury that no more than premeditation of the type required to convict was needed. The judge similarly failed to apply any narrowing or limiting construction.

This Court's decisions subsequent to Roaers have plainly recognized that "cold, calculated and premeditated" requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell V. State, 527 So. 2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor [] requir[es] a

careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because Mr. Hoffman was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rosers, or the standard set forth in Cartwriaht, petitioner's sentence of death violates the eighth and fourteenth amendments.

Although this Court rejected this claim on direct appeal, before Cartwriaht, it is respectfully submitted that in the interests of fundamental faireness, the claim should now be entertained and relief should be granted.[7]

ARGUMENT VIII

MR. HOFFMAN'S TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE PROCEEDINGS FOR FAILING TO OBJECT TO THE JUDGE'S IMPROPER INSTRUCTION CONCERNING THE PRE-TRIAL STIPULATIONS OF DEFENSE COUNSEL AND THE PROSECUTOR; THE JUDGE IMPROPERLY EXHIBITED BIAS CONCERNING THE MITIGATING FACTORS APPLICABLE TO MR. HOFFMAN; AND THE PROSECUTOR FAILED TO HONOR THE TWO STIPULATIONS HE ENTERED INTO, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Prior to the charge conference concerning penalty phase jury instructions, defense counsel and the prosecutor had agreed to

[7] Indeed, this Court had previously understood Godfrev as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981)("Illustrative of the Court's exercise of the review function is Godfrev V. Georgia"). This Court had declined to address the impact of Godfrev upon the adequacy of jury instructions regarding this aggravating circumstance. This Court's prior constructions of Godfrev were in error. That standard has been altered by Cartwright.

stipulate to two mitigating circumstances -- that Mr. Hoffman had no significant criminal record and that Mr. Hoffman's co-conspirators, Leonard Mazzara and James Robert White, had been sentenced to consecutive life sentences (R. 1150).

The stipulations agreed to by defense counsel and the prosecutor constituted facts in evidence. They were not facts which can be rebutted. They were inalterably true for the purposes for which they were stipulated.

Despite the nature of the stipulated-to mitigating circumstances, Mr. Hoffman's defense counsel unreasonably failed to object to the inaccurate and misleading instructions that the judge provided to Mr. Hoffman's sentencing jury and the improper argument given by the prosecutor. His failure to do so was not the result of a reasonable tactic or strategy. If defense counsel simply misunderstood the agreements between the prosecutor and himself, he unreasonably failed to present available, critical evidence to the jury. If he understood them but did nothing to correct the error, his efforts were patently ineffective.

After the judge reconvened the jury for the penalty trial, but before evidence was submitted, oral argument heard and jury instructions issued, the judge simply apprised the jury of some "agreements" between counsel and gave a description of their content:

> There is a practice in the law which is called stipulation. A stipulation is where both sides in the case agree on certain facts or factors or issues and rather than go through the more formal process of presenting those factors to you through testimony, thev have agreed by stipulation that those factors will just be told to you and vou can accept them as having been

presented to you as if they came from the witness stand with the agreement of both parties that those factors may be considered by you.

There is a stipulation in this case that goes to your advisory verdict.

The first of these is that the defendant, Barry Hoffman, has no significant criminal history.

The second stipulated item that the co-conspirators, Leonard Mazzara and James Robert White, were each sentenced to two consecutive life sentences for the murder of Frank Ihlenfeld -- for the murders of Frank Ihlenfeld and Linda Sue Parrish.

Those two items have been stipulated into evidence by Counsel for both sides. You may consider them just as if they had come from the witness stand.

(R. 1178-1179) (emphasis added).

First, by making the announcement when he did in the proceedings and failing to repeat it prior to deliberation, the judge virtually ensured that the jury would not understand, even remotely, the impact of the defense/prosecutor agreements. Defense counsel did nothing about this. Secondly, the judge compounded the error when he issued the final sentencing instructions because he failed to direct that the two mitigating circumstances constituted facts that the jury must, not **may**, consider in their sentencing deliberation:

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.

Among the mitigating circumstances you *may* consider, if established by the evidence, are:

That Barry Hoffman has no significant history of prior criminal activity.

Secondly, you *may* consider any other aspect of the defendant's character or record and any other circumstance of the offense.

You **may** consider the sentences imposed upon the co-conspirators under this provision.

(R. 1197)(emphasis added). The jury was never directed by the judge to find that two mitigating circumstances existed, and that the prosecutor, himself, had agreed that they did. Not one word of the penalty phase jury instructions, which the judge intended to give before learning of the stipulations, was altered to incorporate them.

Defense counsel's omissions -- his failures to insist that the jury be properly instructed concerning the effect of the agreed-to mitigating circumstances and his failures to interpose any objection or instruction request -- denied Mr. Hoffman a constitutionally adequate capital sentencing proceeding. Because the judge failed to instruct the jury that **two** mitigating circumstances existed, when everyone stipulated that they did exist the prejudice is obvious. Mr. Hoffman's death sentence was imposed in violation of the sixth, eighth and fourteenth amendments.

It was also obvious that even the judge did not accept those two mitigating factors, even though they had been stipulated to by the prosecution. First, the judge questioned, at the charge conference, whether Mr. Hoffman really lacked any significant criminal history. He had to be reassured by the prosecutor that criminal history involved convictions (R. 1150-52). Then, when the judge pronounced the sentence of death, he announced:

> The Court does find that there are some mitigating circumstances in this case.
>
> The Court finds that Mr. Hoffman has no significant history of conviction of prior criminal activity. However, the Court has to balance this finding against

the fact that Mr. Hoffman took the witness stand in this case and under oath admitted to making his living part-time or full-time before and after this murder by the selling of druas in this city. So, while I find he has no significant history of conviction, I cannot picture him as a person who prior to this killing did not commit any other crimes because by his own admission he did. However, I do find no significant history of conviction of prior criminal activity.

(R. 1232-1233).

The judge then repeated the following in his written findings:

(a) The Defendant has no significant history of conviction of prior criminal activity. However, the Defendant did take the witness stand and admit to making his living in whole or in part by selling druas both before and after the murder.

(R. 135).

The judge's departure from his role as an impartial, unbiased reviewer of the evidence, as presented, was constitutionally impermissible. **See** Zeigler v. State, **452** So. 2d **537** (Fla. **1984).**

Where counsel for the parties have entered into a stipulation for purposes of establishing the existence of certain facts during the sentencing proceeding, it is fundamentally unfair and a violation of the sixth, eighth and fourteenth amendments for the judge to refuse to honor that stipulation by neglecting to instruct the jury properly and by refusing to fully consider it himself.

Defense counsel remained silent at each and every juncture of the judge's improper, and constitutionally defective, treatment of critically important mitigating evidence to which everyone had agreed to enter by stipulation (R. **1150-1155, 1178-1179, 1232-1233).** The facts accepted as mitigation were barely even presented to the jury, the jury was effectively precluded

from giving them proper consideration, and the judge explicitly refused to do so. Defense counsel's silence was not the result of reasoned strategy and tactic, and unconstitutiona ly affected the jury's proper consideration of mitigating evidence.

The prosecutor introduced no evidence during the penalty proceeding. In conference, however, he had stipulated to disparate treatment as a mitigating factor pursuant to what is now Fla. Stat. 921.141(a) (h):

> THE COURT: What is the second one?
>
> MR. OBRINGER: That the co-conspirators, Leonard Mazzara and James White, were sentenced to consecutive life sentences.
>
> THE COURT: To consecutive life sentences?
>
> MR. HARRIS: Yes, for the murders of Frank Ihlenfeld and Linda Sue Parrish.
>
> I, of course, will argue about the fourth conspirator being given immunity.
>
> MR. OBRINGER: Sure, you can argue that from the evidence.
>
> MR. HARRIS: I'm going to request then, Judse, that you add the additional factor of mitigation that can be considered by the jury that is consistent with the case law, that is, that the sentence of the co-conspirators or principals is a factor that could be considered in arriving at your verdict or your recommendation.

(R. 1152-53)(emphasis added).

Just minutes after entering into this agreement during this conference, however, the prosecutor reneged. He urged the jury to find only one mitigating factor:

> Judge Haddock will very shortly instruct you on what those aggravating and mitigating circumstances are. Basically, as the attorney for the State of Florida. I am here to argue to you and explain to you through my argument how the aggravating circumstances fit this case, and, second of all, how there is a lack of

mitigating circumstances.

> We have stipulated or agree that Mr. Hoffman has no significant criminal history. That is one mitigating circumstance. I believe I will show you in the next few minutes there are at least three aggravating circumstances, which I would submit to you outweight that one mitigating circumstance.

(R. 1182).

> Let's talk about the mitigating circumstances. You are going to hear from Judge Haddock that the defendant has no significant history of prior criminal activity. That's one.
>
> I would submit to you you will find no other mitiaatina circumstance.
>
> Judge Haddock is going to tell you that you can consider as a mitigating circumstance the sentences imposed on the other persons, that is, the backup man, James Robert White, and Leonard Mazzara, the man who paid the money. Ladies and gentlemen, I would submit to you that the aggravating circumstances fit Barry Hoffman . . .

(R. 1187)(emphasis added). Thus, by the time that defense counsel began his closing argument to the sentencing jury, the judge had already provided misleading instructions to the jury about the effect of both stipulations (R. 1178-79); and he had just listened to the prosecutor argue in derogation of the second stipulation. But defense counsel never once raised an objection, never asked for a mistrial, never sought to enforce the stipulation. Counsel's inaction was deficient performance, and Mr. Hoffman was prejudiced.

If the prosecutor's argument did not deprive defense counsel of the benefit of the stipulation concerning the status of the co-conspirators, then counsel unreasonably failed to investigate this issue adequately which, because of closing argument by the prosecutor, became critical to the determination of whether Mr.

Hoffman would live or die.

a. The prosecutor argued that Mr. Hoffman deserved death, in spite of the status of alleged co-conspirator James White because:

> [h]e was a backup man. James Robert White was a fairly immature, relatively uneducated 18-year-old black kid who fell under the domination of two would-be bigshots, Leonard Mazzara and Barry Hoffman. Unfortunately, he got under these people's influence and did a very horrible thing. That kid is 18 years old. The testimony showed Barry Hoffman is 35 years old.

(R. 1188). (As noted previously, the majority of these comments are **not** founded on any evidence.)

b. What the jury never knew, because trial counsel never presented it, was that alleged co-conspirator White was convicted and adjudged guilty of capital murder in the first degree for both victims as well as conspiracy to commit murder in the first degree (App. Θ). By contrast, Mr. Hoffman's jury had only found him guilty of one count of first degree murder and one count of second degree murder (R. 1191-1195).

c. Defense counsel's unreasonable omission was highly prejudicial because his own argument to the jury was that the ultimate issue for their consideration was the fairness of sentencing Mr. Hoffman to death when his alleged co-conspirators had received life:

> In mitigation, you heard Mr. Hoffman on the stand. I can tell you until about a month after the killing he was just a normal guy. I think by your verdict you have indicated that you don't believe that entirely, but I think you do believe that up until just prior to the killing he was a normal guy like everybody else. For 35 years he has lived a productive life. If he did these things it was only because he got side-tracked there, like getting involved in the drug world. But if he is in prison for the rest of his life there will be no possibility of something like this happening again. **But**

> I think the ultimate thins you need to consider here is just the fairness aspect of it. It's just not fair for Rocco Marshall to so free, and for Leonard Mazzara to serve a life sentence, and for James White to serve a life sentence, and for Barry Hoffman to so to the electric chair. It is not necessary and it is not right under the circumstances of this case for the State of Florida to take Barry Hoffman's life. The life sentence, with a provision that he be imprisoned for a minimum of 25 years without possibility of parole, would adequately protect the citizens of the State of Florida, and it will abundantly punish Barry Hoffman. Nothing that you do or nothing the Judge can do or nothing the State of Florida can do can bring Frank Ihlenfeld and Linda Sue Parrish. And the law does not demand retribution against Barry Hoffman. The law should be applied equally to all.
>
> Considering all these aspects, you must recommend to Judge Haddock that he impose a sentence of life imprisonment.
>
> Thank you.

(R. 1194-1195)(emphasis supplied).

For the reasons described above, Mr. Hoffman was sentenced to death in violation of the sixth, eighth and fourteenth amendments. Counsel's deficiencies were prejudicial and were not reasonable. Whether due to ignorance, lack of investigation, lack of preparation, or lack of care, an evidentiary hearing is required in order for this claim of ineffective assistance of counsel to be properly resolved.

ARGUMENT IX

> MR. HOFFMAN'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985) AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988)(IN BANC), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hoffman presented a detailed Caldwell V. Mississippi claim in his Rule 3.850 Motion. In Mann v. Dusser, 844 F.2d 1446 (11th Cir. 1988)(in banc), relief was granted to a capital habeas

corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed in the motion to vacate violated Mr. Hoffman's eighth amendment rights. Barry Hoffman is entitled to relief under Mann. Mr. Hoffman must acknowledge that this Court has today conclusively found "Caldwell inapplicable to this state." King v. Dusser, No. 73,360 (Fla. Jan. 4, 1990), slip op. at 3. Mr. Hoffman, however, respectfully submits that that analysis is in error, that Caldwell does indeed apply to Florida capital sentencing proceedings, see Mann v. Duaser, supra, and that because the diminishing of the jury's sense of responsibility in his case his sentence of death is fundamentally flawed and unreliable and resentencing is proper.[8]

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial reduction of a capital jury's sense of responsibility which is surpassed by the jury-diminishing statements made during Mr. Hoffman's trial. The in banc Eleventh Circuit in Mann v. Dusser, 844 F.2d 1446 (11th Cir. 1988)(in banc), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(in banc), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial

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[8]Additionally, Mr. Hoffman asserts that his trial counsel rendered ineffective assistance by failing to object to the improper comments and instructions, and to properly litigate this issue.

instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Hoffman's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments and instructions created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, mitigating factors existed in this case, and were found.

The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. Because of the inherit reliability involved in this death sentence, Mr.

Hoffman respectfully urges that this Honorable Court revisit its view that Caldwell does not apply in Florida.

Moreover, defense counsel was ineffective for not objecting to the prosecutorial comments and judicial instruction. Florida case law established the basis for such an objection. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959). No tactical decision can be ascribed to counsel's failure to object. Counsel's failure could not but have been based upon ignorance of the law. It deprived Mr. Hoffman of the effective assistance of counsel. Accordingly, Mr. Hoffman was denied his sixth and eighth amendment rights. His sentence of death is neither "reliable" nor "individualized." The Court should order an evidentiary hearing on counsel's ineffectiveness, and grant relief pursuant to Rule 3.850.

CONCLUSION

Because the lower court's orders were erroneous as a matter of fact and law, the decision below should be reversed, and this case should be remanded for proper evidentiary resolution. Because it is appropriate in this case, this Honorable Court should vacate Mr. Hoffman's unconstitutional convictions and sentence of death.

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 U.S. Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, **111-29** North Magnolia Drive, Tallahassee, Florida **32301**, this 5th **day** of February, **1990**.

_____
Attorney