IN THE SUPREME COURT OF FLORIDA

CASE NO. *78,593*

ROBERT DAVID HEINEY

Appellant,

v.

STATE OF FLORIDA.

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL OF DENIAL OF MOTION FOR FLA. R. CRIM. P. *3.850* RELIEF

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PRELIMINARY STATEMENT

This is an appeal from a circuit court's denial of Mr. Heiney's requests for Rule *3.850* relief. All matters involved in the Rule *3.850* action, and all matters presented on Mr. Heiney's behalf before the lower court, are raised again in this appeal and incorporated herein by specific reference, whether detailed in the instant brief or not.'

With regard to the Rule *3.850* appeal, certain matters should be noted at the outset. Although the Rule *3.850* motion and the files and records in the case did not "conclusively show the [Mr. Heiney was] entitled to no relief," Fla. R. Crim. P. *3.850*, the lower court never directed that the State respond to the motion and then summarily denied it. No evidentiary hearing was held, even though serious and legitimate questions regarding the constitutional validity of Mr. Heiney's capital conviction and sentence have been raised. This brief is intended to demonstrate that an evidentiary hearing is warranted in this action and that Mr. Heiney can establish his entitlement to relief if allowed a fair opportunity. The Court is also referred to Mr. Heiney's Motion to Vacate Judgment and Sentence, Amended Motion to Vacate, and Consolidated Emergency Motion for Rehearing, etc., and their appendices, all of which are fully incorporated herein by specific reference.

After proper review of the record, it will be apparent that an evidentiary hearing is warranted, and thereafter, that relief would be proper. This Court has not hesitated to order evidentiary hearings in the past. Lemon v. State, *498 So.* 2d *923* (Fla. *1986)*; State v. Crews, *477* So. 2d *984* (Fla. *1985)*; O'Callaghan

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'Given the death warrant outstanding against Mr. Heiney and Mr. Heiney's counsels' obligations, obligations imposed by the innumerable numbers of death warrants the CCR office is forced to litigate, a brief meanginfully discussing all of Mr. Heiney's claims cannot be completed. This brief therefore should be reviewed in conjunction with Mr. Heiney's Rule *3.850* pleadings, incorporated herein.

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). Mr. Heiney respectfully submits that the Court should do so in this action, as will be discussed herein. A stay is certainly appropriate to permit the judicious consideration of this first Rule 3.850 action, and in order to afford Mr. Heiney the evidentiary hearing to which he is entitled.

Citations in this brief shall be as follows: "R. [page number]" shall indicate references to the record on direct appeal. Citations to the record on appeal from the denial of the Motion to Vacate Judgment and Sentence and related pleadings shall be: "PC-R. [page number]" or otherwise explained. References to the Appendix to the Motion to Vacate shall be designed at "App.I," Appendix to the Amended Motion to Vacate shall be designated as "App.II" and to the Consolidated Motion for Rehearing, etc. as "App.III". All other citations shall be self-explanatory or otherwise explained.

Due to time constraints and the impossible schedule with which the CCR office has had to deal this week, counsel has been unable to prepare a table of authorities.[2]

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[2]CCR counsel are required to file three under-warrant actions pursuant to Rule 3.851 this Wednesday, seven briefs and pleadings in capital actions are due in this Court this week, two are due in the Eleventh Circuit Court of Appeals, seven substantive pleadings and memoranda are due in Florida trial courts, two are due in federal district courts, and a hearing is scheduled in yet another capital action for this Thursday. The State persistently accuses CCR counsel of "delaying" (although the State's representatives do not hesitate to request extensions and continuances on the basis of far less onerous schedules). No one, however, has been able to suggest how CCR's small staff can accomplish all of this. Governor Martinez's announced efforts to "keep the pressure on" CCR counsel have had their intended effects. CCR counsel can no longer effectively represent their clients. The sad consequence is that Florida's capital post- conviction system is quickly becoming a sham, for ineffective post-conviction attorneys can provide no meaningful assistance to their death-sentenced clients. Cf. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).

TABLE OF CONTENTS

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 4, 1978, Robert Heiney left Houston, Texas. The State presented evidence at trial that he was hitchhiking and low on money and that on June 5, 1978, he was allegedly seen in the company of the victim. On June 6, 1978, the decedent was found near Holt, Florida. He had been killed by several blows to the head. There were only slight defensive wounds and the decedent's blood-alcohol level was .28.

All of the evidence against Mr. Heiney was circumstantial and the State featured Williams Rule evidence of another shooting a few days earlier and credit card receipts purportedly signed by Mr. Heiney to obtain a conviction. In fact, only four of the numerous receipts were identified as being in Mr. Heiney's handwriting. Evidence that the victim was in the company of Phillip Cook just before the murder and that two of the receipts signed "Phillip Cook" were not in Mr. Heiney's handwriting was never presented to the jury.

Initially, Mr. Heiney was charged with second degree murder. It was only after an inmate in the jail, Thomas Tuyziski, told the authorities that Robert Heiney had admitted the offense to him that the State sought a grand jury indictment. This was two months later, on August 24, 1978 (R. 2).

Tuszynski stated that Robert Heiney told him that both he and the decedent were drunk, and when the decedent started hollering, he hit him to quiet him down and then went on hitting him with a hammer that had been left in the car (App. II, 1).

Mr. Heiney did not testify. He was convicted of first degree murder on March 2, 1978. On March 8, 1979, the jury returned a recommendation of life imprisonment. The court sentenced Mr. Heiney to death (after finding three aggravating and no mitigating factors) on March 29, 1979. Mr. Heiney's conviction and sentence were affirmed by this Court, with two Justices

dissenting. Heiney v. State, 447 So. 2d 210 (Fla. 1984).

Mr. Heiney's Rule 3.850 motion was filed on January 2, 1987, as was required by the Rule. At the time Mr. Heiney's 3.850 motion and subsequent amendment were filed, CCR counsel were actively engaged in preparing similar motions for six inmates who, like Mr. Heiney, also fell under the recently established time limitation provisions of the Rule. Unfortunately, at the time virtually all of CCR's resources were directed toward representation of individuals who, by virtue of the Governor's issuance of death warrants, were facing imminent execution. As a result, Mr. Heiney and other CCR clients in a similar posture were not provided with the level of professional and diligent representation which is contemplated by Rule 3.850 and by the statute creating CCR and mandating it's post-conviction representation of all death row inmates in the state. See Fla. Stat. sec. 27.001, et seq. (1987); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). At the time that the amendment was filed, counsel informed the court: "Because the instant Motion therefore still does not represent Mr. Heiney's case in its best and fullest light, Mr. Heiney respectfully requests that this court grant him a reasonable time within which to complete the prepatory and investigatory process and further amend this motion. . . ." Subsequent to the filing of the amended motion, the trial court took no action and the State filed no responsive pleadings for two years.

On April 20, 1989, the Governor of Florida issued a death warrant against Mr. Heiney, and execution was set for June 6, 1989. On April 20, 1989, Judge Wells filed a summary of denial of all claims nunc pro tunc to April 12, 1989. Mr. Heiney filed a Consolidated Emergency Motion for Rehearing, etc., including a request for an evidentiary hearing and an application for stay of execution on May 1, 1989. On May 5, 1989, Judge Wells disqualified himself and Judge Ben Gordon was assigned to the case.

On May 30, 1989, Judge Gordon entered orders prepared by the State dismissing the Consolidated Motion and granting the State's requested corrections of the order denying post-conviction relief.[3] This appeal follows.

INTRODUCTION

The sentencing court committed error by allowing counsel to be constrained in presenting, and by failing itself to consider, nonstatutory mitigation contrary to Hitchcock v. Dunner. The jury instructions clearly limited the consideration of mitigation to the statutory mitigating factors; the sentencing order and on-the-record statements of the sentencing court showed that its consideration was precluded. A judge is presumed to follow his jury instructions regarding mitigation. Zeigler v. Dunner, infra. But here the Hitchcock error is much, much clearer. Indeed, the State conceded that this issue is properly before the post-conviction courts. In its sentencing order the trial court specifically stated that: "the Court has carefully reviewed those seven mitigating circumstances contained in Florida Statutes 921.141(6)(a-g)." Although the court made one brief reference about residual doubt, no consideration whatsoever was given to the substantial nonstatutory mitigation which appears in the record. The Court failed to consider evidence of cooperation with the police, capacity for remorse, mental instability, use of drugs and alcohol, impulsive behavior, the victim's behavior when intoxicated, Mr. Heiney's behavior in the courtroom and his prior nonviolent criminal record.

The trial court order denying Rule 3.850 relief on the Hitchcock issue never addressed this failure. Instead the Court denied relief because trial counsel relied on mitigation in the record instead of introducing evidence at the penalty phase (contrary to Harvard v. State, infra) and because Lockett was argued, but

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[3]Counsel for Mr. Heiney did not receive the State's Proposed Order until May 30, 1989 after this brief had already been prepared.

not addressed by this Court, on direct appeal, contrary to innumerable post-Hitchcock precedents of the Florida Supreme Court (discussed in the body of this brief).

In Mr. Heiney's case, both the judge and jury were constrained in their consideration of nonstatutory mitigation. The jury nevertheless returned a life recommendation. The judge, however, overrode that recommendation and imposed death, failing to consider evidence of nonstatutory mitigation. Indeed, both the judge and state high court in Mr. Heiney's case failed to properly consider and evaluate the jury override here, pursuant to Hitchcock (See Claim I, Habeas Petition). Of course, resentencing is proper under Hitchcock whenever the record reflects even an ambiguity as to whether the sentencing judge's consideration of nonstatutory mitigation has been constrained. See Woods v. Dunaer, infra; Morgan v. State, infra. Here, however, there is no true ambiguity.

Mr. Heiney was denied an individualized and reliable capital sentencing determination. His entitlement to relief on the merits is obvious: the proceedings resulting in his sentence of death violated the mandate of Hitchcock v. Duaner.

At the time of the offense and at trial, Mr. Heiney was mentally ill. As an indigent whose mental capacity is at issue at all stages of a capital case, Mr. Heiney was entitled to a competently conducted psychiatric or psychological evaluation. Defense counsel obtained Linda Haese, an unlicensed "staff psychologist," for that purpose. By relying on demonstrably unreliable information gleaned solely from personal reporting, by failing to seek information from an independent source, and by using grossly inadequeate testing procedures and failing to professionally evaluate the limited testing that she did perform, Ms. Haese reached conclusions about Mr. Heiney's mental condition which were at best unreliable and which totally failed to establish long term

mental deficiencies.

Mr. Heiney can now demonstrate that information available to Ms. Haese, had she sought it out (or had counsel rendered effective assistance by obtaining it and providing to her or even asking the right questions), would have established, ~~inter alia~~, that Mr. Heiney's lack of intent and premeditation at the time of the alleged offense, and would have unquestionably established sufficient statutory and nonstatutory mitigating evidence to preclude a sentence of death or otherwise alter the outcome of the sentencing proceeding. The expert appointed in this case failed to provide the professionally adequate expert mental health assistance to which Mr. Heiney was entitled. Her evaluation was, in fact, grossly inadequate. None of the relevant and crucial background facts regarding Robert David Heiney's mental, emotional, and psychological background were ever sought out, looked at, or considered. No adequate testing was performed. A cursory self-report interview, perfunctory testing, and the pro forma presentation of opinions based solely on what little was gleaned from such an interview is all the mental health "assistance" that Robert David Heiney received. This is not enough, and falls far short of what the law and the profession mandate.

Had an adequate history been obtained, Mr. Heiney's history of severe headaches, substance abuse, head injury, and child abuse would have been discovered. None of these facts appear in Ms. Haese's report. Her total discussion of Mr. Heiney in her report (as opposed to general information) consisted of sixteen sentences. A background investigation would have revealed that as a small child, Robert Heiney was constantly beaten and was chained to a cement block in the front yard. Due to the severe abuse and neglect, as a child he would deliberately run into passing cars resulting in serious head injury. These facts, however, never made their way before the judge and jury. Counsel

and the expert failed their client.

Ms. Haese's "evaluation" deprived Mr. Heiney of his most essential rights -- i.e., it directly caused important, necessary, and truthful information to be withheld from the tribunal charged with deciding whether Mr. Heiney was guilty of first-degree murder, and whether he should live or die. The doctor's actions directly "precluded the development of true facts," and "serve[d] to pervert" the sentencer's deliberations concerning the ultimate questions whether in fact Robert David Heiney was guilty of first degree murder and whether he should live or die, Smith v. Murray, infra. An evidentiary hearing is required. The lower court erred in failing to conduct one.

Trial counsel not only failed to obtain adequate mental health expert assistance and not only failed to make any inquiry regarding the mental health mitigating factors, see State v. Michael, 530 So. 2d 929 (Fla. 1988), but also failed to present witnesses to establish Mr. Heiney's severe abuse of alcohol and heroin and state of intoxication at the time of the offense. In fact, counsel unreasonably and with no tactic relied solely on mitigation which appeared in the trial record and presented no evidence in the penalty phase. Further, trial counsel showed gross ineffectiveness during the guilt-innocence phase of the trial. He failed to obtain an adequate mental health evaluation. He not only failed to present defense witnesses but he failed to question witnesses presented by the State regarding addiction to alcohol and heroin. He failed to obtain and argue a correct circumstantial evidence instruction in a circumstantial evidence case. He failed to investigate or present evidence of a second person who was using the victim's credit cards at the time of the murder, and he failed to obtain an independent handwriting expert to establish that Robert Heiney did not sign the "Phillip Cook" receipts. (See infra). Counsel failed his client and an evidentiary hearing was required.

The State's case against Robert Heiney rested on circumstantial evidence regarding his use of the victim's credit cards in combination with "Williams Rule" evidence involving a prior shooting and evidence that Mr. Heiney was a homosexual and a pimp, We now know that through a combination of suppression and mischaracterization of evidence, and ineffectiveness of counsel, important facts regarding the offense were never heard by the jury. The jury never heard evidence that another person, named Phillip Cook, was signing the victim's credit cards at the time of the murder. The jury never knew that Phillip Cook had left an alcohol rehabilitiation center with the victim just six days before the victim's death and that the handwriting on the receipt was not Robert Heiney's.

The following pretrial, trial and post-trial events show why the jury and this Court were misled as to the circumstantial evidence against Mr. Heiney:

1. The State knew Phillip Cook was a real person who left the rehabilitation center with the victim a few days before the murder.

2. The State knew there were two receipts signed by Phillip Cook on the two days preceding the murder.

3. The State knew that of all of the credit card receipts which had come back on the victim's credit cards, only four had been identified as being Mr. Heiney's handwriting.

However, knowing all of this the State misinformed the jury by:

1. Telling the jury that the Mastercard company must have made a mistake when Phillip Cook's receipts were included.

2. Arguing that Mr. Heiney used the credit card at numerous loctions including Valdosta, Georgia when there was no handwriting identification and the receipts were not admitted into evidence (R. **743, 1275**).

3. Failing to obtain a handwriting analysis of a Mossyhead, Florida receipt dated June **6, 1978** and arguing that Mr. Heiney had signed it.

4. Telling the jury that Phillip Cook's identity was unknown and unimportant (R. **1253**).

5. Possibly removing the Philip Cook receipts from Exhibit 106 after it was admitted into evidence and before it went to jury (**See** Claim **I**).

6. Asking the jury to disregard Phillip Cook because the Phillip Cook receipts were introduced into evidence "inadvertently" (R. 1253).

Since the trial, investigation has revealed that the Phillip Cook receipts were apparently not provided to the jury even though they had been admitted into evidence, that the Phillip Cook signatures were not made by Robert Heiney and that the State was in possession of evidence that Phillip Cook had been in the company of the victim shortly before the murder.

From these facts Mr. Heiney has raised Giglio/Brady issues of prosecutorial misconduct as well as ineffective assistance of counsel. A related issue is the subsequent discovery through independent investigation that the first degree indictment was obtained through the use of perjured testimony of the jailhouse informant, Thomas Tuszynski. The claims required evidentiary resolution. The lower court erred in failing to afford any.

The State relied completely on collateral evidence in attempting to show motive in this circumstantial evidence case. On direct appeal this Court expressed concern about the use of "Williams Rule" evidence; "a closer question is presented by testimony relating to Heiney's lifestyle and his relationship with Tawanna Williams. Any error which may have occurred in admitting this particular testimony, however, was harmless." Justices McDonald and Boyd dissented on the grounds that the collateral evidence was not harmless error. When the effect of the Williams Rule evidence is considered in combination with the suppression of evidence regarding Phillip Cook and the special standards applicable to a circumstantial evidence case, it can no longer be said that the introduction of the collateral evidence was harmless error (See Claim IV, Habeas Petition, Claim V, infra). Further, the prejudice resulting from the Williams Rule evidence was exacerbated by the court's refusal to permit cross-examination of the State's key Williams Rule witness, David Benson. The court's denial of this fundamental right was based on the fact that defense counsel conferred with

Mr. Heiney for "one to two minutes" before beginning his cross-examination. The court stated for the record that this unusual ruling was occasioned by the court's anger at counsel for allegedly commenting that the court seemed more favorable to the State. On direct appeal, this Court found the trial counsel's motion to recuse Judge Wells insufficient as a matter of law; however, Mr. Heiney has now documented the court's intent to take revenge on Mr. Heiney through sworn affidavits and Judge Wells has recused himself. *An* evidentiary hearing was required on these issues. The lower court afforded none.

Mr. Heiney has raised thirteen additional, meritorious claims in his pleadings which he is able to refer to only briefly due to time limitations but which are addressed in the trial court pleadings and the Petition for Habeas Corpus pending before the Court. They are incorporated herein and Mr. Heiney urges that this brief be reviewed in conjunction with his lower court pleadings. As will be demonstrated, a stay of execution, an evidentiary hearing, and Rule **3.850** relief would be more than appropriate in this case.

ARGUMENT

ARGUMENT I

THE RULE **3.850** COURT'S SUMMARY DENIALS OF MR. HEINEY'S MOTION TO VACATE JUDGMENT *AND* SENTENCE, THE DENIAL OF THE HITCHCOCK CLAIM AND HEARING, *AND* THE STRIKING OF THE CONSOLIDATED MOTION, WERE ERRONEOUS AS A MATTER OF LAW AND FACT.

The lower court summarily denied Mr. Heiney's claims 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 adequate explanation as to whether (and why) the files and records conclusively showed that Mr. Heiney was entitled to no relief (they do not), without citing those portion of the record which conclusively show that Mr. Heiney is entitled to no relief (the records support Mr. Heiney's claims). In this regard the lower court erred. Subsequent to the page and a half order summarily denying Mr.

Heiney's Rule 3.850 action, Judge Wells disqualified himself based on allegations that he had threatened to take adverse action against Mr. Heiney at the time of sentencing.

Further, in the Order dismissing the Consolidated Motion for Rehearing, etc., penned by the State, the lower court refused to address any of the issues raised in regard to rehearing on the grounds that the claims had been "renumbered" and the petitioner was "rearguing" the issues. The Court's findings are contradictory in that the petitioner is castigated on the one hand for simply reviewing and rearguing all issues and on the other hand for raising new considerations.

The court, signing the State's order, ruled that Mr. Heiney's Consolidated Emergency Motion for Rehearing (herein "Consolidated Motion") was a "successive" motion filed after two years of "inactivity" by Mr. Heiney and the Office of the Capital Collateral Representative (CCR). Quite to the contrary, Mr. Heiney's pleading is not a "new" motion. It was a reconstruction of the January, 1987, pleading and the April 2, 1987, amended pleading, and a request for rehearing regarding what counsel submitted was an erroneous disposition of this action. As will be demonstrated below, the facts and claims supporting the Consolidated Motion were raised in those prior pleadings, albeit inartfully, due to the press of time caused by the necessity to file several 3.850 motions mandated by the two-year rule.[4] The consolidated motion placed facts and claims already presented in proper context. In addition, the emergence of new facts and changes in the law in the ten years since Mr. Heiney's trial took place (and since the January, 1987, filing) paint a rather different picture than what was presented

[4]Given the manner in which Mr. Heiney's case had to be litigated, the sloppiness came with the turf. It should also be noted that the attorneys who initially handled the Rule 3.850 action left the CCR office.

by the State at trial and reviewed by this Court on appeal.' Indeed, the inactivity in Mr. Heiney's case has been on the part of the State and the trial court. First, the State never responded after January, 1987, or the April 2, 1987, filings. The State has yet to properly respond to those pleadings. Second, the court set no hearing date, required no responsive pleadings from the State, and entered its order denying relief on April 20, 1989, nunc pro tunc to April 12th, thirteen days after Governor Martinez signed a death warrant for Mr. Heiney. CCR was in the process of clarifying the facts and claims previously set forth in the prior pleadings and in the process of uncovering serious improprieties committed by the State when the warrant was signed. The motion was then pending.

The initial brief order denying Mr. Heiney's Motion to Vacate and Amended Motion because all of the issues should have been raised on direct appeal, was entered by Judge Wells without requiring that the State even respond to the issues raised. Subsequently, the State conceded that this hasty order was in error in finding that the Hitchcock issue should have been raised on direct appeal. Judge Wells' additional ruling that all issues in the Motion to Vacate should have been raised on direct appeal is clearly erroneous. Mr. Heiney had framed substantial issues of prosecutorial misconduct; ineffectiveness of counsel for failure to obtain competent mental health experts or to present a wealth of available mitigating evidence; failure of counsel to obtain a handwriting expert; other ineffectiveness of counsel claims; and an improper indictment obtained by perjured testimony. It is simply incorrect to find that these issues should have been raised on direct appeal. These are classic post-conviction claims.

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[5]Mr. Heiney prays that this Honorable Court not punish him because of the fact that his attorneys' tasks were impossible to fulfill or because of the ineffectiveness of counsel resulting from the manner in which the CCR must operate.

The court only offered two further grounds for denial: first, that all the errors of counsel should be disregarded in that Mr. Heiney was appointed as a pro forma "co-counsel" and second, that Tom Tuszynski, the jailhouse informant, never testified at trial.

After Mr. Heiney was indicted for first-degree murder, counsel requested that Mr. Heiney be allowed to participate as co-counsel. Without conducting any inquiry into Mr. Heiney's understanding of what he was doing, the court granted the request. Generally, when a defendant appears pro se after a proper penetrating and comprehensive inquiry by the court, the defendant cannot later challenge his or her own decisions or actions as being ineffective. That is not the situation here. Mr. Heiney was represented by counsel, who was responsible for making decisions and controlling the direction of the case. Mr. Heiney, in fact, agreed to co-counsel status upon his attorney's suggestion and urging, and relied upon that advice. He did not in any way waive the right to effective assistance of counsel. As to Tuszynski, the fact that the State did not choose to present him to the jury at trial only bolsters the improper grand jury indictment claim.

After Judge Wells summarily, and improperly, denied relief, Judge Gordon refused to properly consider the motion for rehearing. In addition, the trial court's order improperly characterized many of the issues as "new issues"; barred issues; or, as in the case of Tom Tuszynski's perjured testimony, ignored the issue altogether.

CCR has never had the luxury of employing tactics such as those asserted by the State below. Indeed, CCR has no luxury at all. This Court has already been apprised of the oppressive conditions under which CCR has had to operate. In the original pleadings filed below the conditions of CCR were fully disclosed. If counsel failed Mr. Heiney by not discussing the claims earlier as thoroughly as

discussed in the motion for rehearing, then post-conviction counsels' ineffectiveness[6] can be stipulated to at this juncture. There was no "tactic" here, only the work of attorneys whose task has been made impossible by the Florida Governor's death warrant signing policies. Cf. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). CCR described all this in its responses to the State's assertions below (those responsive pleadings should be part of the record before this Court). CCR counsel also plainly stated the current impossible circumstances under which they must deal in Mr. Heiney's Consolidated Motion for Rehearing. Robert Heiney was entitled to a full, fair, and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Fla. R. Crim. P. 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Florida law, as well as the federal constitution, guaranteed Mr. Heiney that opportunity. The right to such an adequate corrective process is what Mr. Heiney's requests for Fla. R. Crim. P. 3.850 relief invoked. The lower court, however, denied Mr. Heiney those recognized rights: one judge summarily denied everything, the other judge accepted, without a hearing, the State's attacks on Mr. Heiney's counsel. This Court should stay Mr. Heiney's execution, and allow him the judicious consideration of his post-conviction claims to which he is entitled.

As is obvious, and as discussed below, since the files and records by no means showed that Mr. Heiney was "conclusively" entitled to "no relief," he was absolutely entitled to an evidentiary hearing. Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); see also Fla. R. Crim. P. 3.850. What the trial court complains of has resulted from no fault on the part of Mr. Heiney

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[6]Ineffectiveness contrary to Mr. Heiney's wishes; Mr. Heiney desired all claims pursued expeditiously.

or his counsel. Indeed, counsel honestly represented to the lower court that they have been unable to provide Mr. Heiney with the effective representation to which he was entitled under the sixth, eighth, and fourteenth amendments, and under Fla. Stat. section 27.001, et seq. (1987) and Spalding v. Dunner.

The lower court pleadings nevertheless demonstrated the need for an evidentiary hearing. Mr. Heiney's execution should be stayed, and a full and fair Rule 3.850 evidentiary hearing ordered.

ARGUMENT II

MR. HEINEY'S SENTENCE OF DEATH RESULTED FROM PROCEEDINGS AT WHICH THE TRIAL JUDGE REFUSED TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This is Mr. Heiney's first opportunity to present this claim in any forum. In Mr. Heiney's January, 1987, pleading, this claim was briefly sketched in Claim IX. Subsequent to the filing of the motion the United States Supreme Court decided Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Mr. Heiney further developed the issue in the Consolidated Motion for Rehearing.

Mr. Heiney's case presents a clear violation of Hitchcock. Mr. Heiney's entitlement to relief is clear: Mr. Heiney's "sentencing judge refused to consider[] evidence of nonstatutory mitigating circumstances, and . . . the proceedings therefore did not comport with [the eighth amendment]." Hitchcock, 107 S. Ct. at 1824.

A. THIS CLAIM IS PROPERLY BEFORE THE COURT AT THIS TIME

This Court has explicitly recognized that no procedural bar can be applied to foreclose merits review of a Florida habeas corpus petitioner's Hitchcock claim,[7] and the Eleventh Circuit has recognized that "Hitchcock has breathed new

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[7]The fact that no state procedural bar is any longer applicable to such claims is apparent from every post-Hitchcock pronouncement of the Florida Supreme Court and the Eleventh Circuit Court of Appeals. See Stone v. Dunner, 837 F.2d 1477 (11th Cir. 1988); Armstronn v. Dunner, 833 F.2d 1430 (11th Cir. 1987); Waterhouse v. (continued...)

vitality into claims based on the exclusion of non-statutory mitigation factors." Hargrave v. Dunner, 832 F.2d 1528, 1533 (11th Cir. 1987)(in banc).

Mr. Heiney has had no opportunity to have this claim heard in any court. The Florida Supreme Court recently announced in Hallv. State, 14 F.L.W. 101 (Fla. 1989) that all claims raised under Hitchcock must be raised in a Rule 3.850 motion. Mr. Heiney did just that. A stay of execution is proper in order to afford Mr. Heiney's claim the consideration it deserves.

B. HITCHCOCK ESTABLISHED THE LEGAL ANALYSIS ATTENDANT TO MR. HEINEY'S CLAIM

A sentencer in a capital case may not limit his or her consideration of mitigating circumstances. Hitchcock v. Dunner, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U. S. 104, 113-14 (1982); Lockett v. Ohio, 438 U. S. 586 (1978). In Florida, a death-sentenced petitioner is entitled to relief if such a limitation occurs either before a sentencing jury or a sentencing judge:

> The record of the sentencing proceeding in this case shows a situation similar to that found in Hitchcock v. Dugger, ___ U.S. ___,

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[7](...continued)
State, 522 So. 2d 341 (Fla. 1988)(defendant sentenced after Lockett v. Ohio and Songer v. State; no procedural bar applied and merits relief granted because Hitchcock v. Dugger represents change in law mandating merits post- conviction review); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue]"; merits relief granted); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(granting relief and rejecting State's procedural default contentions because Hitchcock is a "change in law" mandating merits review in post-conviction proceedings); Morgan v. State, 515 So. 2d 975 (Fla. 1987)(same); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) (same); McCrae v. State, 510 So. 2d 874 (Fla. 1987)(same); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988)(merits relief granted and no procedural bar applied to Hitchcock claim because Hitchcock "represented a sufficient change in the law to defeat the application of procedural default."); Combs v. State, 525 So. 2d 853 (Fla. 1988)(same); Foster v. State, 518 So. 2d 901 (Fla. 1988)(same); Zeigler v. Duaner, 524 So. 2d 419 (Fla. 1988)(same). Indeed, this Court has reviewed the merits of every post- conviction litigant's Hitchcock claim, whether the claim had been raised in earlier proceedings or not, and irrespective of whether the defendant was sentenced before Lockett, see McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987), between Lockettv. Ohio and Songer v. State, 365 So. 2d 696 (Fla. 1978), see Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), or after Lockett and Songer, see Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988).

> 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). There the Supreme Court found that "the sentencing proceedings actually conducted" showed that the sentencing judge operated under the assumption that non-statutory mitigating circumstances could not be considered. Id. 107 S. Ct. at 1823.
>
> * * *
>
> [W]e find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors.
>
> This finding, based on the record, is sufficient to require a new sentencing hearing.

McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987). Even where, indeed especially where, as here, a trial judge overrides a jury's recommendation of life, when "the trial judge believe[s] that non-statutory mitigating evidence [is] not a proper consideration," resentencing is required. Zeigler v. Dugger, 524 So. 2d 419, 421 (Fla. 1988). See also Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987)("[T]he standards imposed by Lockett bind both the judge and the jury under our law"); Messer v. Florida, 834 F.2d 890, 892 (11th Cir. 1987)(same).

In Mr. Heiney's case, both the judge and jury were constrained in their consideration of nonstatutory mitigation. The jury nevertheless returned a life recommendation. The judge, however, overrode that recommendation and imposed death, failing to consider evidence of nonstatutory mitigation. Indeed, both the judge and state high court in Mr. Heiney's case failed to properly consider and evaluate the jury override here pursuant to Hitchcock. See Parker v. Dugger, No. 86-797-Civ.-J-12 (M.D. Fla., March 14, 1988), slip op. at 54-56 & nn.30-31 (Supp. Auth. 1); Lusk v. Dugger, No. 88-22-Civ.-J-12 (M.D. Fla., Nov. 1, 1988)(Supp. Auth. 2); Zeialer v. Dunner, supra, 524 So. 2d 419. Cf. Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Of course, resentencing is proper under Hitchcock whenever the record reflects even an ambiguity as to whether the sentencing judge's consideration of nonstatutory

mitigation has been constrained. See Woods v. Dugger, No. 88-910-Civ.-J-14 (M.D. Fla., Feb. 21, 1989)(Supp. Auth. 3); Morgan, supra.

Mr. Heiney was denied an individualized and reliable capital sentencing determination. His entitlement to relief on the merits is obvious: the proceedings resulting in his sentence of death violated the mandate of Hitchcock v. Dugger. See also Lockett, supra; Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Eddings, supra. The trial judge's failure to consider evidence of nonstatutory mitigating circumstances parallels the Hitchcock sentencing court's limited consideration of nonstatutory mitigation. In Hitchcock, the unanimous court held:

> [I]t could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978)(plurality opinion).

107 S. Ct. at 1824.

If the record, particularly in an override situation, leaves any ambiguity about whether the sentencing judge considered factors which would support a lesser sentence, then resentencing is required. It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605, that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring). Reading the record in Mr. Heiney's case in proper context, there is no ambiguity that the sentencer restricted consideration.

In its written Penalty Jury Instructions the sentencing court stated:

> **PENALTY JURY INSTRUCTIONS**
>
> LADIES *AND* GENTLEMEN OF THE JURY: It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for

his crime of first degree murder. As you have been tokd, the final decision as to what punishment sh 11 be imposed is the responsibility of the judge; however, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exists to justify the imposition of the death penalty and whether sufficient mitigating circumstances exists to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

(R. 204)(list omitted for brevity).

The court then stated:

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these:

(a) That the defendant has no significant history of prior criminal activity;

(b) That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) That the victim was a participant in the defendant's conduct or consented to the act;

(d) That the defendant was an accomplince in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;

(e) That the defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) age of the defendant at the time of the crime.

(R. 202-4).

The court read these instructions to the jury verbatim (R. 1338-1344). See Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988)(sentencing judge is "presumed" to follow his jury instructions regarding what mitigating factors may be

considered).

The sentencing court in Mr. Heiney's case was even more specific in delineating exactly what migation it had considered. Cf. Woods v. Dugger, supra (Supp. Auth. 3). In its sentencing order the court wrote:

> The Court has carefully reviewed those seven mitigating circumstances contained in Florida Statutes 921.141 (6)(a-g). Based on the Court's consideration of these mitigating factors, the Court specifically finds as to each:
>
> (a) That the Defendant does have a significant prior criminal record dating back to 1965 and thus is not entitled to consideration under this circumstance.
>
> (b) There has been no evidence or inference that the Defendant was under the influence of any mental or emotional disturbance, and thus should receive no consideration under this mitigating circumtance.
>
> (c) There has been no evidence nor indication that the Victim was a participnat in the Defendant's conduct except to offer the Defendant and accommodation ride, thus the Defendant receives no consideration under this circumstance.
>
> (d) There is no proof or inference that the Defendant was acting in concert with anyone. The proof is all to the effect that the Defendant was acting alone, thus the Defendant is entitled to no consideration under this circumstance.
>
> (e) There is no basis in the evidnce of either any duress or domination by another to entitle him to any mitigation under this provision.
>
> (f) There has been no showing that the Defendant had a lessended appreciation for the criminality of his conduct nor that his ability to conform his conduct was even slightly impaired. Thus, the Court rejects this section from consideration.
>
> (g) The Defendant, at the time of this offense, was 31-32 years of age, appeared to be sufficiently physically and mentally normal for his age, and thus the Court finds his age should not constituute a mitigating factor in his favor.
>
> The Court has found that the aggravating circumstances, as enumerated in 921.141 (5)(a), (e), and (h), are present in this case and that there are no mitigating circumstances to overcome the aggravating circumstances found present.
>
> While acknowledging the recommendation of the trual jury, The Court, has required by the Statutes, has carefully considered the aggravating circumstances as compared to the mitigating circumstances, and finds that there are no mitigating circumstances to offset the aggravating circumstances found to exist.

(R. 221-2). The Court cited the following cases to support its findings:

State of Florida v. Dixon, 283 So. 2d 9

Sullivan v. State, 303 So. 2d 632 (1974)

Proffitt v. State, 315 So. 2d 461 (1975)

Jackson v. State, 359 So. 2d 1190 (March 9, 1978)

Foster v. State, So. 2d (Opinion filed Feb. 22, 1979)[8]

Not cited by the court were Lockett and Tedder (R. 223). The court read its sentencing order in open court (R. 247-48) as its oral pronouncement of sentence. The record here is not ambiguous: the Hitchcock violation is plain. See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987)(The question in addressing a Hitchcock issue is not whether Lockett or Sonner had been yet decided, but whether the "proceedings actually conducted" show a Hitchcock violation). Even if the record was ambiguous, however, resentencing would be required.

Hitchcock has worked a substantial change in the law, requiring a different outcome in Mr. Heiney's case. For example, under the prior standard, the opportunity to present evidence of nonstatutory mitigation defeated a constitutional challenge. Hitchcock rejected that standard, as the Florida Supreme Court has explained:

> Hitchcock rejected a prior line of cases issued by this Court, which had held that the mere opportunity to present nonstatutory mitigating evidence was sufficient to meet Lockett requirements. Under this "mere presentation" standard, we routinely declined to consider whether the judge or jury actually weighed the evidence in question. A consideration of the history behind Hitchcock illuminates this Court's prior standard of review and the Supreme Court's reaction to it.
>
> In Hitchcock's collateral challenge under Rule 3.850, this Court expressly had rejected his claim that a mere presentation standard was insufficient to meet Lockett:
>
> > The record refutes the contention that Hitchcock was deprived of presentation or consideration of nonstatutory mitigating circumstances. His counsel both presented and argued nonstatutory mitigating circumstances.
>
> Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983)(McDonald & Overton, JJ., concurring with opinion). This statement elaborated upon this Court's earlier pronouncement on direct appeal that Hitchcock

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[8]Mr. Foster's case was recently remanded for resentencing by this Court because of the Hitchcock errors involved in that action. See Foster v. State, 518 So. 2d 901 (Fla. 1987).

> presented only one witness [during sentencing]. There is nothing in the record indicating that the trial judge limited the defense's presentation.

Hitchcock v. State, 413 So. 2d 741, 748 (Fla.), cert. denied, 459 U.S. 960, 103 S. Ct. 274, 74 L.Ed.2d 213 (1982). With this comment, we thus rejected Hitchcock's claim of a Lockett violation based on our conclusion that a judge and jury "consider" mitigating evidence by receiving it.

On review, the Supreme Court was unpersuaded by our reasoning. It held that the record in Hitchcock reflected a Lockett violation:

> [T]he members of the jury were told by the trial judge that he would instruct them "on the factors in aggravation and mitigation that you may consider under our law."...He then instructed them that "[t]he mitigating circumstances which you may consider shall be the following..." (listing the statutory mitigating circumstances).

107 S. Ct. at 1824 (citations omitted). The Supreme Court further noted that the trial judge, in imposing sentence, expressly weighed only those mitigating factors enumerated in the death penalty statute. Id.

We thus can think of no clearer rejection of the "mere presentation" standard reflected in the prior opinions of this Court, and conclude that this standard no longer can be considered controlling law. Under Hitchcock, the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of that evidence may not be weighed during the formulation of an advisory opinion or during sentencing. As we recently have stated,

> The United States Supreme Court [in Hitchcock] clearly rejected the "mere presentation" standard, finding that a Lockett violation had occurred. 107 S. Ct. at 1824. The court made clear that the fact that the judge and jury heard nonstatutory mitigating evidence is insufficient if the record shows that they restricted their consideration only to statutory mitigating factors.

Riley v. Wainwright, No. 69,563 (Fla. Sept. 3, 1987), slip op. at 7 (footnote omitted). Accord Thompson v. Dunner, 515 So. 2d 173 (Fla.1987)(consolidated cases).

Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987). Rather than focusing on whether evidence of nonstatutory mitigation was presented, the inquiry post-Hitchcock focuses on whether nonstatutory mitigation was given "serious" consideration. McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987).

Additionally, whereas under the prior standard, the courts presumed that the trial judge considered all evidence of mitigation unless there was an affirmative indication that the judge refused to consider nonstatutory mitigating circumstances, under Hitchcock and its progeny that presumption is reversed. Post-Hitchcock, the inquiry looks to the record of the proceedings -- including jury instructions, judge comments, and the sentencing order -- to determine whether the sentencer did not properly and "seriously", McCrae, supra, 510 So. 2d at 880, consider nonstatutory mitigation. Thus, for example, the courts post-Hitchcock "presume[] that the judge's perception of the law coincided with the manner in which the jury was instructed." Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988).

When Mr. Heiney's claim is analyzed according to post-Hitchcock standards, his entitlement to relief is clear. The proceedings "actually conducted," Hitchcock, 107 S. Ct. at 1823, resulted in the imposition of a death sentence by a trial judge who believed he was precluded in his consideration of nonstatutory mitigating circumstances. What cannot be doubted, on the basis of this record, is that "serious" consideration, McCrae, supra, was not afforded to the nonstatutory mitigating factors in Mr. Heiney's case.

The judge declined to instruct the jury on any but the statutory "list" of mitigating circumstances (a legislative "list" which the Cooper Court had said could not be "expand[ed]" by Florida's trial courts, see Cooper v. State, 336 So. 2d 1133, 1139 (Fla. 1976)). Mr. Cooper ultimately received Hitchcock relief in 1988. Cooper v. Dunger, 526 So. 2d 900 (Fla. 1988). Mr. Heiney is entitled to the same relief.

In Mr. Heiney's case the trial court's findings set out in the sentencing order reflect wholesale judicial limitation. See Combs v. State, 525 So. 2d 853, 855 (Fla. 1988)(relief granted on basis of sentencing order which in all

pertinent respects mirrored order issued in Mr. Heiney's case); Zeinler, supra, 524 So. 2d at 420-21 (After instructing the jury without reference to nonstatutory mitigation, ". . . the judge issued written findings of fact supporting the death sentence in which there was no reference to nonstatutory mitigating circumstances," both factors establishing that sentencing judge believed himself to be constrained). The court listed, seriatim, only the statutorily mandated criteria provided in Section 921.141(6), as they existed in 1978 (R. 202-4). Cf. Hitchcock; Cooper v. Dugger, supra, 526 So. 2d 900. The court instructed the jury only on the statutorily mandated criteria. But the court here was even more precise in the sentencing order:

> The Court has carefully reviewed those seven mitigating circumstances contained in Florida Statutes 921.141(6)(a-g). Based on the Court's consideration of these mitigating factors, the Court specifically finds as to each.

The sentencing order standing alone plainly reflects the trial judge's failure to consider nonstatutory mitigation. Combs; Zeinler; Woods. The order is virtually identical to the sentencing order in Hithcock: "the sentencing judge found that 'there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances.'" Hitchcock, 107 S. Ct. at 1824 (emphasis in original). See also Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987)("[T]he Court in its order sentencing appellant to death, examined the list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there anv reference to nonstatutory mitinating evidence" [emphasis added]); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987)("In sentencing Defendant to death, the judge's order explained: 'The only mitigating circumstance under Florida statute is the fact that the defendant had no prior criminal conviction'" [emphasis in original]); Zeinler v. Dugger, 524 So. 2d at 420-21 (judge's findings overriding jury recommendation of life gave "no reference to

nonstatutory mitigating circumstances").

When the Order is read in conjunction with the jury instructions it is obvious that the trial judge did indeed employ an unconstitutionally restrictive view of nonstatutory mitigation. Here, the record indications of preclusive consideration are pervasive, much more so than in Woods v. Dugger, No. 88-910-Civ-J-14 (U.S.D.C. M.D. Fla. Feb. 21, 1989)(Black, J.)(Supp. Auth. 3), where the jury was correctly instructed, but the district court nevertheless ordered resentencing based on the restriction reflected in the judge's sentencing order:

> In this case, petitioner does not argue that the jury was prevented from considering nonstatutory mitigating circumstances, but that the judge failed to consider nonstatutory mitigating circumstances. The Court need not summarize the entire sentencing proceeding. . . .
>
> The Sentencing judgment indicates that the state trial judge in this case committed the same error as did the state trial judge in Hitchcock. Although the judge considered the evidence presented by petitioner, he considered this evidence only to the extent that the evidence tended to establish statutory mitigating factors. For example, the judge would not consider the evidence of petitioner's mental capacity except to the extent that the evidence showed insanity. Such a limitation of the judge's consideration of the evidence violates Hitchcock.

Woods, supra, slip op. at 35-37 (emphasis added).

The indicia now used in deciding Hitchcock claims establish that an unconstitutionally limited sentencing hearing occurred in Mr. Heiney's case. Where there is "any legitimate basis for finding ambiguity concerning factors actually considered by the trial court," resentencing is required. Eddings, supra, 455 U.S. at 119 (O'Connor, J., concurring). Cf. Magwood v. Heiney, 791 F.2d 1438, 1448 (11th Cir. 1986). A thorough review of this record in light of Hitchcock reveals a trial judge who limited himself to statutory mitigation in determining the propriety of overriding the jury's life recommendation.

C. HITCHCOCK/LOCKETT ERROR OCCURRED

This Court's own review of the life override in this case was distorted by

constitutional error only recently brought to light in the wake of Hitchcock v. Dugger, 481 U.S. ___, 107 S. Ct. 1821 (1987). The override order was approved in 1980 under pre-Hitchcock principles and assumptions ("mere presentation") then enshrined in Florida law. In 1980, "mere presentation" of nonstatutory mitigation, along with jury instructions then regarded as constitutional, was sufficient to show proper trial court consideration of mitigation evidence. See, e.g., Sonner v. State, 365 So. 2d 696, 700 (1978). This rule has now been totally rejected. As the Court unequivocally stated in Downs v. Dunner:

> We thus can think of no clearer rejection of the 'mere presentation' standard reflected in prior opinions of this Court, and conclude that this standard can no longer be considered controlling law. Under Hitchcock, the mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of the evidence may not be weighed during the formulation of an advisory opinion or during sentencing.

514 So. 2d. at 1071. Accord Thompson v. Dunner, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Foster v. State, 518 So. 2d 901 (Fla. 1987); McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Manilly. Dunner, 824 F.2d 879, 890-94 (11th Cir. 1987). These cases make it undeniable that the presentation of nonstatutory mitigating evidence is constitutionally meaningless if the jury or judge is precluded or fails to consider it. As the Supreme Court noted in Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982), "[t]he sentencer, and the court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Accordingly, in cases such as Morgan v. State, 515 So. 2d 975 (Fla. 1987), the Florida Supreme Court found an omission like the one in Mr. Heiney's case controlling for an evaluation of the petitioner's Hitchcock claim:

> Nowhere in [the judge's] order is there any reference to any non-statutory mitigating evidence proffered by the appellant. The state

> argues that there is no evidence that the trial court refused to consider such non-statutory mitigating circumstances. We disagree with this view of the record. Our reading of the record leads to one conclusion. That is, that non-statutory mitigating factors were not taken into account by the trial court, as required by Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), and now ~~Hitchcock~~.

~~See also~~ McCrae v. State, 570 So. 2d 874 (Fla. 1987)(granting relief pursuant to Hitchcock because of judge's failure to give "serious" consideration to nonstatutory mitigation).

Hitchcock, Lockett, and Eddinas mandate that the presentation and consideration of mitigating circumstances which might call for a sentence of less than death must be completely unfettered. Unrestricted sentencer consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind" has therefore been considered a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(emphasis supplied). Today, "[t]here is no disputing" the rule of Skipper v. South Carolina, 106 S. Ct. 1669 (1986), and the force of the Lockett constitutional mandate -- that a sentence of death cannot stand when the defendant has been denied an individualized sentencing determination by the sentencer's failure to consider nonstatutory mitigating evidence. Based on the explicit limiting language of the sentencing order, the judge's limiting instructions to the jury, and his statements during the charge conference, here also "it could not be clearer [that] the sentencing judge [] refused to consider evidence of nonstatutory mitigating circumstances." Hitchcock v. Dugger, 107 S. Ct. at 1824.

Unfettered sentencer consideration of all mitigating evidence is at the heart of the eighth amendment's mandate that a capital sentence be individualized. Lockett v. Ohio, 438 U.S. 586 (1978). A man simply cannot be sent to his execution when there is uncertainty as to whether his sentence was

individualized -- i.e., when we do not know whether the mitigating factors in his background were fairly considered. Here, however, there is no real ambiguity: the Hitchcock/Lockett errors are plain.

In Skipper v. South Carolina, 476 U.S. ___, 106 S. Ct. 1669, 1673 (1986), answering an argument that the excluded evidence was cumulative and harmless, the United States Supreme Court said it could not "confidently conclude" that the evidence "would have had no effect upon the jury's deliberations." Id. (emphasis added). Accordingly, the law is clear that when there is some nonstatutory mitigating evidence in the record that "could justify a lesser sentence," Hitchcock error can not be deemed harmless. See Zeigler, supra; Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989); Booker v. Dugger (N.D. Fla. 1988)(Supp. Auth. 4). This Court has held that the sentencer's failure to consider nonstatutory mitigation "affects the sentence in such a way as to render the trial fundamentally unfair." Riley v. Wainwright, 517 So. 2d 656, 660 n. 2 (Fla. 1987). See also Morgan v. State, 515 So. 2d 975 (Fla. 1988)(the fact that the judge did not properly take into account evidence of non-statutory mitigating circumstances "may not be considered harmless [error] in light of the close nature of the jury recommendation vote. . . . Under such, and other circumstances, the failure to consider nonstatutory mitigating factors cannot be termed harmless error"). In Mr. Heiney's case, the jury recommended life. Applying his restrictive review, the judge overrode that proper recommendation despite the mitigation in the record (See Claim I, Habeas Petition). As the district courts determined in Parker (App. 14) and Lusk (App. 15) the sentencing judge's restrictive review of nonstatutory mitigation affected his decision to override, and to sentence the defendant to death. The error here is thus more egregious than that found sufficient to warrant relief in Morgan. This life override case leaves no room for harmless error. As in McCrae and Zeigler, the trial court limited itself in

its consideration of mitigation when it overrode. And as in McCrae, "[t]his . . . is sufficient to require a new sentencing hearing." Id. at 880. Even if the life recommendation itself does not provide the Hitchcock-error harm, the fact that "there was some nonstatutory mitigating evidence that the court could have considered" does provide the harm. Foster v. State, 518 So. 2d 901 (Fla. 1987).

The trial court order denying 3.850 relief on the Hitchcock issue never addressed the trial court's failure to consider the substantial nonstatutory mitigation which appears in the record. Instead, strangely, the court denied relief because trial counsel relied on mitigation in the trial record instead of introducing evidence at the penalty phase. This finding is contrary to Harvard v. State, 486 So. 2d 537 (Fla. 1986)(mitigating evidence may arise from the entirety of the record before the sentencing judge, including the trial record). The lower court also erred in denying the Hitchcock claim because a Lockett issue was briefed on direct appeal, but not addressed, by this court. This is clearly contrary even to the State's own Motion to Correct Order in which the State argued that the trial court's order was in error for dismissing the Hitchcock claim "because it should have been raised on direct appeal." In addition this is contrary to consistent precedent from this Court and the Eleventh Circuit Court of Appeals making it clear that a pre-Hitchcock adverse ruling does not overcome a petitioner's post-Hitchcock entitlement to relief. See. inter alia. Downs; Foster; Cooper; Thompson; Ruffin Magill; Hargrave, supra. Hitchcock, after all, is new law. Downs; Hargrave; Hallv. State, 14 F.L.W. 101 (Fla. 1989).

Under no construction can it be said that the sentencer's errors in this case were harmless beyond a reasonable doubt. See, e.g., Riley v. Wainwright, supra, 517 So. 2d at 659. Given the abundant nonstatutory mitigation in this case, under no construction can it be "confidently concluded" that the Hitchcock

errors discussed herein and in Mr. Heiney's Motion "would have had no effect upon the [sentencers'] deliberations." Skipper v. South Carolina, 106 S. Ct. 1669, 1673 (1986)(emphasis added); Armstrong v. Dunner, supra, 833 F.2d at 1436; Coooer v. Dugger, 526 So. 2d 900, 903 (Fla. 1988). That is the Hitchcock eighth amendment harmlessness test, a test which the State's Motion to Correct and the trial court's order never mentions. The burden is, of course, on the State, and here the State has done little to prove harmlessness beyond a reasonable doubt. Cooper, supra. In fact, the State has ignored or mischaracterized the compelling nonstatutory mitigation in this case.

The Hitchcock errors in this case were by no means harmless. Mr. Heiney's sentencers had before them many items of significant mitigating evidence that more than reasonably could have led to a life sentence. None of these factors were listed in the capital statute and therefore none were given independent mitigating weight. All are matters that Florida's courts have now recognized as nonstatutory factors justifying a life sentence.

In the record of Mr. Heiney's trial, the judge and jury had substantial evidence of Mr. Heiney's background and intelligence. They were told that Mr. Heiney acted with courtesy when arrested and was cooperative with the police. Further, Mr. Heiney acted as co-counsel and exhibited respect and courtesy in the courtroom. In addition, Mr. Heiney did not fight extradition and offered no resistance when arrested (R. 1122, 1182). His prior life history reflected a life of non-violence. Very important, was evidence concerning a shooting incident, only days before the death of Mr. May. After shooting his friend, Mr. Heiney went to Terry, hugged him and helped him to the automobile to be taken to the hospital (R. 758, 775). The behavior of Mr. Heiney showed a person who, at one moment might act irrational, and also had the capacity for remorse and affection. In addition the jury heard that the incident was one precipitated by

passion, and not thought out rationally. The gun belonged to Mr. Benson, the roommate (R. 776). Hours after the incident Mr. Heiney returned the gun to Mr. Benson (R. 776). This was not the act of a man bent on escape, robbery and murder, This was evidence that Mr. Heiney was emotionally unstable, but nevertheless compassionate and remorseful. There was also mitigating evidence regarding the offense itself. The autopsy showed that any of several blows would have rendered Mr. May unconscious immediately if he was not already in an alcoholic stupor (R. 917-919, 926). There was only one slight "superficial", "minor" and "inconsequential" defensive wound (R. 910). The victim's blood alcohol level was recorded at .28 (R. 913). As testified to by the coroner, Mr. May was "quite out of possession of his normal faculties" (R. 917). Further, the coroner stated that Mr. May's alcohol content could have been .35 (R. 937); that Mr. May was "completely uncoordinated," "couldn't drive" and "couldn't focus" (R. 918). What the coroner made clear is that any of the blows would have killed or rendered Mr. May unconscious immediately (R. 926).

Defense counsel argued at length that the victim's wife testified that when the victim was extremely intoxicated, he was obnoxious, loud and violent. Counsel also argued that during a lengthy drive in the confines of an automobile, the victim was loud and obnoxious, and possibly violent, thereby provoking the defendant. Defense counsel also argued at length that Mr. Heiney was intoxicated and not responsible for his actions. This explanation was consistent with Mr. Heiney's irrational behavior in the Terry Phillips incident and the fact that both incidences allegedly occurred late at night. Mr. Heiney had no prior arrest record for violent crime. Again, his record for forgery and bad checks was consistent with an alcohol problem. Altogether, the judge and jury were presented with a picture of a man with a nonviolent history, who did not carry a weapon, and who responded on impulse to act against his normal nature by the

provocations of an obnoxious drunk. In response, he allegedly snatched up a hammer, which testimony showed the victim had in his car, and struck a blow which rendered the victim unconscious before he had much time to resist or realize what was happening. It is simply not true to allege that the only nonstatutory evidence on which a sentencer could base a life sentence was residual doubt.

Evidence was elicited and argued at trial that Mr. Heiney's capacity may well have been diminished due to the consumption of alcohol or drugs. The sentencer did not consider this evidence as potentially mitigating, although Florida courts have recognized the mitigating value of such evidence. See, e.g., Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987) (Florida Supreme Court has "held improper an override" where, among other mitigating factors, there was some "inconclusive evidence that [defendant] had taken drugs on the night of the murder"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug use may mitigate recommended sentence); Foster v. State, 518 So. 2d 901, 902 n. 2 (Fla 1988)(evidence of alcohol use at time of offense).

According to the State's case at trial, Mr. Heiney, from the moment of his arrest, provided law enforcement officers with cooperation in consenting to a search and waiving extradition. All this also mitigated against a sentence of death. See Jordan v. State, 478 So. 2d 512, 513 (Fla. 1st DCA 1985)("defendant's cooperation with law enforcement officers can be grounds for reducing or suspending a sentence"); Banzo v. State, 464 So. 2d 620, 622 (Fla. 2nd DCA 1985)("cooperation can be grounds for reducing or suspending a sentence. . . ."). Moreover, the evidence showed a capacity for remorse, another recognized nonstatutory mitigating circumstance. See, e.g., Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988).

In this case, it by no means can be "confident[ly] conclud[ed]" that the errors discussed herein and in Mr. Heiney's Habeas Corpus Petition (Claim I) had "no effect," Skipper, supra, 106 S. Ct. at 1673, or that the errors were harmless beyond a reasonable doubt. Riley, supra, 517 So. 2d at 659; Cooper, supra, 526 So. 2d at 903.

The "proceedings actually conducted," Hitchcock, 107 S. Ct. at 1823, undeniably reflect that Mr. Heiney is entitled to the relief he seeks. Relief is more than appropriate.

ARGUMENT III

MR. HEINEY WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE SOLE DEFENSE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL, AT WHICH DEFENSE COUNSEL FAILED TO ESTABLISH AVAILABLE INSANITY, INTOXICATION, AND DIMINISHED CAPACITY DEFENSES, AND IN THE LACK OF A FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION.

At the time of the offense and at trial, Mr. Heiney was mentally ill. As an indigent whose mental capacity is at issue at all stages of a capital case, Mr. Heiney was entitled to a competently-conducted psychiatric or psychological evaluation. Defense counsel obtained Linda Haese, a "staff psychologist" who was not even a licensed mental health expert, for that purpose. By relying on demonstrably unreliable information gleaned solely from personal reporting, by failing to seek information from independent sources, and by using grossly inadequate testing procedures and failing to professionally evaluate the limited testing that she did perform, Ms. Haese reached conclusions about Mr. Heiney's mental condition which were at best unreliable and which totally failed to establish long term mental deficiencies.

Mr. Heiney can now demonstrate that information available to Ms. Haese, had she sought it out (or had counsel rendered effective assistance by obtaining it

and providing to her), would have established, inter alia, Mr. Heiney's lack of intent and premeditation at the time of the alleged offense, and would have unquestionably established sufficient statutory and nonstatutory mitigating evidence to preclude a sentence of death or otherwise alter the outcome of the sentencing proceeding. The expert appointed in this case failed to provide the professionally adequate expert mental health assistance to which Mr. Heiney was entitled. Her evaluation was, in fact, grossly inadequate. None of the relevant and crucial background facts regarding Robert David Heiney's mental, emotional, and psychological background were ever sought out, looked at, or considered. No adequate testing was performed. A cursory self-report interview, perfunctory testing, and the pro forma presentation of opinions based solely on what little was gleaned from such an interview is all the mental health "assistance" that Robert David Heiney received. This is not enough, and falls far short of what the law and the profession mandate.

Well-established standards for psychiatric evaluations were extant at the time Ms. Haese saw Mr. Heiney, but were not even approximated by the sole defense "expert." The expert simply failed to diagnose and evaluate Mr. Heiney in a reasonably professional competent way.

The due process clause protects indigent defendants against professionally inadequate evaluations by psychiatrists or psychologists. The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and who undertakes that task in a professional manner. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). Ms. Haese did not exercise that level of care. In fact, Ms. Haese was apparently not a Ph.D psychologist and would therefore not have been licensed to practice in the State of Florida at the time of the evaluation,

Florida law made Robert David Heiney's mental condition relevant to criminal responsibility and sentencing in many significant ways: (a) specific intent to commit first degree murder; (b) legal insanity; (c) intoxication; (d) diminished capacity; (e) statutory mitigating factors contained in Fla. State Secs. 921.141(6)(b), (e), and (f); (f) aggravating factors (Fla. Stat. sec. 921.141 [5]); and, (g) myriad nonstatutory mitigating circumstances relevant at sentencing. Robert David Heiney was entitled to professionally competent mental health assistance on these issues. However, he never received the assistance to which he was entitled under professionally recognized standards of care.

In the context of diagnosis, exercise of the proper level of care, skill and treatment requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient but he or she must also employ methods that are recognized as necessary and customary by similar health care providers as being acceptable under similar conditions and circumstances." 36 Fla. Jur. 2d Medical Malpractice sec. 9, at 147 (1962). The inquiry focuses upon the acceptable methods of diagnosis of a person presenting symptoms that include violent and antisocial behavior. Thus, for example, psychology and psychiatry have long recognized that organic brain damage must be considered. See R. Slovenko, Psvchiatrr and the Law 400 (1973). See also S. Arieti, American Handbook of Psychiatry 1161 (2d ed. 1974); J. MacDonald, Psychiatry and The Criminal 102-03 (1958). Accord H. Kaplan and b. Sadock, Comprehensive Textbook of Psvchiatrr 548, 964, 1866-68 (4th ed. 1985); R. Hoffman, Diagnostic Errors in The Evaluation of Behavioral Disorders, 248 J. Am. Med. Ass'n 964 (1982). As succinctly stated in the chapter in the 1985 edition of the Comprehensive Textbook of Psvchiatrr concerned with personality disorders, "it is the rule, not the exception, that organic defects . . . mimic facets of

personality disorder." Id. at 964. Similarly, major mental illnesses (e.g. paranoia, schizophrenia) may result in symptoms similar to those exhibited by patients with a behavioral disorder. See DSM-III. Such illnesses, therefore, must also be always properly evaluated, considered, and assessed.

Because organic brain damage and major mental illness can be readily but mistakenly diagnosed as personality disorder, the mental health profession has recognized that before a diagnosis of personality disorder -- particularly antisocial personality disorder (formerly called sociopathy or psychopathy) -- can be made, the evaluating psychiatrist must first rule out those bases for the symptoms presented. See, e.g., Kaplan and Sadock at 964. See also MacDonald at 98, 102-03. Accordingly,

> [P]sychiatrists have a clear responsibility to search out organic causes of psychic dysfunction either through their own examinations and workups or by referral to competent specialists.

S. Halleck, Law in the Practice of Psychiatry 66 (1980).

Simply put, the clearly recognized standard in the field mandates that "only in the absence of organic, psychotic, neurotic or intellectual impairment should the patient be . . . categorized [as antisocial]." Kaplan and Sadock at 1866. See also, id. at 543. The evaluation here flatly failed under the recognized standards.

On the basis of the generally-agreed upon principles discussed above, the proper method of assessment must include the following steps:

a. *An* accurate medical and social history must be obtained. Because "[i]t is often only from the details in the history" that organic disease or major mental illness may be accurately differentiated from personality disorder, R. Strub and F. Black, Organic Brain Syndromes, 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." Kaplan and Sadock at 837. See also MacDonald at 98, 103,

110 (emphasizing the singular importance of a "painstaking clinical history"). Among other matters, the history must ascertain whether the patient ever experienced serious head injury, and if so, whether the patient's personality changed in the wake of that injury. See Kaplan and Sadock at 489, 877. See also Strub and Black at 42-44. Obviously, such a history must also include a review of background facts demonstrating the presence or possible presence of mental illness. Pertinent records (e.g., school records, prior incarceration records, etc.) are critical and central to such an assessment and review.

b. Historical data must be obtained not only from the patient. but from sources independent of the Datient. It is well recognized that the patient is often an unreliable data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan and Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull.

Am. Acad. Psych. & L. *267, 274 (1974);* H. Davidson, Forensic Psychiatry *38-39* (2d ed. *1965);* MacDonald at *98.*

1) In fact, a thorough review of background information and collateral data is most critical in forensic cases and, especially in cases involving mentally ill clients. As is obvious, the client's mental illness will invariably preclude any ability to accurately relate facts. This is particularly true in a case such as Mr. Heiney's where he lacks insight into his family history and substance abuse. Robert David Heiney's mental deficiency was and is plain. His behavior, his background, and even evaluations conducted by professionals other than Ms. Haese prior to the trial, demonstrated substantial and longstanding mental health problems. Ms. Haese, however, failed to seek out or use critical and available background information. She failed to undertake the procedures necessary to an adequate evaluation. She simply failed to look. Her evaluation, based almost entirely on self-reporting, was not professionally adequate.

c. Information regarding the Patient's past and present physical condition should be reviewed. See, e.g., Kaplan and Sadock at *544, 837-38* and *964;* Arieti at *1161;* MacDonald at *48.* The profession's standards require that the evaluating psychiatrist review information concerning the patient's past and present physical condition: "[The psychiatrist] should be expected to obtain [a] detailed medical history. . ." Kaplan and Sadock at *544.* Any past or present somatic complaints should be considered as should any evidence of odd or unusual behavior. Here, such factors were ignored. Had adequate information been obtained, Mr. Heiney's history of head injury, headaches and alcoholic behavior would have been revealed.

d. Appropriate diagnostic studies must be undertaken in light of the history and physical examination. The mental health profession recognizes that

psychological testing is indispensable to an adequate evaluation. Previous testing and the results thereof must be reviewed. Proper testing of the patient's mental state at the time of the evaluation should be conducted. Thereafter, the results of proper testing must be considered and reviewed alongside the information concerning the patient's mental health background and history. In short, psychological testing is critical to an adequate evaluation. See Kaplan and Sadock, pp. *547-48.*

e. The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessinn the presence or absence of organic impairment. "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," Kaplan and Sadock, p. *835,* and cognitive loss goes hand in hand with serious mental illness. Such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; *(3)* impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and *(4)* impairment of judgment." Id. at *835.* While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE -- standing alone and in isolation from other evaluative procedures -- has proved to be very unreliable in detecting cognitive loss associated with organic impairment or major mental illness. Kaplan and Sadock have explained why:

> When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.
>
> In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. . . The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues.

Id. at 835. Accordingly, "[c]ognitive impairment[s]" should be considered in the context of the patient's overall clinical presentation -- past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. Id. at 836. It is only in such a context that a reasonable decision can be made concerning whether any cognitive impairment exists and, if so, regarding what the causes of such an impairment may be.

Ms. Haese failed to meet the standard of care. She was called on to evaluate a defendant whose history demonstrated mental illness, head injury and substance abuse yet she sought out no information and considered nothing regarding organcity or substance abuse. She provided but one psychological personality test (the MMPI) and an IQ test. Because of Mr. Heiney's mental illness, e.g., his lack of insight and denial, his cooperation with the counselor was limited. In her report, Ms. Haese described Mr. Heiney's participation in the testing and evaluation process as varied at best and nonproductive at worst:

> Robert's mood varied during the interview from cooperation to hostile, to passive resistance to answering questions. He often stated he knew the answer but didn't feel like stating them.

(R. 90). Under these circumstances, a competent mental health professional would have characterized the testing results as conditional and would have sought background information. Had the mental health expert followed adequate procedures, she would have discovered numerous defenses to the charges and compelling mitigating evidence.

The professional inadequacies in Robert David Heiney's pretrial evaluation are clear. A review of available information would have demonstrated that Mr. Heiney was, as a result of his mental illness, not sane at the time of his alleged crimes, and that a plethora of mitigating circumstances existed.

Had an adequate history been obtained, Mr. Heiney's history of severe headaches, substance abuse and head injury would have been discovered. See State

v. Sireci, 13 F.L.W. 722 (Fla. 1988). None of these facts appear in Ms. Haese's report. In fact, Ms. Haese was not a Ph.D psychologist and apparently was not licensed in the State of Florida. Her total discussion of Mr. Heiney in her report (as opposed to general information) consisted of sixteen sentences.

Overall, Ms. Haese conducted a totally inadequate evaluation and failed to avail herself of any of the readily available information that would have helped her to attain the recognized standards applicable to a professional evaluation. In fact, she wholly failed to adequately consider Mr. Heiney's mental state at the time of the offenses. During the offenses Mr. Heiney had access to (and consumed) illegal drugs and alcohol. Ms. Haese failed to consider Mr. Heiney's behavior and state of mind during the offenses in spite of clear evidence that Mr. Heiney was insane at that time.

In addition, Mr. Heiney's mental state was further diminished by his intoxication at the time of the offense. This was a valid defense. His drinking was a lifelong problem as attested to by the record. He had been drinking heavily and injecting heroin immediately prior to and at the time of the offenses, further damaging his cognitive controls already loosened by his impaired mental state and organic brain damage. Cf. Sireci, supra.

Counsel failed to effectively represent his client by developing and providing to the expert no relevant background facts regarding Mr. Heiney and by failing to ask the expert to evaluate the mental health mitigating factors. See State v. Michael, 530 So. 2d 929 (Fla. 1988). Thus, Ms. Haese also was never asked to consider, and in fact never evaluated Mr. Heiney in consideration of, the many available mitigating circumstances of both a statutory and non-statutory nature. Mr. Heiney suffered from extreme emotional disturbance. His ability to conform his conduct to the requirements of law was substantially impaired. He was mentally ill. He was intoxicated. He was brain damaged. Non-statutory

mitigation was also ignored. Mr. Heiney was raised by an abusive father who beat him. He was raised in a family with little or no affection and serious physical abuse. Ms. Haese failed to look for this information, counsel failed to provide it, and counsel failed to ask her about it.

No one considered the effects of Mr. Heiney's several head injuries. As a child, Mr. Heiney suffered head injuries when he purposely "ran into cars" after he had been beaten by his father (App. H). He required x-rays. In another incident, after falling off a bicycle, he had to have stitches for a head injury. He also suffered severe migraine headaches (App 21). Mr. Heiney had a history of severe substance abuse since childhood. He was addicted to alcohol and heroin at the time of the offense. None of these factors, factors clearly demonstrating the possibility of organic brain damage, were considered. Neither statutory nor non-statutory mitigation was addressed by the evaluator retained for the purpose of aiding in Mr. Heiney's defense.

Mr. Heiney' attorney's failure to provide available collateral data to the counselor makes it abundantly clear that counsel was inadequate and contributed to the gross inadequacy of the mental health evaluation. Counsel could have, for example, obtained Mr. Heiney's previous prison records, military records, court records or his juvenile records. Each of these documents contain invaluable information. The counselor, on the other hand, when faced with an invalid MMPI, could have done further testing and did not.

Had Mr. Heiney had a competent professional evaluation, significant mental health mitigation and guilt-innocence issues would have been presented for the consideration of the judge and jury. Mr. Heiney has now had such an evaluation:

> As you requested I have conducted an evaluation of Robert David Heiney, a death row inmate at Florida State Prison. On April 24, 1989, I interviewed Mr. Heiney for approximately one and one half hours and then conducted a number of psychological tests including the Bender Gestalt, the Revised Beta and the Carlson Psychological Survey (CPS). In addition, I have reviewed numerous records including transcripts, police reports, accounts of witnesses, prior mental health evaluations,

incarceration records, and numerous other records. As you requested, I have also evaluated whether any mental health related evidence in mitigation of sentence was available for presentation at the time of Mr. Heiney's 1979 capital trial.

The report that follows is based on my evaluation of Mr. Heiney including the psychodiagnostic interview, testing, and an examination of the extensive records available. The report is also based on my training and experience as a clinical psychologist.

I have conducted numerous assessments involving the use of psychological tests and I teach graduate level courses in client assessment and psychotherapy. I have served extensively as an expert witness in civil and criminal proceedings for the past thirteen years and have testified with regard to mental health issues in criminal cases. I am a tenured full professor and director of the graduate program of community counseling at Florida International University, Miami, Florida. Additionally, I am a licensed psychologist in the State of Florida and a Diplomate of the American Board of Professional Psychology. I am also affiliated with Harbor View Hospital also located in Miami.

Behavioral Observations and Interview Data

Robert David Heiney is a 43 year old divorced white male, presently on Death Watch at Florida State Prison, where he is awaiting execution on a conviction for murder. He was cooperative during the interview, although his affect was characterized by blunting and flatness. He was responsive to requests for information, and did not display gross loosening of association. Although talkative, his speech was characterized by circumstantiality, and other reactions equated with anxiety and anxious affect. The subject is aware of his present situation, but refuses to acknowledge that he is distressed. His ideas and emotions are separated, apparently as a way of defending against painful affect and emotions. This is obviously not just a reaction to his arrest situation as it was noted in a 1978 report.

Interview and Background Data

Mr. Heiney was born on December 1, 1945 in East Liverpool, Ohio. He was the eighth in a sequence of nine children and was raised by his mother and father. The subject's father, who was a steel worker, died in 1969 and his mother died in 1977. Affidavits provided by siblings paint a picture of a dysfunctional family characterized by physical abuse by the father, passivity by the mother, and general chaos and lack of nurture or guidance. The father is described as a man of explosive temperment who administered severe physical punishment, to the extent that the intervention of the mother was the sole factor preventing the subject from suffering severe injury. As a young child the father's violent temper is also documented by probation records. A juvenile official states that, "I cannot help but wonder what kind of psychological and emotional mechanisms were working in the report of the father having a quick temper and Robert also having a quick temper." The subject was tied to a cement block in the back yard to supposedly control his behavior. and he could be seen by siblings and neighbors

slowly dragging the cement block around the back yard. The subject, after being punished, would sometimes run directly into the path of an oncoming car. The family believes it was the only way he knew to get love or attention, although it clearly could have been a means of escape from an intolerable situation. His mother is described as a very religious person and saw their son's abnormal behavior as directed by God. The subject's sister described the mother's reactions as being partially a result of the guilt she felt from having many times indicated that Robert was unwanted.

Mr. Heiney was first known to the Ohio juvenile court system in August of **1956,** when he was charged with breaking and entering. He was charged with a number of offenses as a juvenile between **1956** and **1962.** In **1962,** he was removed from the Juvenile Diagnostic Center, made a ward of the juvenile court and placed on probation. Records indicate that the subject was referred in **1962** to the Child Counseling Center by a teacher who said he needed "emergency help" and "psychiatric help". He was described as moody, depressed and nervous and had been expelled from school for exposing himself to several girls. In spite of all of the problems manifested, the parents assumed what was described by mental health workers as a "hands off" posture, believing that "things would work themselves out." In spite of this, they admitted that their son's behavior was "not normal from the time he was five years of age." Mental health workers described a big part of the subject's problems as a result of parental behavior and attitude. When given the options of providing psychological intervention and help, the family refused to follow through. Psychological testing conducted as early as **1962** describes the subject as manifesting **"an** attitude of self criticism or wish to appear in an unfavorable light". He was further described as an individual "characterized by bizarre and unusual thoughts or behavior, there would be a splitting of his subject life from reality, so that the observer could not follow rationally, the shifts in mood or behavior." This splitting of mood from behavior has been consistently noted throughout. School personnel as early as **1962** believed that the subject "has never experienced much parental guidance from early youth". Chronological records of a series of visits to the aforementioned center demonstrate the mood variability and impulsivity which characterized the subject's behavior. On one occasion he would present the image of a "perfect gentleman", on another occasion "he would be resistant and not keep appointments. Next in the cycle would be manifestation of behavior described as aggressive and belligerent." The court recommended that the subject be examined by a psychiatrist for diagnosis, prognosis and treatment, but records indicate that no follow through ever occurred. While Mr. Heiney reports that he did well in school, his family reports that he had problems in school. His military records indicate a history of headaches that may have been related to earlier car accidents. Additionally, these headaches were noted to cause insomnia. It is also noted in these records that he is under emotional stress. After serving approximately one and one-half years, he was discharged under other than honorable conditions. While in the military (Fort Hamilton, New York) he exhibited erratic behavior and an inability to adjust to military service.

After being first arrested for burglary and forgery in **1965,** he was subsequently confined at the Ohio State Reformatory, the Ohio State

Penitentiary, the Kansas State Penitentiary. Since his first conviction as an adult, he served a total of six years in confinement. A prison personality evaluation gives a diagnosis of "hysterical personality." Other evaluations describe him as a "follower". At one point, a condition of his parole was that he seek psychiatric out- patient counseling. Obviously, he has always had notable mental health problems.

Mr. Heiney was married for the first time in April of 1963. He was divorced in October of 1965, dates which coincide with the time of his military service. He married again in 1968 and divorced in 1969. His third marriage was in 1973. Although he no longer has contact with his spouse, earlier records note that the marriage had some "strengths in terms of trust, faithfulness, and respect for one another's person."

The subject describes his overall health as good and reports no periods of hospitalization. However, it is significant that the subject has a history of head injury: in 1949 he "ran into a car", in 1950 he also "ran into a car", and again in 1950 he fell from a bicycle. One of these head injuries required x-rays and another stitches. As noted earlier, military records document frequent migraine headaches and record an onset from a car accident five years previous. The record notes tension type headaches and sleep disturbance. A medical examination in 1969 indicates moderate hearing loss in both ears.

Mr. Heiney details a drug history going back to age 14 or 15. He has utilized marijuana daily since the mid-1960's, has experimented with acid and speed, and was on these substances over a five year period prior to his most recent arrest. In addition to "speed balls" he was utilizing an average of 2 grams of cocaine daily. Immediately prior to the current offense, he was utilizing heroin, Dot and alcohol on a regular basis. He was "mainlining" heroin two to three times daily. His girlfriend corroborates their drug use during this time. The subject's records also document his abuse of alcohol. In 1965 at the age of 20 he was arrested for burglary because he was so intoxicated that he broke into a business and was found by police passed out inside. In 1973, he was arrested for public intoxication. Clearly he has a long history of substance abuse.

Test Results

The results of the Revised Beta Examination indicate that the subject's level of functioning is in the low/normal range with a Beta I.Q. of 93. This is a test which taps nonverbal abilities only.

Responses on the Bender-Gestalt Designs are indicative of behavior characterized by poor impulse control and planning ability, low ego strength, feelings of inferiority and insecurity and a lack of self-esteem. Protocol responses also indicate a low frustration state and mood variability. Modifications in the reproductions of the designs, changes in angulation and closure difficulties along with distortions reflect immature emotional development and the presence of organicity. Such distortions in reproduction are indicative of brain damage and are congruent with Mr. Heiney's history of repeated head injury and chronic substance abuse.

The Carlson Psychological Survey (CPS) is a psychometric instrument intended primarily for individuals incarcerated in the prison system. It recognizes the unique situation of these individuals as well as the atypical reasons for referrals. Mr. Heiney's CPS Profiles indicated elevated scores for chemical abuse, thought disturbance, social inability to conform, maladjustment, and self- depreciation.

These results are congruent with behavioral observations and with earlier reports. As stated in a psychiatric evaluation by the Kansas Reception and Diagnostic Center in 1975:

For a man who seems to be as resourceful as Mr. Heiney, and considering that he seeminaly has the capacity to learn from past experience, he shows considerable difficulty when under stress, at which time his ability to handle critical situations is impaired to the extent that he has broken the law several times in order to cope with such crisis.

Even as an adolescent it was clear that Mr. Heiney was emotionally disturbed. His MMPI results at the time were described as possible indicators of self-criticism. The MMPI was also indicative of someone who had "bizarre and unusual thoughts," a "splitting of his subiective life from reality," phobias, "compulsive behavior" and "overproductivity in thoueht and action."

The only people, in fact:, who failed to notice Mr. Heiney's long history of disturbance, his head injuries and his substance abuse were those who evaluated him in 1978. The 1978 report makes no mention of his serious substance abuse, head injuries, previous mental health evaluations nor any of the relevant history available on Mr. Heiney. The report contains no history at all, save his date of birth. It is not, for example, noted that he came from an abusive family, that he had numerous head injuries, that he had a history of mental health problems and had been previously diagnosed as an "hysterical personality" and that he had serious substance abuse problems. Because of the utter lack of backeround, an adequate evaluation was impossible. No testing was done for organicity; no attempt was made to assess his level of intellectual functioning or achievement levels. The report notes that his "ideas are separate from his emotions and feelings," an indication of discordant or inappropriate affect which is associated with certain mental health disorders or with neurotic defense mechanisms, but clearly not with antisocial personality disorders. Yet, in spite of their acknowledgment that his ideas are "separated from his emotions and feelings", take at face value that he "showed little concern over the results of his upcoming trial." They noted that his resistance to answering questions on an intelligence test was a "defense" rather than oppositional behavior, but fail to integrate their own observations into the report.

Well established standards for a professionally adequate forensic mental health evaluation were well known to reasonably competent professionals at the time that Mr. Heiney was examined, immediately prior to his capital trial. Linda Haese, a staff psychologist, was the individual who actually evaluated Mr. Heiney in 1978. As noted above,

the standards require the use of background information and appropriate testing. Otherwise, a reliable diagnosis is impossible. Mr. Heiney's use of intoxicant around the time of the offense and his history of substance abuse should have been examined, and should have triggered testing for organicity. In fact, it was well known to professionals at the time that organic defects mimic facets of personality disorder and must be ruled out before making a diagnosis of personality disorder. Self-report is particularly unreliable in a case such as Mr. Heiney's, because he has no insight into his past family history or substance abuse.

The circumstances under which Ms. Haese conducted her testing would require a competent mental health professional to find that the test results are conditional, at best. Specifically, she described mood variations from cooperative to hostile and passive resistance to answering questions and reported: "He often stated he knew the answer but didn't feel like stating them." The subject's state of mind made the testing results and self-report of the subject unreliable. These circumstances should have triggered a background investigation to determine significant factors which the subject was unable to provide due to his mental deficiencies.

In fact, there is no information included in the 1978 report that would reliably lead to any diagnosis. Although the MMPI was given, there was no indication of whether or not it is valid; and in the absence of adequate background materials, the blind interpretation of an MMPI was inappropriate. The writers of this 1978 report indicated that Mr. Heiney was antisocial. Yet, the DSM II (the appropriate authority at the time) indicates that antisocial personalities are incapable of loyalty, unable to feel guilt and are basically unsocialized. Yet, Mr. Heiney was described by his family as more "harmful to himself than others." Other prison reports cited earlier describe a positive relationship with his wife in spite of their separation. In fact, he had and has clear signs and positive history for organic brain dysfunction which as authorities (Kaplan and Sadock) have noted tends to mimic facets of personality disorder. Thus, not knowing his history, no reliable diagnosis nor conclusions could have been had at the time. A common error in psychological evaluations is to rely solely on self-report; this 1978 report failed to obtain even self-report, no less corroborating information.

Had an adequate history been done, it would have been clear that Mr. Heiney's abnormal behavior had its advent with the head injuries he suffered. He was hit by a car in 1949 and 1950 and was in a bike accident in 1950, accidents which required head x-rays and stitches. It is significant to his parents that it was at this time that his behavior was not normal. They noted his behavior was "not normal" since age five. Although his parents failed to make the connection between the serious consequences of a head injury and his problems, it is unconscionable that a mental health professional would fail to make the connection between closed head injuries, behavior change, mental health problems and a heightened susceptibility to drugs and alcohol. Of course, given that no history was taken or reported, no adequate or reliable diagnosis or conclusion could ever have been reached. The prior testing done on Mr. Heiney was never examined. Their report fell

far below the standard of care.

SUMMARY

Mr. Heiney was administered a variety of psychological tests to assess his intellectual functioning, achievement levels, organic brain damage and personality functioning. The results are consistent with his history and current observations. He functions at a slightly below average range of intelligence. He shows clear signs of organicity. in all likelihood contributed to by head injury and a long history of substance abuse dating back to age 15. It is significant that his problem behaviors are noted to have begun after his head injuries in 1949 and 1950.

Mr. Heiney's deficits are long-standing in nature and are of the type that would have contributed to the offense for which he has received the death sentence. Mr. Heiney's mental and emotional illness, extensive history of substance abuse, organicity and the other deficits discussed explain his life-long pattern of behavior and his involvement in the offense. These illnesses and deficits relate to the issues addressed at Mr. Heiney's trial, including the question of mitigation of sentence. From the perspective of Mr. Heiney's mental health, they answer important questions regarding his involvement in the crime. The circumstances of the shooting of Terry Phillips a few days before this offense illustrate Mr. Heiney's mental condition. After shooting Mr. Phillips. he then hugged Mr. Phillips. told him he was sorry and helped get him to the hospital. Mr. Heiney's self-report was that he "flipped out" and was very intoxicated. This is corroborated by the accounts the witnesses of his immediate remorse.

Clearly. Mr. Heiney suffers extreme mental or emotional disturbance, and suffered such at the time of the offense. There is evidence of organicity contributed to by a history of substance abuse. Due to these factors. Mr. Heinev's ability to appreciate the criminality of his conduct and conform his conduct to the law would have been substantially impaired. He has a life-long history of alienation, social isolation and inadequate functioning. Prison records document that Mr. Heiney is a follower which is what would be expected given his mental and physical deficiencies. He decompensates under stress and has poor judgment and insight. These Problems are of long-standing duration. and have been documented by mental health professionals since the subject was approximately 15 years of age. In spite of this, no intervention ever occurred to address the aforementioned problems. Additionally, Mr. Heiney's subsequent abuse of alcohol and drugs clearly had an impact on his behavior and subsequent confrontations with the criminal justice system.

The history of family abuse must also be considered. Mr. Heinev was an unwanted child perceived by his mother to be a punishment from God. Although the family knew he had problems, they failed to seek help. He was tied to a cement block in the backyard and beaten so severely that he would run from the house to escape, at times being injured by oncoming cars. He was described by his family as "never violent" when a child and more injurous to himself than others. The attitude of the parents was described in a report as discouraging. The

report correctly predicted that unless Mr. Heiney's parents would take positive action, it would only be "a matter of time" before he was in a correctional institution. A letter from his school principal also contemporaneously states that "the attitude on the part of the parents seems to me to be the cause of most of Lee's troubles." It further states "Lee can be a mature person but he needs someone badly to help him grow." Obviously help was not forthcoming, leading Mr. Heiney to where he is today.

While the aforementioned information relates to mitigating factors, both statutory and non-statutory, it also speaks to other important issues, such as the subject's intent and premeditation, and lack thereof, at the time of the offense. The subject's emotional deficiencies, emotionally deprived background, history of child abuse and organicity all combined to impact the mental health issues related to his level of culpability, as well as his mental state at the time of the offense.

Overall, the subject's history, the numerous records I have reviewed regarding Mr. Heiney, the results of this evaluation and the results of other evaluations provide clear evidence of mitigating factors relating to the subject's mental health. This information provides substantial data, critical in evaluating Mr. Heiney in regard to statutory and non-statutory mitigating circumstances.

(App. 28)(Report of Dr. Toomer)(emphasis added). Sadly, the issues were ignored. As a result, Mr. Heiney' capital trial and sentencing were rendered fundamentally unreliable and unfair.

In sum, Mr. Heiney was denied his fifth, sixth, eighth, and fourteenth amendment rights. The evaluation conducted in this case was not professionally adequate. Counsel failed to assure that it would be, and the counselor failed in her task. Consequently Mr. Heiney was tried and sentenced to death in violation of his due process and equal protection rights. Ake v. Oklahoma, supra. The professional inadequacies of the one counselor whom he saw before trial resulted in the abrogation of Mr. Heiney's right to the assistance of an adequate mental health professional. The guilt/innocence phase was rendered fundamentally unreliable: available and provable insanity, diminished capacity, and intoxication defenses were ignored. Such defenses would have made a difference (as is obvious when these defense are compared to the non-defense presented at trial). At sentencing, a professionally adequate evaluation would have made a

significant difference: substantial statutory and non-statutory mitigation would have been established; aggravating factors would have been undermined. These facts, however, never made their way before the judge and jury. Counsel and the expert failed their client.

Ms. Haese's "evaluation" deprived Mr. Heiney of his most essential rights -- i.e., it directly caused important, necessary, and truthful information to be withheld from the tribunal charged with deciding whether Mr. Heiney was guilty of first-degree murder, and whether he should live or die. The doctor's actions directly "precluded the development of true **facts,"** and "serve[d] to pervert" the sentencer's deliberations concerning the ultimate questions whether in fact Robert David Heiney was guilty of first degree murder and whether he should live or die." Smith v. Murray, ***106*** S. Ct. ***2661, 2668 (1986).*** A stay of execution and full and fair evidentiary resolution are proper. Thereafter, Rule ***3.850*** relief would be more than appropriate, for Mr. Heiney can show that he has been denied his most essential constitutional rights.

ARGUMENT IV

MR. HEINEY'S COURT-APPOINTED TRIAL COUNSEL RENDERED UNCONSTITUTIONALLY INEFFECTIVE ASSISTANCE AT THE GUILT-INNOCENCE AND PENALTY PHASES OF THESE CAPITAL PROCEEDINGS IN VIOLATION OF MR. HEINEY'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Strickland v. Washington, ***466*** U.S. ***668 (1984).*** the Supreme Court held that counsel has **"a** duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing **process."** ***466*** U.S. at ***688*** (citation omitted). Strickland v. Washington requires a petitioner to plead and demonstrate: 1) unreasonable attorney performance, and ***2)*** prejudice. Mr. Heiney has pled and shown each. ***An*** evidentiary hearing was and is required.

At trial, counsel completely failed to investigate and present wholly provable and meritorious defenses. They would have altered the result. They

should have been presented. However, they were never adequately investigated, developed, and prepared, and, obviously therefore, never presented.

Such defenses included voluntary intoxication. Abundant evidence existed which substantiates the defense. However, that evidence was never argued, nor ever supported with the needed expert testimony. The jury never heard the substantial evidence which showed that Mr. Heiney was not guilty of first-degree murder.

An additional provable and substantial defense was available. But it was ineffectively ignored: Mr. Heiney was not legally sane at the time of the alleged offenses.

A. THE INEFFEECTIVELY IGNORED INSANITY DEFENSE

Mr. Heiney was insane at the time of his alleged offenses. He suffered from longstanding mental infirmities, diseases, and defects. As a result, he did not know what he was doing or its consequences, and he could not distinguish right from wrong.

Mr. Heiney's longstanding mental illness developed and was exacerbated by factors in his environment. He was severely abused as a child. His father whipped him causing him to run into the street and actually to purposely run into cars, sustaining head injuries as a result, at the ages of four and five. He later suffered another head injury as a result of an accident. He suffered from severe and persistent headaches. He drank heavily and used drugs beginning in his teens.

His client was never well, yet counsel failed to notice this. Mr. Heiney suffers from severe substance abuse and organic brain damage which is characteristic of his current and long-term functioning and is not limited to episodes of illness. It is pervasive and causes now, and caused at the time of the alleged offense, a significant impairment in his functioning. And during

times of extreme stress, transient psychotic symptoms appear. Mr. Heiney suffers from mental illness, organic brain damage, and severe substance abuse.

The relationship of his disorders to the alleged offenses was clear. Mr. Heiney's mental disease is such that he loses his ability to make rational judgments under conditions of severe stress particularly when he is heavily intoxicated, Given the stress of his immediate environment at the time of the offense, his mentally ill reations controlled his behavior.

The offense was the direct result of his insanity and his transient psychotic state. These illnesses existed and exist. An evidentiary hearing is necessary.

B. MR. HEINEY WAS DENIED A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BY HIS ATTORNEY'S FAILURE TO INVESTIGATE AND PRESENT SUBSTANTIAL EVIDENCE IN MITIGATION OF PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Counsel not only failed at guilt-innocence, he failed at the penalty phase. No attorney ever asked Ms. Haese or any mental health expert to evaluate Mr. Heiney with regard to mitigating circumstances. No attorney asked the evaluating counselor to consider how the client's diminished mental health could have been used to rebut aggravating circumstances. Counsel failed the client and the prosecutor argued this failure to the judge and jury in support of a death penalty, ". . . we're going to a psychiatric testimony of the defendant's condition at that time. There was no evidence upon which to support any finding that this mit exists." (R. 1326).

Defense counsel conducted no, or grossly inadequate investigation into his client's history, family, and background. No family members were contacted. The following critically important information, inter alia, was unreasonably ignored by counsel and consequently was not proven before the jury and court when the determination was made that Mr. Heiney should be executed:

a. Robert Heiney was born on December 1, 1945. He is the eighth of nine

children born to an abusive father and impaired mother. His father was so abusive that as a child, Mr. Heiney would run into cars in the street in attempts at suicide. As a very small child Mr. Heiney ran away from home to escape the abuse but was returned, only to be chained to a cement block which he dragged slowly around the front yard (App. 19).

b. As a child, Mr. Heiney received serious head injuries from running into cars. As a young adult he suffered a head injury in an automobile accident. The consequences of this brain injury were unexplored and thus totally unexplained to the jury and the court.

c. Mr. Heiney was a substance abuser. He had a history of heroine, cocaine and acid use and drank heavily since he was a teenager. Mr. Heiney drank especially heavily during the weeks prior to the alleged offense in addition to injecting large doses of heroin several times a day.

d. The alleged offense was committed while Mr. Heiney was under the influence of extreme emotional disturbance. Mr. Heiney suffered and still suffers from numerous mental infirmities. In addition to severe substance abuse, as well as other mental deficiencies, Mr. Heiney may well suffer from other mental infirmities including brain damage as a result of a history of head injuries. Trial counsel failed to present the available evidence concerning their client's mental health problems to the jury or court. They failed to investigate, and failed to secure the needed mental health assistance. In fact, they failed to provide any assistance even to the one professional they did secure. Had mental health mitigation been fairly developed and presented, and had the sentencer been aware of the nature and severity of Mr. Heiney's mental health problems, he would not have been sentenced to death.

e. The capacity of Mr. Heiney to conform his conduct to the requirements of law was substantially impaired and he committed his alleged offense under the

influence of extreme mental or emotional disturbance. Mr. Heiney's mental infirmity was exacerbated by his state of inebriation. In response to a stressor he was incapable of forming intent or premeditation.

Defense attorney Pascoe unreasonably relied on the mitigation in the record. He ineffectively failed to submit the compelling statutory and nonstatutory mitigation which was available.

Had defense counsel contacted family members, he would have discovered a story of severe abuse that distorted Mr. Heiney's whole life. The affidavits submitted below are appended to this brief for the Court's review.[9]

In addition, counsel failed to inform the judge or jury that Mr. Heiney had provided substantial cooperation to law enforcement authorities in obtaining convictions against a Reverend Herman Keck for securities fraud and statutory rape in Daytona Beach, Florida (App.I)(appended hereto). Reasonable investigation would have uncovered these significant mitigating facts.

Counsel can be ineffective at capital sentencing in Florida even when the jury recommends a life sentence. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). Indeed, in such instances, an attorney's ineffectiveness is easier to prove: all an effective attorney has to do is present a "reasonable basis" for the life recommendation. Mr. Heiney believes that the jury override in this case was improper. However, even assuming that no reasonable juror could have voted to recommend life as the jury did, counsel was unreasonable in not providing a rational basis for the jury recommendation, so that it could not have been overridden. Additionally, new evidence could have been presented to the judge Counsel, however, did almost nothing.

Mr. Heiney was denied a meaningful and individualized capital sentencing

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[9]They are not quoted herein not because they lack significance (they are of critical importance) but in the interests of brevity.

determination by his attorney's failure to investigate, prepare, and present available evidence in mitigation of punishment. Mr. Heiney was denied his sixth, eighth, and fourteenth amendment rights by his attorneys' failure; he is entitled to relief.

C. OTHER CLAIMS

Various other errors and failings are apparent. Counsel failed to properly protect the record, to object, or to adequately litigate constitutional errors. Counsel failed to develop exculpatory evidence regarding the use of the victim's credit cards by Phillip Cook. Counsel failed to object when the State argued that Mr. Heiney had signed credict cards for which there was no handwriting evidence and which had not been admitted into evidence. Counsel failed to move for a change of venue in this highly publicized case. Counsel failed to object to his client's involuntary absences from the proceedings. Counsel failed to fully argue the mitigation which appears in the record.

Trial counsel rendered ineffective assistance of counsel by the failure to retain forensic experts to establish that the handwriting on the receipts signed "Phillip Cook" was not that of Mr. Heiney; that in fact it is possible to obtain fingerprints from a hammer contrary to the representations of a non-expert Okaloosa deputy; and a blood spatter expert to establish that due to the small amount of blood found in the car the offense could not have occurred in the car as purported by the State.

It falls below recognized standards for counsel to fail to subpoena witnesses to establish that Phillip Cook was in fact a real person who had left the alcohol rehabilitation center with the victim a few days before the victim's death. Florida courts have ruled that failure to interview witnesses or to have them subpoenaed is ineffective assistance of counsel. Warren v. State, 504 So. 2d 1371 (Fla. 1st DCA 1987); Martin v. State, 363 So. 2d 403 (Fla. 4th DCA 1978).

It fell below recognized standards for counsel to lose the right to opening and closing argument without realizing it in a first degree murder trial:

> THE COURT: Okay. Now, so we can get this out of the way - this always a big thing with counsel for the parties - as to the order of closing arguments. tomorrow it will be, in my assessment of the case at this point. that Mr. Anderson would have the opening and closing. Do you agree with that?
>
> MR. PASCOE: No sir.
>
> THE COURT: You introduced an exhibit as Defendant Exhibit "A", which causes You to lose the closing argument.
>
> MR. PASCOE: What was that. Your Honor? Oh, that was that twixt message.
>
> THE COURT: Huh?
>
> MR. PASCOE: That twixt message was strictly initiated by a State's witness to another State's witness, Your Honor.
>
> THE COURT: You introduced it. What's your position on that, Mr. Anderson?
>
> MR. ANDERSON: My position is the same as the Court's, Your Honor. Any time they offer any evidence, they lose their opening and closing right.
>
> THE COURT: That's a rule that's been strictly adhered to ever since I've been practicing law. As a matter of fact, I got caught in the same bind one time in a case that I was defending, and the judge ruled the same way I did. I'11 give you a chance -- the reason I bring it up tonight is I figured you probably would object to that. I want you to show me if I'm wrong.
>
> MR. PASCOE: Thank you, Your Honor.

(R. 1222-23)(emphasis added).

Although counsel had introduced the twixt message much earlier in the trial, the court waited until the defense rested before announcing that counsel had given up the right to opening and closing argument.

The rationale of the loss of opening and closing argument to the State is based on the counterbalancing value of the admission of defense evidence. Here defense counsel failed to introduce any significant evidence on behalf of the defendant. A decided advantage was passed to the State without the

counterbalancing benefits which adhere to a defendant by the introduction of significant evidence.

It is a further cruel irony resulting from counsel's ineffectiveness that the evidence he introduced was in fact used against Mr. Heiney to create inadmissible, prejudicial and irrelevant allegations that Mr. Heiney may have had homosexual tendencies. The prosecutor delighted in exploiting this cumulation of errors by defense counsel in his argument:

> The only motion in the evidence in this case of homosexual, the only time the word "homosexual" appears in the evidence, is in regard to the Defendant. When they sent out a teletype on the Defendant to Reno, or whereever it was sent, they said, "The Defendant, Robert Heiney, may be a homosexual."
>
> MR. PASCOE: Objection, Your Honor, not in evidence; it's not true; false.
>
> THE COURT: Well, the exhibit is in evidence, and the jury will use their interpretation of what the evidence says, not counsel.

(R. 1271).

Trial counsel failed to adequately raise or argue the correct circumstantial evidence instruction. Consequently, in this circumstantial evidence case, defense counsel argued a different standard for circumstantial evidence than the standard upon which the jury was instructed (See Claim XI, Habeas Petition).

Indeed, a number of unreasonable errors and omissions of counsel were presented to the lower court. These issues are incorporated, rather than repeated, herein in the interests of brevity. An evidentiary hearing is required.

ARGUMENT V

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE AND THE INTRODUCTION OF KNOWINGLY IMPROPER EVIDENCE VIOLATED THE CONSTITUTIONAL RIGHTS OF ROBERT DAVID HEINEY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

If ever a case bears close scrutiny, it is the case of Robert David Heiney. If ever a case bears the mark of questionable testimony, questionable government

tactics and questionable effectiveness of counsel, it is the instant case: the case of Robert David Heiney.

The jurors in Mr. Heiney's trial were deceived. The flaw in the illusion created by the State was discovered during seemingly innocuous testimony; the chain of custody, expert, and physical evidence testimony that so often seems to dull the senses of all present: "Why" asked a juror, "in Exhibit 106, do we have two different peoples names in there?" (R. 1195).

The Court: What was the question?

Juror: Why do we have two different peoples names, two that's signed by a different person?

The Court: Who is the different person?

Juror: Phillip Cook

The Court: Good question.

(R. 1195)(emphasis added).

At this time Exhibit 106 was examined by Mr Anderson representing the State and defense counsel Mr. Pascoe. Whereupon the State announced to the court:

I thought the Mastercharne company made a mistake. Your Honor. but it's the same credit card.

(R. 1195)(emphasis added). The Court examined the exhibit and remarked to the jury:

Yes it's the same one [creditcard]. We don't have the answer to that.

(R. 1196)(emphasis added). The Juror thanked the Judge and the trial proceeded.

Who is Phillip Cook and what did the State know about him? Were the charge slips contained in Exhibit 106 an aberration, unexplainable and unknown to the State as Mr. Anderson for the State informed the jurors and court? Post-conviction investigation now shows the State knew of Phillip Cook, and had every intention of keeping his involvement with Mr. May, the victim, from Mr. Heiney's jury. In fact, the State knew of Phillip Cook eight months before trial.

On June 29, 1978 Officer J. R. Berry reported on conversations had between Deputy Hollinghead of the Okaloosa County Sheriff's Office and Detective A. T. Keen from the Jackson Police Department, Jackson Mississippi. Detective Keen confirmed for the Okaloosa County Sheriff's Task Force that Mr. May lived in Jackson, having been arrested on several ocassions for various charges of assaults, disorderly conduct and DWI (App. 1). Further, Detective Keen spoke with Mr. May's mother who informed him that Mr. May had been in an alcohol rehabilitation center in Jackson until the end of May, 1978. Detective Keen proceeded to interview Mr. Schwartz of Harbor House, the rehabilitation center in Jackson, Mississippi. As the report reads: "Mr. Schwartz stated that on 5-31-78 he had seen Francis Marion May, Jr. with a subject name Pee Wee actual name Francis Phillip Cook. white male in his mid 30's." (App. 1, p.2). As of the date of the report, 6-29-78, the State, through Detectives Hollinghead, Barbaree and Berry, knew of Phillip Cook and that Cook had been with the victim as recently as May 31. 1978. six days before Mr. May was killed.

More crucial facts are brought to light by this report. The description of the individuual with Mr. May the day or evening he was killed, as supplied by his mother, was that of a "white male approximately 150 lb, 5'7", Blond hair . . . 31 to 32 years of age. Mr. Heiney is 6'3" tall with dark hair (App. 1). Further on June 4 and 5, 1978, Mr. May used his credit card to stay at the Terrymore Motel in Jackson, Mississippi (App. 1, p.2).

On June 29, 1978 the State was in possession of more information provided by the Jackson, Mississippi Police Department. On that date, an additional report was prepared by Officer Berry. In this report he relates:

> On 6/27/78 Detective M.T. Ingram received information from Mr. Bill Watson head of security from Mastercharge that the Mastercharge issued to a Francis Marion May, Jr., Jackson, Ms. had been utilized numerous times and included the following information where and when it had been utilized.
>
> 6/3/78 Houston, Texas

6/6/78 Valdosta, Georgia
6/6/78 Cleveland, Tennesee
6/6/78 Corbin, Kentucky
6/6/78 Mossy Head, Florida
6/7/78 Urbana. Illinios
6/8/78 Mahomet, Illinios
6/9/78 Rawlins, Wyoming
It had been utilized 6/10/78, Little America, Wyoming
It had been utilized again at Little America, Wyoming
It had been utilized on 6/10/78 at Little American Motel in Salt Lake city, Utah.
It had been utilized on 6/14/78 at North Platte Nebraska, specific place unknown.
It had been utilized on 6/16/78 at Shell Oil Co. in Knoxville, Tenn.
It had been utilized on 6/16/78 at Fana Oil Co. in Walker, La.

In talking further with security agent, Bill Watson for the Mastercharge Company he said that as soon as information was received on all transaction in which this card was utilized that he would contact this department and this detective and offices in Florida on this case and give them a copy of this information for record purposes in their report.

(App. 2). This report shows 18 credit card charges starting with a charge on June 3. 1978 in Houston. Texas and contains 4 charges made on the day of Mr. May's death.

A tracing of the June 3, 1978, Mastercard receipt in the report will demonstrate a second awareness of Cook. And like the first, again Cook is with the victim. The only person continuously with the victim from May 31, 1978, thus far is Phillip Cook. On June 3, 1978 in Houston, Texas, Phillip Cook signed a charge receipt for gas using the credit card of Francis M. May, Jr. (App. 3). This is the same Phillip Cook referred to by Mr. Schwarz as having been with Mr. May at the rehabilitation center on May 31, 1978 in Jackson, Mississippi (App. 1). There is more of Phillip Cook to be uncovered. Although there is no mention of a June 4. 1978, receipt in the report such a receipt had been found. On June 4, 1978, Phillip Cook again used Mr. May's credit card to make yet another charge (App. 4).

On June 29, 1978, 23 days after Mr. May was killed Detectives from Okaloosa County Florida went to Jackson, Mississippi to investigate the May case. In a

report by Investigator Gordon as of this date, June 29, 1978, the Okaloosa County Sheriff's Department Task Force was aware of the numerous charges made on the May Mastercharge Card and noted that all credit card receipts were in the process of being gathered for the Okaloosa investigators (App. 5, p.3-4). Copies of all charges on Mr. May's Mastercharge Card were later delivered to the Okaloosa Sheriff's Department by Mr. Watkins of Mastercharge Center in Jackson (R. 1185)

The State had all the Mastercard charge receipts; knew the dates of the charges, the places where the charges were made and the names signed on the charge receipts. The State also had the Jackson Police Department reports. Phillip Cook was seen and positively identified by name and nickname in Jackson, Mississippi on May 31, 1978. He signed his name to credit card charges in Houston on June 3 and 4, 1978, and the State had those receipts. The State labeled Phillip Cook "the mistake made by Mastercharge." Phillip Cook was real and not a Mastercharge mistake, but a man who met the victim at the alcohol rehabilitation center, a man who proceeded to Houston with the victim, a man whose name was signed on charge receipts for Mr. Mays' Mastercharge card.

What would the Jury have thought had it known Philip Cook had Mr. Mays' car and Mastercharge Card on June 3, and 4, 1978 in Houston, the day before Mr. May arrived at his mother's house on June 5, 1978. Further, what would the jury have thought had it discovered the State had misled them; that there really was a Phillip Cook; that the State with all this evidence in its possession could, with a straight face, tell the judge and the jury that Phillip Cook was a "mistake".

The State, in its closing argument, expressly argued that the charge slips from Houston had "nothing to do with the case because this was when Francis Marion May was alive. This was when he was in Houston, Texas. This was not when he was in Jackson, Mississippi, on the 5th, . . ." (R. 1235). But Phillip Cook was in Houston with the victim. And Phillip Cook was in Jackson with the victim.

The State knew this, but the State labeled Cook a "Mastercharge mistake." In a strident final closing the State, through its representative looked the Jury in the eye and said:

> Mr. Pascoe said something to you about Phillip Cook, did Phillip Cook kill Francis Marion May. There is not one shred of evidence that Phillip Cook had anything to do with it . . .
>
> They're saying, "Did Phillip Cook kill Francis Marion May." That's like saying, "Did Walter Anderson kill Francis Marion May."

(R. 1276).

The Court may ask itself why in the world would defense counsel fail to establish the "reality" of Phillip Cook a/k/a "Pee Wee" as known by Mr. Schwartz. Why did counsel not call Mr. Schwartz to the stand to testify as to the relationship between Mr. May and Mr. Cook? Why was Mr. Schwartz not asked to describe PeeWee? In addition to establishing the **"reality"** of Phillip Cook, counsel very well may have established that "Pee Wee" was **5'7"** in height, had blond hair, and was approximately 31 years of age, as described by Mrs. May. Why did counsel not inquire of the Mastercard Center representative Mr. Billy Watson whether there were any Phillip Cook signatures on any of Mr. May's charge receipts? To have presented such simple but illuminating evidence would have laid waste to the State's case. It would have decimated the State's denial of Phillip Cook's existance. The State was fully aware of the consequences of the discovery of Phillip Cook. What did the State do? It hid Mr. Cook and denied he existed.

Defense counsel did not even have to subpoena the man from Mastercharge. The State had called him as their witness. Defense counsel did not question him. Nor did defense counsel elicit the evidence that would have bound Francis Marion May and Frances Phillip Cook together beginning on the 31st day of May, 1978.

Defense counsel leaves behind, in the record, his lack of knowledge of Phillip Cook **and** his response to the Phillip Cook discovery by the Juror.

> Phillip Cook, who in the world is Phillip Cook? Well, Phillip Cook sounds like a male, sounds like a male. It sounds like an individual that was probably very close friends with Francis Marion May. You don't normally give your credit card to somebody else, unless that individual is real close. That's who Phillip Cook is. How in the world did those sales slips ever get in that bundle? Huh? They came in inadvertently, inadvertently. A young lady in the jury right here noticed it, noticed it. She picked them out.

(R. 1253). The question to be answered now becomes: Where did the State hide Phillip Cook?

In an envelope. In evidence. Right inside Exhibit number 106 (App. 6). The envelope within the envelope is marked with the Mastercharge logo. It is from Mastercharge Center and is post marked November 2, 1978 (App. 7). It was addressed to the Okaloosa Sheriff's Office to the attention of Glen Barboree. On the outside of the envelope there is a notation by Detective Barbaree "Prior to June 6 or unreadable." Discovery consisted of only 10 credit card receipts, the 10 receipts taken from Mr. Heiney in Ohio (R. 1174-6). The same 10 receipts as will be shown, were provided to the FBI. None of the receipts provided to the FBI contained Phillip Cook's name and none of these receipts were dated before June 16, 1987. The receipts from June 3, 1987 to June 16, 1987, with the exception of one receipt, were never submitted to the FBI. These critical receipts reflecting the crucial days prior to Mr. May's death and the actual day of his death were known to the State, possessed by the State, and suppressed by the State. This information was in the hands of the State as of June 27, 1978 (App. 5).

Although several motions for discovery were made, motions to hold the State in contempt, motions to hold certain officers in contempt, and motions for in camera inspections (R. 3, 6, 8, 9, 25-27, 33, 34-36), the court laid blame for any failure to discover on defense counsel. Given the egregious nature of the conduct in this case, culpability becomes an open question. An analysis of State's Exhibit 106 and its contents is necessary here in order to demonstrate

the lengths the State went to in order to hide Phillip Cook. Detective Glen Barbaree testified for the State and was the State's witness for the introduction of several items of evidence. Detective Barbaree testified that the Mastercard receipts sent to the FBI were receipts taken from Mr. Heiney's wallet (R. 1174-6). (Detective Barbaree described these receipts as specimens Q1 through Q10 (R. 1175).) Exhibit 106 began this way:

Q. Mr. Barbaree, do you have your file on this case with you?

A. Yes sir, I do.

Q. May I see it, please.

A. Yes sir.

(Mr. Anderson examined file)

Q. May I have this marked as State's Exhibit Number 106, for identification.

(State's Exhibit Number 106 marked for identification)

Q. I show you State's Exhibit Number 106, for identification, and ask you to identify that exhibit, if you can, please.

A. Can I open it?

Q. Yes, um-huh.

(Witness examined exhibit)

A. Yes sir, it's five envelopes, Mastercharge envelopes, Mastercharne envelopes from Jackson, Mississippi, with copies of credit card tickets and receipts in there.

Q. Do you know where they came from?

A. Yes sir, they came from the Mastercharne Center in Jackson, Mississippi.

Q. Thank you, Mr. Barbaree. I have no other questions.

(R. 1183)(emphasis added).

Exhibit 106 (marked for identification) was described as containing five envelopes from Mastercharge in Jackson, Mississippi.

The next witness for the State was Billy B. Watson, fraud investigator for

the Mastercharge Division of First National Bank in Jackson, Mississippi.

Mr. Watson testified that Exhibit 106 for indentification contained envelopes from the Center which in turn contained charge slips:

A. These came through our office as they were made on our card and then, of course, we mailed them on to here.

Q. What are those, Mr. Watson?

A. These are sales slips made for purchases on the credit card Mastercharge card belonging to Francis M. May, Jr.

Q. During what period of time?

A. From about the 8th of June of 1978 through at least about the 12th of June, 1978.

Q. Do you have any later than that?

A. There may have been. There may be some. I do not know for sure.

Q. Are you just looking at one envelope?

A. Yes.

Q. Are there others in the other envelopes?

A. Yes, there is.

Q. In that particular envelope. it's the 6th of June to the 12th of June?

(R. 1185)(emphasis added).

MR. ANDERSON: We're going to introduce them right now.

THE COURT: Did you say they're six envelopes in there?

MR. ANDERSON: Yes. (sic?)

THE COURT: Examine the contents of all of them, Mr. Watson --

THE WITNESS: All right, sir --

THE COURT: -- and tell us what you find.

(Witness examined exhibit)

THE COURT: Have you examined them, now?

THE WITNESS: I have gone through a couple of them.

THE COURT: What?

THE WITNESS: I have gone through two envelopes, Your Honor. This contains ones from 6-4-78 through 6-25-78.

(Witness continued examining exhibit)

(R. 1186)(emphasis added).

The witness is asked finally:

Q. You've gone through them and there is nothing, but credit card slips in Francis M. May's name in there?

A. Yes sir, and one note that somebody wrote right here (indicating).

Q. Well, lets remove the note, please. At that time the State offers into evidence State's Exhibit 107 (sic), for identification, Your Honor.

THE COURT: Have you examined that, Mr. Pascoe?

MR. PASCOE: No.

(R. 1187)(emphasis added).

The State next called FBI agent Donald Hayden.

It was at this time that the Juror asked "Why, on Exhibit 106, do we have two different peoples name in here?", referring to Phillip Cook (R. 1195).

The FBI never saw the Phillip Cook receipts, or any receipts dated prior to June 16, 1978 (R. 1197-99) with the exception of Q11, a receipt from Valdosta, Georgia dated June 6, 1978. (The only receipts sent to the FBI were receipts taken from Mr. Heiney long after Mr. May was killed. Out of these receipts only four were identified by the FBI as being written by Mr. Heiney (R. 1199-1201-2)(App. 8)).

The FBI had occasion to see only this one receipt relevant to the time period during which Mr. May was killed. In a report dated November 22, 1978 the FBI indicated that one receipt dated June 6, 1978 was submitted to them by the Okaloosa County Sheriff's Department (App. 9). That receipt signed in Valdosta, Georgia on June 6, 1978 proved negative and although it was marked for

identication (R. 107) it was never introduced into evidence (R. 1195)(App. 10). That receipt was, however, argued to the Jury. It was also listed as State's Exhibit No. 58. This Exhibit also was never moved into evidence (R. 347)(App. 12). The June 6, 1978 Valdosta receipt, however, was presented to the jury, notwithstanding the State's knowledge that it had no evidentiary value. This was an intentional act designed to lead the jury to believe Mr. Heiney had signed the receipt in Valdosta and therefore was using Mr. May's Mastercard and car on the day he was killed. Indeed, the State made a visual aid blow up of the Valdosta receipt (through Exhibits 58 and 107 for Identification) for the jury to see and argued to the jury that Mr. Heiney sinned that receipt in Valdosta. Georgia (R. 743, 1275) knowing full well the FBI had not identified the receipt as being in Mr. Heiney's handwriting and knowing full well the receipt was worthless as evidence.

The contents of Exhibit 106 are unknown (App. 11). The Exhibit list simply notes it as an envelope containing receipts (App. 11). The exhibits viewed by the jury, including exhibit 106, were incorporated into the Record on Apepal and transferred to the Florida Supreme Court. The Phillip Cook receipts had been removed from Exhibit 106 and remain in the Circuit Court file. Apparently the jury did not get the Phillip Cook receipts for purposes of deliberating even though they had been admitted into evidence. The contents of Exhibit 106 were never specifically identified nor described other than Detective Barbaree stating there were five envelopes and Mr. Watson reading off dates of some receipts in some of the envelopes (R. 1185-87).

There is a serious question concerning the credibility, relevancy and admissability of the contents of Exhibit 106. Found in the State's file is a receipt dated June 6, 1978 made in Mossyhead. Florida and a sample receipt from the same establishment (App. 13). This receipt, never sent to the FBI, was

attached to Q2, a receipt that had been sent to the FBI. Why this receipt was not submitted to the FBI to determine whether Mr. Heiney had in fact signed a receipt dated June 6, 1978, in Mossyhead, Florida, just a short distance from where the victim Mr. May was found and on the day he was found is inexplicable unless the State through its own experts already knew that Mr. Heiney had not signed that receipt. The State had the Mossyhead, Florida receipt dated June 6, 1978 on June 29, 1978 (See Apps. 2 and 5). The receipts found in Mr. Heiney's wallet, Q-1 through Q-11, were resubmitted to the FBI after November 14, 1978 (R. 1198)(App. 9). The original Q1 through Q10, the receipts taken from Mr. Heiney were resubmitted to the FBI along with the Valdosta, Georgia receipt. This resubmission was after Detective Barbaree had received the receipts from Mastercharge Center in Jackson, Mississippi (R. 1198). Why were the Cook receipts from Houston, Texas for June 3 and 4, 1978, the Jackson, Mississippi receipts for June 5, 1987, all the June 6, 1978 receipts with the exception of the Valdosta, Georgia receipt, and the Mossyhead, Florida receipt dated June 6, 1978 kept from the FBI? For the simple reason they would have exposed Phillip Cook and shown a separate trail of receipts other than the trail of receipts signed by Mr. Heiney.

For all intents and purposes only 1 receipt was ever identified by the FBI and admitted into evidence. That was Exhibit 57 (R. 380). All other Q receipts with possible admissibility were marked as Exhib ts for identification 108 through 113. (None were moved into evidence). It had been the opinion of the FBI as of November 22, 1978 that "due to unexplained variations, no conclusion could be reached whether Robert D. Heiney, the writer of K1 and K2, did or did not prepare the questioned signature on Q11 (Valdosta) or any of the remaining unidentified writings in this case." (App. 9, p.2) Thus, for all the receipts viewed to the jurors only one was technically admissible. Exhibit 106, the

exhibit containing all the receipts remains a mystery. Whatever the game, the pertinent receipts, those Mastercard receipts which damn Phillip Cook, those Mastercard receipts from June 3, 1987 to June 16, 1987 which paint a picture quite different from the picture presented by the State were not viewed by the Jurors. The Jurors only got to see and hear about the June 6, 1978 Mossyhead, Florida and Valdosta, Georgia receipts, both of which were known by the State to be improper evidence, deceptive evidence. The presentation of these receipts was as calculatingly a deception as was the hiding of Phillip Cook.

The State, notwithstanding the wealth of information in its files connecting Phillip Cook to the victim Mr. May, from May 31, 1978 to June 6, 1978, including the time of Mr. May's killing, told the jury that Phillip Cook was a "Mastercharge mistake" and argued this "mistake" in closing arguments (R. 1133-34).

The State used Exhibit 106 like a street gambler uses the shell game.

First, the State never placed Exhibit 106 in their own files in the mistaken belief that they did not have to provide discovery if it remained in the Detective's file. The State then introduced Exhibit 106 by having Detective Barbaree take the envelope out of his files to have marked for identification (R. 1183). Defense counsel had never seen Exhibit 106 (R. 1187).

Second, Exhibit 106 for identification was given the stamp of approval by Mr. Watson the man from Mastercharge, although Mr. Watson, proclaiming to have looked through envelopes in Exhibit 106, testified that Exhibit 106 contained no receipts without the name May on them (R. 1187). This was in direct response to a question posed by the State.

Third, the State, through the FBI agent, established that Mr. Heiney signed one receipt or perhaps four receipts at most; however, the State, by having Mr. Watson "look" at the receipts contained in Exhibit 106 was able to introduce into

evidence approximately 30 receipts, many of which were already known not to have been signed by Mr. Heiney. Ironically the State inadvertantly introduced into evidence receipts bearing Phillip Cook's name. The State might have gotten away with hiding Phillip Cook totally but for the misfortune of having one Juror notice the two different names and so state for the record.

This much is now known about Exhibit 106.

a. It contained numerous receipts not properly admitted into evidence.

b. The receipts bearing Phillip Cook's name were no mistake.

c. The State lied when it said Phillip Cook was a "Mastercharge Mistake," and misled the jury when it implied Phillip Cook was a creation of the defense.

d. The State knowingly deceived the Jury by arguing that Mr. Heiney killed Mr. May and then signed credit card receipts in Mossyhead, Florida and Valdosta, Georgia.

There is, however, more disturbing news concerning Exhibit 106. A close scrutiny of Exhibit 106 now in the possession of the Supreme Court of Florida reflects the absence of the Phillip Cook receipts and the absence of certain envelopes, first described by Detective Barbaree and Mr. Watson as being 5 in number (R. 1183). One envelope missing from Exhibit 106 is the envelope from Mastercharge with the notation: "Prior to June 6, or unreadable." This envelope is dated November 2 (Appendix 9). Rather, this envelope was found in the Circuit Court file and contains the Phillip Cook receipts, four receipts from Houston, Texas (not two), and three receipts from Louisiana dated June 4. 1978, and June 5, 1978.

Further found missing from Exhibit 106 are all the receipts from Jackson, Mississippi dated June 4, June 5, 1978 and June 6, 1978 and receipts dated June 14, 1978, and June 16, 1978 from Kentucky and Tennessee. On or around these last dates are also receipts allegedly signed, as argued by the State, by Mr. Heiney,

in Nevada, California, Oregon, Walla Walla, Washington, Idaho, Montana and Wyoming.

What happened to Exhibit 106? It must have been purged after it was submitted into evidence. All traces of Phillip Cook were removed, as well as receipts which could have shown the existence of charges at opposite ends of the country during the same period of time. What was not purged from Exhibit 106 were charge receipts the State knew were not capable of being attributable to Mr. Heiney.

When did the bait and switch occur? We can only look to the record for some clue. During closing, Mr. Anderson for the State commented:

> We had three packages of credit card slips up here, they're in evidence -- or, two of them are. I think we just inserted them into two different envelopes. There are two white envelopes in that Exhibit, State's Exhibit 106.

(R. 1275)(emphasis added). What started out as five envelopes comprising Exhibit 106 (R. 1187) now is somehow reduced to three envelopes with the contents placed into two envelopes. There are in fact two envelopes still in Exhibit 106, but two or three are missing: most notable the envelope marked "Prior to June 6 and unreadable" which contained the Phillip Cook receipts (App. 7).

Having erased and repudiated Phillip Cook as defense "fiction" after his unexpected appearance in Exhibit 106 the State argued the credit charge charges it illegally included in Exhibit 106. The State, referring to Exhibit 106, invited the Jury to look at Exhibit 106 to prove Mr. Heiney was in Florida and Georgia. Mr. Anderson for the State argued:

> Well, we know he headed for Florida . . . And if you'll check that thing, you'll find a credit card slip I'll bet you, from Mossyhead and one from Valdosta, Georgia, on the same day, the 6th. If you will, just please think about things like that. ~~Think about where is the evidence~~. Anytime you mention something say, "Where is the evidence in there. If someone mentions something to you about the case say, "Where is the evidence."

(R. 1275)(emphasis added). That this improper reference to Valdosta, Georgia was

less than premeditated the Court need only refer to the State's opening argument to see the prejedice the State planned for Mr. Heiney. The State argued:

> And he continued running from the law. He took the victim's car and he drove East to the Valdosta, Georgia, area, using the victim's credit cards, signing -- forging the victim's name to credit card slips to obtain gasoline to run the car and lodging and food.

(R. 743).

This Court now knows "where the evidence is": in an envelope removed from Exhibit 106. This Court also knows that illegal and tainted evidence was included in Exhibit 106 with crystal clear knowledge of the inadmissibility.

The State also hid a separate trail of receipts leading from Houston, Texas on June 3, **1978** and June **4, 1978,** to Louisiana on June **4, 1978** to Jackson, Mississippi on June **5, 1978** and receipts from Jackson, Mississippi on June **6, 1978,** a trail of receipts connected to Phillip Cook. The State did not stop there. **Also** expunged from the Mastercard record are the additional receipts showing a trail leading to Kentucky and Tennessee on dates Mr. Heiney was, according to the State, driving around out West. With these receipts missing the State was able to make the following argument to the Jury:

> You can follow a pattern with the card. Going East, turning back and going across the country and then turning back and then turning back and going to Eaton [Ohio]. He went all the way to California, if you'll **look** at the credit card slip,

(R. 1245).

The evidence presented by the State at Mr. Heiney's trial misled the court and jury. This case is a classic case **of prosecutorialmisconduct,** zeal that lead to the manipulation of evidence and a fraudulent res gestae argument that allowed the State to inflame the Jury with acts committed by Mr. Heiney in Houston, Texas on June **4, 1978.** The State introduced extremely prejudicial Williams Rule evidence under the guise of res gestae arguing that Mr. Heiney was broke and running from the law because he shot Terry Phillips. The State then

argued that Phillip Cook was a mistake even though Phillip Cook was with Mr. May in Houston on June 3, 1978 and June 4, 1978. Phillip Cook who had to sign a receipt for $1.46 on June 4, 1978 was in more of a res gestae posture than Mr. Heiney (App. 4). But, as the State contended throughout: Phillip Cook did not have anything to do with the case. He was a Mastercharge mistake --- a figment of the defense imagination. Had competent counsel had the Phillip Cook information, the jury would have learned that Phillip Cook a/k/a "Pee Wee" had knowledge of the victim, continuous access to the victim's credit cards, was accompanying the victim and had motive. He had no money.

The "res gestae" evidence of the Texas shooting was a fraud, a smoke screen to hide the true nature of the evidence, the nature of which was to inflame the jurors with bad acts. The State intended to use this Williams rule evidence expressly for the purpose, and in the manner forbidden by the Supreme Court of Florida. Now that the truth is out about Phillip Cook the court needs to readdress the Williams rule evidence in light of its intended use by the State. See State v. Heiney, 447 So.2d 210 (Fla. 1984)(Boyd, J. dissenting with opinion in which McDonald, J., concurred)(See Claim IV, Habeas Petition). The State, with the precision it used to hide Phillip Cook and exploit the inadmissible charge receipts, pulled the wool over the Court's eyes when it pressed the argument that the Houston, Texas events of June 4, 1978 were part and parcel of Mr. Heiney's motive to rob and kill Mr. May while at the same time hiding the fact that Phillip Cook was also in Houston, Texas, and with Mr. May, and left two signed receipts in his name. Ronald M. Dick, examiner of questioned documents, stated conclusively, after examining the two Phillip Cook signatures:

> The two signatures in question were executed by one person in a free and natural manner with no attempt to alter or disguise normal writing habits. Both show the same basic handwriting characteristics, . . .
>
> The evidence shows conclusively that Robert David Heiney, the author of the specimen writing on the documents comprising Exhibit K1, did not execute the "Phillip Cook" signatures. . .

(App. 29).

This case involves much more than a simple violation of Bradv v. Maryland, 373 U.S. 83 (1967). As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violated a criminal defendant's right to due process of law. Moonev v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berner v. United States, 295 U.S. 78, 88 (1935). "A prosecutor must refrain from improper methods calculated to produce a wrongful conviction." United States v. Rodrinuez, 765 F.2d 1546, 59 (1985)(citing Berger, id.).

The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 105 S. Ct. 3375 (1985); Ginlio v. United States, 405 U.S. 150 (1972), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, supra, and to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio v. United States, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated by the prosecution. Donnellv v. DeChristoforo, 416 U.S. 637, 647 (1974).

Not only did the State withhold evidence here, but it intentionally presented evidence to create a false impression. The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, supra, 427 U.S. 97, 103-04 and n.8 (1976). The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 105 S. Ct. 3375, 3382 (1985). quoting United States v. Agurs, 427 U.S. at 102. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is any reasonable likelihood, Bagley, supra, that the falsity affected the verdict. The motion demonstrates that these principles were flouted during the proceedings resulting in Mr. Heiney's capital conviction and sentence of death. Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading testimony affected the verdicts at guilt-innocence or sentencing, Mr. Heiney is entitled to relief. Obviously, here, there is much more than just a "likelihood" -- as the facts presented established.

Moreover, it is by now well-settled that the prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). Thus the prosecution must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, supra. In this regard, the Florida Supreme Court has set the proper standard of review -- a standard directly applicable to Mr. Heiney's case -- in its recently issued Roman opinion: where, as here, the State violates its discovery duties regarding a prosecution witness the defendant is entitled to a new trial unless the State can demonstrate "beyond a reasonable doubt" that the "failure to disclose" had no effect on the conviction. 528 So. 2d at 1171.

As the facts attest, the State's action of withholding exculpatory evidence violated the fifth, sixth, eighth and fourteenth amendments. An explanation of how each amendment's guarantees were denied is therefore appropriate. The cornerstone is the fourteenth amendment: the government's withholding of exculpatory, impeachment, or otherwise useful evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated as well. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived; thus suppression of exculpatory or impeaching information violates the sixth amendment right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648 (1984). The unreliability of fact determinations resulting from such State misconduct also violates the eighth

amendment requirement that no unreliable death sentence be imposed.

These rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in Mr. Heiney's case. Given the pattern of State misconduct and evidence suppression discussed herein, a good point to consider is the Court's language in Banley:

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

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

What "secret" is still untold by the State with regard to this case? There can be little doubt that material evidence was withheld in Mr. Heiney's case -- evidence which would have made a difference at trial and sentencing. Material evidence is evidence of a favorable character for the defense which could affect the outcome of the guilt-innocence and/or capital sentencing trial. Heinev (Dennis Wayne) v. Wainwrinht, 799 F.2d 1442 (11th Cir. 1986); Chanev v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Bradv, 373 U.S. at 87. Napue, Giglio, and Banley make clear that exculpatory evidence as well as evidence which can be used to impeach are governed by the same constitutional standard of reversal. Moreover, the materiality of the evidence at issue must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Aaurs, supra, 427 U.S. at 112; Chanev v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone,

each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cadv, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983)(withheld evidence may not be considered "in the abstract" or "in isolation." but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982). Here, the withheld evidence involved the cornerstone of the State's circumstantial evidence case, the use of the victim's credit cards. The knowing suppression of an individual more likely to have killed Mr. May than Mr. Heiney and an intentional misuse of charge receipts clearly meets the materiality standard. See Roman v. State, supra.

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from its relevance to an important issue in dispute at trial, to its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence. Roman, supra; Heiney, supra; Chaney v. Brown, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). See also, Davis v. Hevd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). In this circumstantial evidence case, the applicability of those factors is obvious -- had the truth regarding Phillip Cook, his past, his association with Mr. May, the victim, and had all the charge receipts been made available to defense counsel and therefore to the jury, there exists a reasonable likelihood that Mr. Heiney would not have been found guilty of first-degree murder and sentenced to die.

The facts alleged herein speak for themselves. At an evidentiary hearing, Mr. Heiney could prove these facts through documentation and live testimony. At

an evidentiary hearing, Mr. Heiney could establish the constitutional error now so blatently obvious.

Promises and threats to witnesses are classically exculpatory. When State witnesses, such as the detective on this case, with the help of the State, hide evidence and by omission create a false impression for the Jury, the harm is even more greivous. Giglio v. United States, 405 U.S. 150 (1972); Name v. Illinois, 360 U.S. 264 (1959). Any motivation for testifying and all the terms of official or unofficial agreements or understandings with witnesses must be disclosed to the defense, Gielio. Impeachment of prosecution witnesses is often critical to the defense case, as is especially true in Mr. Heiney's case, since the case involved a credibility contest between the State and defense counsel (concerning the very existence of Mr. Cook). The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a witness.

Evidence which even tends to impeach a critical State witness is clearly material under Brady. See Heiney v. Wainwrieht, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwrieht, 785 F.2d 1457 (11th Cir. 1986). This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such subtle factors as the possible interest of a witness [that a] defendant's life . . . may depend." Name v. Illinois, 360 U.S. 264, 269 (1959). The jurors at Mr. Heiney's trial were never allowed to hear the important information regarding the extent of Phillip Cook's relationship with Mr. May, his presence with Mr. May in Jackson, Mississippi, and in Houston, Texas and the State's cover-up of Cook's existence. To the extent that defense counsel should have discovered and/or rebutted this evidence, he rendered ineffective assistance of counsel.

Mr. Heiney's claim that his rights under Brady v. Maryland, Giglio v. United States, and United States v. Bagley were violated is undeniably evidenced by the facts provided here and elsewhere in the 3.850 pleadings and could be proven at an evidentiary hearing. Mr. Heiney respectfully requests this Court to stay his execution, and order an evidentiary hearing.

In regard to the instant Giglio/Brady prosecutorial misconduct issue, this was not a "new" issue, as the State argued below. This claim was a part of issues presented in the January, 1987, motion and the amendment (e.g., prosecutorial misconduct issue, the failure to obtain a handwriting expert, the failure to provide discovery, and the ineffectiveness of counsel and related prosecutorial misconduct claims). The ultimate issue presented is that Mr. Heiney's jury was misled as to the existence of Phillip cook who was also signing credit card receipts at the time of the murder, whether it was due to prosecutorial misconduct or defense counsel's ineffectiveness. Cf. Squires v. State, 513 So. 2d 138 (Fla. 1987).

A handwriting expert has now established that Mr. Heiney did not sign the name "Phillip Cook" to the receipts (App. B). Only an evidentiary hearing can resolve these issues. Squires, supra. In fact, if defense counsel had the evidence, a Richardson hearing would not have been appropriate, as the lower court intimated. Defense counsel, however, did not have it. The lower court's reliance on Curry v. Wilson, *405* F.2d 110 (9th Cir. 1968), is completely misplaced as the Curry holding has been overruled by recent precedents. The order, however, was penned by the State and therefore reflected the improprieties in the State's reasoning. A stay of execution and an evidentiary hearing were and are warranted. The lower court erred.

ARGUMENT VI

THE PRECLUSION OF CROSS-EXAMINATION OF **A** KEY STATE'S WITNESS, DAVID BENSON, VIOLATED MR. HEINEY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant's right to confront and cross-examine the w tnesses against him is a fundamental safeguard "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Heiney was denied his right to confront and cross-examine the witnesses against him when trial counsel was precluded from conducting any cross-examination of David Benson.

This issue is before the Court as Claim III of the Habeas Petition and Mr. Heiney will only summarize the issues of fact and law which are spelled out in detail in the Habeas Petition. An evidentiary hearing is necessary on this claim, as the Eleventh Circuit made clear in McKinzy v. Wainwright, 719 F.2d 1525 (11th Cir. 1983).

David Benson was called as a Williams Rule witness for the State (R. 773). He was called upon to recount his knowledge of the facts in the days proceeding the homicide. After the State concluded their direct examination, the court refused to allow Mr. Heiney or his counsel to proceed with cross-examination (R. 782).

Later the court justified the preclusion by stating that he had precluded the cross-examination because Mr. Heiney and Mr. Pascoe conferred for one to two minutes before beginning cross-examination (R. 791-2). The court then proceeded to explain this incredible ruling on the grounds that the Court had been angered by an alleged remark by defense counsel (R. 792). Certainly it must be highly unusual for a court to preclude cross-examination of an important state witness in a first degree murder trial and then explain that the action was prompted by the court's anger at an unrelated comment allegedly made by defense counsel.

David Benson was the State's most critical witness. It was upon his testimony that Mr. Heiney was fleeing from the Houston authorities, had no money and was hitchhiking that the State constructed their argument for motive and premeditation. Obviously, it was critical to the defense to fully explore this

witness' credibility and to effectively impeach his testimony before the jury. However, cross-examination was never permitted.

There can be no doubt that this decision violated the sixth amendment right of confrontation, which requires that a defendant be allowed to impeach the credibility of prosecution witnesses by showing the witness' possible bias or showing that there may be other reasons to doubt the State's reliance upon the witness testimony.

The prejudice to the petitioner resulting from this denial of cross-examination and confrontation rights is manifest when the testimony of this witness is analyzed in the context of the testimony that may have been elicited during cross-examination. David Benson gave tantalizing preliminary information during direct examination regarding Mr. Heiney's behavior at the time of the shooting of Terry Phillips a few days before the instant offense:

> I didn't pay a whole heap of attention at the time. But I heard a gunshot, and I kind of just rolled over and went to sleep. Then Terry came up, and he said - at first I was kind of about half awake, half asleep - and he said, "Dave, I've been shot," and proceeded to bleed all over me. And Bob was with him; and Bob had the gun; and said, "I shot Terry." And at that time I got up and got my clothes on, and everything, and we got Terry down to the car and I took him to the hospital. And Bob didn't go to the hospital with us, but Bob did help me get him in the car.

(R. 792)(emphasis added). There are many questions raised by this unusual testimony. If Bob Heiney shot Terry, why was he then assisting him to get treatment only minutes later? The strong suggestion was that the shooting was unintentional. Was Bob intoxicated? Was Terry intoxicated? Many critical questions for the defense remained unanswered due to the preclusion on cross-examination.

This constitutional error contributed to Mr. Heiney's conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Satterwhite v. Texas, 108 S. Ct. 1792 (1988).

The court's refusal to permit one to two minutes for counsel to confer prior to cross-examination violated an absolute constitutional right to confrontation of a critical witness.

This violation of the Confrontation Clause allowed the jury to assess David Benson's testimony without the knowledge that cross-examination would have revealed. The jury should have been granted the opportunity to properly weigh Mr. Benson's testimony. The preclusion of cross-examination prevented the jury from reaching a reliable verdict.

The Florida Supreme Court has recognized the overriding importance of the right to confront a witness time and time again. In State v. Stubbs, 239 So. 2d 241, 242 (Fla. 1970), for example, the Court pointed out that the effect of the preclusion of cross-examination of even written evidence taints the evidence which is offered. As the Court has noted:

> The right of a defendant to cross-examine witnesses and his right to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law. See Horton v. State, Fla.App.1964, 170 So.2d 470 at 474.
>
> After a careful examination of the record on appeal, we conclude that there was no indication of probable tampering with the packets of heroin and thus, these packets should have been introduced into evidence. See Bernard v. State, Fla.App.1973, 275 So.2d 34 and cases cited therein. The packets in the case sub judice having been marked for identification, but not introduced into evidence, defendant was denied thereby of a real opportunity to cross-examine the witnesses of the prosecution. For a mere formal proffer of an opportunity to cross-examine. where the circumstances as in the case at bar are such that the accused cannot effectively avail himself of it, is not a sufficient observance of the right. 21 Am.Jur.2d Criminal Law sec. 333 (1965).

Alexander v. State, 288 So. 2d 538, 539 (Fla. 3d DCA 1974)(emphasis added). Furthermore, the right of Confrontation cannot be taken from a defendant without a knowing and voluntary waiver of the constitutional gurantees of due process and the right to counsel. See Whitney v. Cochran, 152 So. 2d 727 (Fla. 1963). It is only after the defendant has had the opportunity to exercise the right to full cross-examination that the discretion of the court to limit the scope of the

examination becomes operative. United States v. Greenberg, 423 F.2d 1106 (1970).

Here, Mr. Heiney's cross-examination of David Benson was not merely limited, but actually precluded. The preclusion of cross-examination here is far more serious but with a much less substantial basis than the limitation which occurred in Davis v. Alaska, 415 U.S. 308 (1974).

The preclusion of cross-examination at Mr. Heiney's trial presented a wholly irrelevant factor for the jury's consideration. David Benson was seated before the jury on the witness stand. After calling him to the witness stand and allowing him to testify on direct, the prosecutor stated, "Your witness." The jury watched as counsel attempted to confer and then heard the judge dismiss the witness over defense counsel's objection. Not only was Mr. Heiney denied his right to confront the witness but he and his counsel were deliberately demeaned in the presence of the jury. The court later explained that this was a deliberate strategy to discredit defense counsel and to seek revenge at Mr. Heiney's expense for an earlier remark allegedly made by Mr. Pascoe.

Without the opportunity of subjecting the testimony of David Benson to cross-examination, Mr. Heiney was deprived of his fundamental rights. What is more basic to the right to defend than the right to cross-examine? The State attempted to elicit Mr. Heiney's intent to leave Houston from Mr. Benson's testimony in order to provide the jury with a purported motive for robbery and murder. The State relied on the evidence provided by David Benson to make its case and its argument in both the guilt and penalty phases. Yet, the State deliberately precluded the defense's right to cross-examine.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's capital conviction and death sentence and which rendered the conviction and sentence unreliable. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). It resulted in the admission of unreliable "facts" and

the preclusion on the development of true ones. Id. It "perverted" the jury's deliberations. Id. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. An evidentiary hearing and Rule 3.850 relief are appropriate.

ARGUMENT VII

THE PREDICATE FOR THE INTRODUCTION OF THE OTHER CRIMES "WILLIAMS RULE" EVIDENCE WAS UNSUBSTANTIATED, THE STATE IMPROPERLY ARGUED TO THE CONTRARY, AND DEFENSE COUNSEL INEFFECTIVELY OPPOSED THE INTRODUCTION OF THIS INFLAMMATORY AND PREJUDICIAL EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State was allowed to introduce into evidence information which, according to now Chief Justice McDonald, had "no relevance . . . at all, and it was clearly prejudicial." Heiney v. State, 447 So. 2d at 219. The evidence was that:

> On June 4, 1978, Heiney was residing in Houston, Texas, with Lawanna Wickline, Terry Phillips, and David Benson. On that date, after fighting with his girl friend, Lawanna Wickline, Heiney shot Terry Phillips in the abdomen. Wickline called the police. Upon learning that Phillips was in critical condition and that the police had been notified of the shooting, Heiney requested Benson to give him a ride out of town. Benson drove him to near the Texas state line. Heiney told Benson he was broke and that he planned to hitchhike to Florida. Benson gave Heiney $4.

Id. at 211. See also Heiney, 447 So. 2d at 216 (Boyd, J., dissenting).

Unknown to the jurors, and apparently to counsel for Mr. Heiney, this "crime" in Texas was unsupported by any official law enforcement activity whatsoever. No indictment, no warrant, no arrest, no fugitive from justice warrant. The State made much ado about the serious nature of this crime which purportedly caused Mr. Heiney to flee and kill, yet the truth of the matter is Texas authorities never believed the matter to be of significance.

The State's overreaching runs throughout the transcript:

It's the whole basis for the State's case, it's the motive the defendant

had in killing May . . . And that night, or early the next morning, he killed the victim, took his credit cards, his wallet, his car, a diamond ring that he had, and took off and went all over the country to avoid capture and prosecution for the shooting, which he thought was killing, in Houston, Texas, and the killing of May one or two days later.

[T]here's no question that under our rules of evidence and our law that you have a right to present evidence on the motive, and this is the motive for the killing. We have to show he was running to avoid capture and prosecution for the Phillips' shooting.

(R. 709-10). In fact, no prosecution was contemplated, yet "this is the whole basis for the State's case, the reason for the robbery" (R. 711). During the State's opening argument, the prosecutor argued:

Phillips was in the hospital for a long time, in critical condition for four or five days and they didn't think he'd live. . . . After he shot Terry Phillips, the defendant, to avoid prosecution, capture and prosecution, decided to run.

(R. 740-41). During the State's first closing argument at guilt-innocence, the prosecutor stated:

There are two questions because there are two counts. The defendant is charged with murder in the first degree in the first count, and robbery with a deadly weapon, to wit: a hammer, in the second count. So, you're called on to answer questions, "Did the defendant, Robert Heiney, kill Francis Marion May intentionally," that's with a premeditated design, and/or he could have had a premeditated design to do it. And I think when we get into the evidence, that you could reach the conclusion that it was both, since he was on the run from the law and needed time to get away.

. . . .

He made lots of mistakes, and lots of bad mistakes. We have to go, to start with the mistakes, we have to go back to Houston, where he shot Terry Phillips and he started out on his run. He's running from the law. You know he did that, you know he was running from the law because David Benson told you he was . . . So we know he was running from the law . . . He has no wheels. He's running. He's desperate. He didn't know. You know, they didn't know, they didn't even know for four or five days whether or not Terry Phillips was going to live or not. So, as far as Mr. Heiney was concerned, they'd be looking for him any minute for murder. You've got a desperate man on the run from the law, no transportation and no money.

. . . .

So we know, here you've got a man on the run from the law who needs money, finances, and transportation. You know that. That's the beginning.

. . . .

> You know that Robert Heiney was looking for somebody to rob because he needed money and transportation.

(R. 1235, 1241-43). During the State's closing at sentencing, the State argued:

> Was he trying to -- did he do this in order to prevent himself from being arrested? You know that he did. You know that he shot Terry Phillips in Houston a day or two before that, that he was on the run from Houston, hitchhiking, when May picked him up. You know that he murdered Francis Marion May in order to get his automobile and to get finances, to avoid arrest for the shooting in Houston. So that aggravating circumstance exists.
>
> . . . .
>
> Mr. Pascoe's hypothetical example to you is pitiful. It has no basis of fact, whatsoever, with the situation here. He tells you about a fisherman that goes fishing with somebody and comes back and finds the body dead. Now, what we're talking about in our situation is a man who shoots another one in Houston, Texas; the man is in critical condition. Right after the body is taken to the hospital, he takes off running from the law. He is in need, he had no money, no transportation.

(R. 1322, 1327).

The insertion of baseless accusations that serious crimes had been committed surely distracted the jury from objectively determining Mr. Heiney's guilt or innocence of murder and robbery and as importantly, whether Mr. Heiney should live or die. Under well established Florida law, evidence of collateral crimes is not admissible to establish propensity or bad character. It is only admissible if relevant to a material issue. Drake v. State, 400 So. 2d 1217 (Fla. 1980); Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847.

Here, the prosecution succeeded in bootstrapping a murder conviction through bad character evidence.

As evidenced by the claims in this pleading and the record as a whole, Mr. Heiney was denied his right to a fundamentally fair trial as demanded by due process. "Improper admission of evidence of a prior crime or conviction, even in

the face of other evidence amploy supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1978). See also United States v. Gilliland, 586 F.2d 1384, 1391 (10th Cir. 1978); United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983).

A prosecutor's concern in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. at 88-89. Clearly the inclusion of the collateral crimes evidence tainted this trial to an extent that justice was left by the wayside.

In addition to the evidence related to the shooting, the State introduced evidence casting aspersions on Mr. Heiney's lifestyle and alleging that he was a pimp for Lawanna Wickline. There was no possible justification for this deliberate character assasination.

This Court found on direct appeal:

> A closer question is presented by testimony relating to Heiney's lifestyle and his relationship with Lawanna Wickline. Any error which may have occurred in admitting this particular testimony, however, was harmless.

When this improper and deliberate character assasination is considered in combination with the other errors and misrepresentations in Mr. Heiney's trial, it can no longer be considered harmless.

Presenting the evidence of a prior shooting during Mr. Heiney's trial for his life violated his rights under the fifth, sixth, eighth and fourteenth amendments to the Constitution of the United States,

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163

(Fla. 1985), and it should now correct this error. An evidentiary hearing and Rule 3.850 relief are required.

ARGUMENT VIII

THE STATE'S INTENTIONAL USE OF PERJURED TESTIMONY BEFORE THE *GRAND* JURY IN ORDER TO OBTAIN *AN* INDICTMENT VIOLATED THE CONSTITUTIONAL RIGHTS OF ROBERT DAVID HEINEY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Heiney was originally charged with second degree murder in the death of Mr. May. Subsequent to his arrest the State "found" a jailhouse informant who stated that Mr. Heiney had made incriminating statements to him. This jailhouse informant was the primary witness presented to the Grand Jury. On the basis of Mr. Tuszynski's testimony a grand jury indicted Mr. Heiney for first degre murder.

On February 1, 1979, Mr. Pascoe, representing Mr. Heiney filed a Motion to Quash Indictment (R. 100). This motion was based on the allegation that the State's primary witness, who allegedly heard a confession from Mr. Heiney, was ordered to lie by the Okaloosa Sheriff's Deputy investigating the case (R. 100). Pursuant to this motion a hearing took plce on February 9, 1979. On that date the following colloquy took place in Chambers of Judge Clyde B. Wells. Mr. Anderson represented the State:

> MR. PASCOE: The first motion I would like for the Court to consider is the motion to quash the indictment, Your Honor.
>
> THE COURT: OKAY.
>
> MR. PASCOE: First of all, I would like to call my first witness on that particular motion, and that is Tom Tuszinski.
>
> MR. ANDERSON: State objects to that, Your Honor.
>
> THE COURT: What's the basis of the objection?
>
> MR. ANDERSON: The allegation in the motion to quash is that the State's witnesses testified at the grand jury proceedings as to the alleged confession from Thomas Tuszinski. There's no way that Mr. Pascoe could know what Thomas Tuszinski testified before the grand jury, it's a secretive proceeding, and, therefore, that allegation is wrong, or he has been delving into something he has no right to delve into.

And to call Thomas Tuszinski and ask him about what he testified before a secretive proceeding would be wrong, as prohibited under the law, Your Honor, and the State objects to it. And in any event, the allegation that this would subject the indictment to being quashed is totally incorrect. The testimony, even if the allegation of the motion was correct, it would go to the credibility of the witness and would be something that would be introduced to impeach the witness at the trial of the case, and for no other purpose. It would not, even if true, be justification for questioning.

THE COURT: Mr. Pascoe, you want to respond to that?

MR. PASCOE: Yes, sir, if I may. Agreed, the proceedings in front of the grand jury are secret. But there no, no reason, whatsoever, or, that is, no legal requirement that I cannot ask an individual, who was a witness in front of the grand jury, as to what he testified to. And if he's willing to tell the attorney, then there's nothing illegal about it. And this is exactly what I have done with Mr. Tuszinski, since he is a State's witness, a very important State's witness; in fact, their case hinges on him. I have asked him what he testified to at the grand jury, what he had to say, what questions were asked of him, and what his responses were. And I don't think there's anything illegal about it. As far as it being irrelevant as to whether Tom Tuszinski lied to the grand jury, as to whether or not Tom Tuszinski was ordered by Mike Hollinshead, the chief deputy on the case, to lie to the grand jury, that certainly is relevant, definitely. If this was done, then that means the indictment is based on fraud. It's a fradulent document. . .

MR. HEINEY: Mr. Hollinhead uresented the witness to the erand jury.

THE COURT: Is that true. Mr. Anderson?

MR. **ANDERSON:** You Honor. I'm Prohibited from commenting on what took place before the grand jury, and so are these other people, and Mr. Pascoe should be held in contempt of court for talking to a witness about somethine that took place before the grand jury. Because, certainly, Mr. Pascoe knows that that's a secretive proceeding and that he should not be questioning people about what took place before the grand jury.

MR. PASCOE: The only thing that's essentially secret in front of the grand jury is how they voted and what issues were considered, and that's all, not what the witnesses testified to. They testified under oath. That is not a secret. It certainly isn't a secret to the defense attorney. Now, Mr. Heiney brought up a good, valid point. The question was, was this indictment based on the alleged confession of Heiney to Tuszinski. Yes. In fact, the State didn't even attempt to go in front of the grand jury until Tuszinski reported this alleged confession. . .

I went in front of the Court - in fact, it was Judge Wade at that time - with a motion to dismiss the information on murder, and I had a good valid case to dismiss then, except Judge Wade allowed the State to go ahead and put in the alleged confession of the defendant. And, in my opinion, that's the only reason Judge Wade didn't dismiss it in the

first place.

(R. _____)(emphasis admitted).

The Court denied the motion to quash the grand jury indictment (R. *449-454).*

Defense counsel Pascoe attempted to proffer the witness for testimony:

MR. PASCOE: Request that I be allowed, or unless the State Attorney will agree with my motion, as typed there, request that I be allowed to at least proffer, for the record, the testimony of Tom Tuszinski; that Mike Hollinhead ordered him to lie and that he did lie in front of the grand jury.

THE COURT: Okay. Well, let's assume, for the sake of argument, that he would testify to that. Don't you think that would be something to attack his credibility at trial, rather than in a motion to quash?

MR. PASCOE: No sir, I think it should be used in both areas. In fact, if that's so --

THE COURT: Okay. let's assume that's the way I'm going to consider it. What would be the purpose of the proffer, at that point?

MR. PASCOE: For appeal purposes. Your Honor. So it will be in the record.

THE COURT: What?

MR. PASCOE: So the testimony will be in the record. Unless the State agrees that that is the testimony that will be elicited.

THE COURT: Well. assuminn. for the sake of argument. that he would testify as you have stated --

MR. PASCOE: Yes sir --

THE COURT: Doesn't that suffice the purpose of appeal. and save the time of taking his testimonv?

MR. PASCOE: I think I would need his testimonv into the record.

THE COURT: Why?

MR. PASCOE: For appeal purposes.

THE COURT: Why would you need it?

MR. PASCOE: For appeal purposes. Tom Tuszinski's testimony under oath. that he did say that, that he was ordered to lie and he did lie.

THE COURT: Well. I don't. I don't see it. in view of the fact that I make the finding that even if he testified to that. I wouldn't quash the indictment. So I'm not going to hear his testimony today.

(R. 454-55)(emphasis added).

Tom Tuszynski revealed that the State in this case was willing to go to any lengths to obtain a conviction.

Tom Tuszynski provided an affidavit in which he stated, under oath, that his entire story about Mr. Heiney "confessing" to him was a lie, prompted and orchestrated by Officers Donaldson, Hollinhead, Barbaree, Barrow and Silva. Mr. Heiney in fact never discussed the case with Tom Tuszynski, despite the State saying so. In Mr. Tuszynski's words:

> During the Summer of 1978, I was a trustee in the Okaloosa County Jail. Robert D. Heiney (David) was being held in the jail awaiting trial at the time.
>
> In late June or early July, I was approached by several officers with the Okaloosa County Sheriff's Department (including Officers Donaldson, Hollinhead and Barbaree) and two members of the jail personnel (Officers Barrow and Silva). They showed me the arrest reports and other information about the offense for which David was in custody, and also talked to me about how they thought the murder happened. They wanted me to agree to testify to a lie--they wanted me to say that David Heiney had confessed to me about the murder.
>
> Everything that I knew and said about the murder came from my conversations with these men and from reading the materials they provided me. My only contact with David was when I brought him his meals, and he never spoke to me about the murder.
>
> In exchange for me testifying to this lie before the grand jury, I was promised $500, an early release, and enrollment in the police academy.
>
> When I went in front of the grand jury in August of 1978, I gave the story that I had been told to give, and said that I had learned this information from David himself. I also said that I had not been promised anything in exchange for my testimony.
>
> I have not been promised anything by David's lawyer in return for signing this affidavit, and I am signing in spite of the fact that I'm afraid that this statement could cause my family and me some trouble in this county. I am signing because I don't want to see a man be put to death when he may not have committed a murder.

(Affidavit of Tom Tuszinski).

The State of Florida had a tenuous circumstantial case against Mr. Heiney. He was originally charged with second degree murder. An indictment for first

degree murder was obtained only through the testimony of Tom Tuszynski before the grand jury. We now know that all of that testimony was false, and that the grand jury indictment was obtained by fraud, in violation of due process.

The Ninth Circuit Court of Appeals in United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) originally set the standard for review of a case wherein perjured testimony was used to obtain an indictment:

> The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The purpose of that requirement is to limit a person's jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecutor or the judge. Stirone v. United States, 361U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).
>
> We hold that the Due Process Clause of the Fifth Amendment is violated when a defendaat has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.

Id. at 785.

The Court went on to reason:

> In Napue v. Illinois, supra, the Supreme Court reaffirmed the principle stated in many of its prior decisions that
>
> > "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, [citations]. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations.]"
>
> The Court reiterated "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty . . . ." Id. See Giles v. Maryland, supra, at 74.
>
> The Court held in Napue that the prosecution's use of known false testimony at trial required a reversal of the petitioner's conviction. The same result must obtain when the government allows a defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony. The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court.

Id.

Courts differ on whether an indictment based in part on perjured testimony must be dismissed; materiality being the focus. Recent decisions have more narrowly focused on the materiality requirement. See United States v. Flaherty, 668 F.2d 566, 584 (1st Cir. 1981)(validity of indictment not affected by perjured immaterial testimony); United States v. Levine, 700 F.2d 1176, 1180 (8th Cir. 1983)(validity of indictment not affected by perjured immaterial testimony). In Mr. Heiney's case, the primary witness to testify offered totally perjured testimony, testimony supplied entirely by the State; testimony known by the State to be entirely perjured. In United States v. Benny, 786 F.2d 1410, 1420 (9th Cir. 1986), the court quoted United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977):

> only in a flagrant case, and perhaps only when knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment . . .

Mr. Heiney's case fits within the narrow standard enunciated by the Ninth Circuit: knowing perjury relating to a material matter was presented to Mr. Heiney's grand jury.

Government misconduct during the indictment process warrants dismissal when the government conduct significantly impairs the ability of the grand jury to exercise independent judgment. In United States v. Hogan, 712 F.2d 757 (2nd Cir. 1983) the Second Circuit opined:

> It is true of course that prosecutors, by virtue of their position, have gained such influence over grand juries that these bodies' historic independence has been eroded. 8 R. Cipes, J. Hall, M. Waxner, Moore's Federal Practice para. 6.02[1] at 6-19-6-23 (2d ed. 1982). After all, it is the prosecutor who draws up the indictment, calls and examines the grand jury witnesses, advises the grand jury as to the law, and is in constant attendance during its proceedings. Nonetheless, there remain certain limitations on the presentation that a prosecutor may make to the grand jury. See, e.g., United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979)(prosecutor may not mislead grand jury or engage in fundamentally unfair tactics before it). In fact the gain in prosecutor's influence over grand juries is all the more reason to insist that these limitations be observed strictly. Due process considerations prohibit the government from obtaining an indictment based on known perjured testimony. See United States v. Basurto, 497

F.2d 781, 785 (9th Cir. 1974). Under the applicable guidelines prosecutors have an ethical obligation strictly to observe the status of the grand jury as an independent legal body. See American Bar Association, Standards For Criminal Justice Standard 3-3.5 at 3.48 (2d ed. 1980); United Stares Attorney's Manual 9-11.015 (August 17, 1978).

In short, a prosecutor as an officer of the court is sworn to ensure that justice is done, not simply to obtain an indictment.

Id. at 759-60.

The Hogan court held:

In summary, the incidents related are flagrant and unconscionable. (The government presented hearsay testimony and false testimony by a DEA agent.) Taking advantage of his special position of trust, the AUSA impaired the grand jury's integrity as an independent body . . . We believe that the indictment below must be dismissed.

Id. at 662. Mr. Heiney meets the test set forth in Hogan.

In United States v. Kilpatrick, 821 F.2d 1464 (10th Cir. 1987), the Tenth Circuit stated its position regarding prosecutorial misconduct before the grand jury:

"An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is some significant infringment on the grand jury's ability to exercise independent judgment." Pino, 708 F.2d at 530 (emphasis added); see also United States v. Page, 808 F.2d 723, 726-27 (10th Cir. 1987).

Id. at 1465. The court continued:

[W]e conclude that consideration of dismissal of an indictment because of prosecutorial misconduct before a grand jury calls for weighing several factors. First, a reviewing court must determine whether the claimed errors should be characterized as technical or procedural and affecting only the probable cause charging decision by the grand jury, or whether the alleged errors should be characterized as threatening the defendant's right to fundamental fairness in the criminal process. If the errors can be characterized as procedural violations affecting only the probable cause charging decision by the grand jury, then the defendant must have successfully challenged the indictment before the petit jury rendered a guilty verdict. Mechanik, 475 U.S. at ___ - ___, 106 S.Ct. at 941-43. If, however, the errors can be characterized as threatening the defendant's rights to fundamental fairness as "go[ing] beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment, . . .," a determination of guilt by a petit jury will not moot the issue. Taylor, 798 F.2d at 1340.

Second, it must be determined whether the prosecutor engaged in flagrant or egregious misconduct which significantly infringed on the

> grand jury's ability to exercise independent judgment. Pino, *708* F.2d at *530*. Thus even assuming misconduct, a failure by the defendant to show a significant infringement on the ability of the grand jury to exercise its independment judgment in the charging decision will result in the denial of a motion to dismiss. "The relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability." De Rosa, *783* F.2d at *1405* (citation omitted).

Id. at *1466*. See also, United States v. Serubo, *604* F.2d *807* (3rd Cir. *1979*); United States v. Giorgi, *840* F.2d 1022 (1st Cir. *1988*).

The standard set by the First, Third and Tenth Circuits is also met in Mr. Heiney's case. Tom Tuszynski's testimony regarding Mr. Heiney's alleged confession was the only basis for the grand jury's handing up of the indictment. The "impact of the prosecutor's misconduct on the grand jury's impartiality" is unquestioned in this case. But for the testimony of the "informant" there would have been no indictment. The prejudice requirement of all the circuits is met in Mr. Heiney's claim.

The various federal circuits all agree on one point: the knowing use of perjured testimony by the government, which testimony was material to the obtaining of the indictment, is a violation of the Constitution and as such requires a striking of the indictment. Basurto, supra; Kennedy, supra; Honan, supra; Kilpatrick, supra; Serubo, supra; Giorgi, supra. Given the strictest standard, applying harmless error review, there is far more than an inference of bias on the part of the grand jury in the instant case. A jailhouse informant, bought and paid for by the State, knowingly and intentionally perjured himself before the grand jury. The perjury was suborned by the State. Such testimony can hardly be deemed non-prejudicial. (The whole case for the defense revolved around impeachment of the informant (R. 690-91).) The State did not call Tom Tuszinski to testify at the trial of Mr. Heiney. This move was made to prevent the defense from establishing that Tom had lied and had been caught. The failure to call a witness who once claimed to have heard a confession from Mr. Heiney and

so testified as the feature witness before the grand jury could not be called a tactical decision on the part of the State. Such an important witness, especially in a case based solely on weak circumstantial evidence, would not fail to be called unless the State knew the witness was going to give false testimony and would be exposed in the process.

This prosecution, from beginning to end, was so conducted as to violate the fifth, sixth, eighth and fourteenth amendments. Mr. Heiney was first charged with robbery and second degree murder. Without Tuszynski, no capital proceeding would have occurred -- his was the only evidence of capital murder presented to the grand jury. The State presented knowingly false evidence to the grand jury and perhaps the ultimate, paid a witness to lie. This is beyond the pale and violates the fifth, sixth, eighth, and fourteenth amendments. A stay of execution, and evidentiary hearing, post-conviction relief are requested and warranted.

Although the State has attempted to argue that the trial attorney was aware that Tom Tuszynski lied about the facts of Mr. Heiney's alleged statement to the Grand Jury, this is not the case. The trial attorney only knew that Tom Tuszynski had made a deal for his testimony and suspected that he had lied about the deal. It was not known to the defense that Tom had also lied about the facts of the alleged statement by Mr. Heiney until the post-conviction investigation. This is a classic post-conviction claim which is why the trial court refused to dismiss it. An evidentiary hearing is required to discover all the facts of the Tom Tuszynski statement,

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Heiney's death sentence and rendered it fundamentally unfair. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness

and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. The lower court orally stated concerns over this claim during a telephonic conference which should now be part of the record before this Court. The lower court, however, erred in signing the State's order denying relief. An evidentiary hearing should be conducted. Trial counsel preserved the issue of perjury regarding a deal by Tom Tuszynski. Appellate counsel should have urged it. New investigation reveals that there was even more perjury that defense counsel was unaware of. This is a classic post-conviction issue.

ARGUMENT IX

A number of other claims were presented in the 3.850 pleadings. See Rule 3.850 Motion, Claims II, III, IV, V, VI, X; Amendment, Claims XII, XIII; Motion for Rehearing, Claims IV, VII, IX, X, XI; and Petition for Habeas Corpus, Claims I, II, V, VII, VIII, IX, X, XI, XII, XIII. Given the time constraints, it has been impossible for counsel to brief the claims herein. Accordingly, as indicated in the Preliminary Statement to this brief, counsel respectfully incorporates these claims herein for this Court's review and respectfully refers the Court to Mr. Heiney's lower court pleadings. As stated, this brief should be read in conjunction with the 3.850 pleadings, and all claims presented in those pleadings are incorporated herein. No claim that is not specifically discussed in this brief is waived; rather, as indicated, they are specifically presented for this Court's review.

CONCLUSION

Accordingly, Mr. Heiney respectfully urges that this Honorable Court enter a stay of execution, allow a full and fair evidentiary hearing, and grant Rule 3.850 relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. MAIL/HAND DELIVERY to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 31st day of May, 1989.

_____
Attorney